

Summary of the Royal Decree-Law 9/2020

Summary of the Royal Decree-Law 9/2020

I. Introduction

March, 28th, the Royal Decree-Law 9/2020 has been published, with a series of complementary measures in the labour regulations, in order to palliate the COVID-19 effects.

The law contains aspects of great importance that can be divided into two groups:

- Measures to limit the dismissal of workers when the dismissal is based on the crisis caused by COVID-19.
- Complementary/clarification measures of the special regulation on ERTes (Temporary suspension of contracts proceeding) caused by COVID-19 adopted by the previous Royal Decree-Law 8/2020.

II. Measures to limit dismissals based on the COVID-19 crisis

(a) Article 2 of Royal Decree Law 9/2020, hereinafter referred to as the "Regulation", provides that

"Force majeure and the economic, technical, organisational and production causes underpinning the measures to suspend contracts and reduce working hours provided for in Articles 22 and 23 of Royal Decree Law 8/2020 of 17 March cannot be understood as justifying the termination of the employment contract or dismissal."

This brief wording is the basis on which the media and the administration claim that dismissal during the COVID-19 crisis has been prohibited.

Is this really the case?

What actually is regulated in this article is that the COVID-19 crisis cannot be the employers' reason to justify the objective dismissal of workers.

So, can the dismissal be justified for other reasons?

Yes, the Regulation on dismissals, whether for objective or disciplinary reasons, has not been modified beyond the specialties addressed in this regulation.

What are the legal consequences of dismissal for objective reasons linked to COVID-19?

The new legal Regulation states that such dismissal shall be considered *unjustified* and therefore cannot be declared *fair*.

The result of this situation is that the dismissal will be declared *unfair*, with the legal consequences inherent in such a declaration, but there is no specific cause of invalidity linked to these dismissals, so that this prohibition of dismissal is not absolute and will have the same result as if the dismissal had been made without just cause.

(b) Article 5 of the Royal Decree Law 9/2020 provides that

The suspension of temporary contracts, including training, relief and interim contracts, for the reasons set out in Articles 22 and 23 of Royal Decree Law 8/2020, of 17 March, will entail the interruption of the calculation of both the duration of these contracts and the reference periods equivalent to the suspended period, in each of these contractual modalities, for the workers affected by them.

This article deals with the problems that temporary contracts may present when the company considers temporary employment regulation measures derived from the COVID-19.

Many companies have doubts about how to deal with their temporary contracts, when they want to apply the ERTes under Royal Decree Law 8/2020.

Should temporary contracts be included in these ERTes?

Workers with temporary contracts in force on the date of application of the ERTes must be included in them, if these workers are within the groups affected by the temporary suspensions or reductions in working hours that the companies decide to apply.

What happens if these contracts expire during the period of application of the ERTE?

What the Regulation precisely regulates is, that the entire period of application of the ERTE in which these workers are included, with the suspended contract, will not be taken into account for the effects of the duration of the contract. Once the ERTE is concluded, these workers will provide services for the remaining duration of their contracts as if the time of regulation within the ERTE had never elapsed.

What happens if a temporary worker has been included in an ERTE, but only reduced his working hours and not suspending the full contract?

In this case the Regulation does not protect this situation and the temporary work contract will expire upon its ordinary termination, even if it is in the middle of the period of application of the ERTE, if the company decides not to extend it.

What happens with temporary employment contracts that have a maximum legal duration?

For the purposes of the legal limitation of the maximum duration of a temporary contract, the time during which the temporary worker had his contract suspended due to the application of an ERTE caused by the COVID-19 will be considered as not existing.

III. Measures complementary to the regulation of RSTEs derived from COVID-19

The health and social alarm being caused by the COVID-19 pandemic, and the dizzying speed with which events are occurring, is leading to a situation in which the government and the legislator find themselves having to adopt regulations, governing aspects of great impact on the population, the economy and employment with hardly any time to assess the details, possible problems of application and, not to mention effects in the medium and long term.

For this reason, it is not surprising to find, just ten days after the publication of the special regulations for ERTes related to the COVID-19, that the Regulation clarifies some aspects of this regulation and its control with a double objective: to facilitate the processing of the collection of unemployment benefits for workers affected by the COVID-19 and, at the same time, to determine more clearly, and with greater severity, the cases of non-compliance by companies regarding the processing of ERTes and the unemployment benefits associated with them.

Who should process the unemployment benefits caused by the inclusion of workers in an ERTE?

Article 3 of the Regulation establishes that the procedure for the recognition of unemployment benefits caused by the ERTes of the COVID-19 *"shall be initiated by a collective request submitted by the company to the entity managing the unemployment benefits, acting on behalf of the latter"*.

It further adds that the company must make this communication in the form provided by the State Public Employment Service (*Servicio de Empleo Público Estatal*, in its Spanish abbreviation 'SEPE'), which must be sent telematically, and which must contain the data required by the SEPE.

Together with the official SEPE data form completed, the company must provide a 'responsible statement' stating that it has obtained the consent of all the workers included in that list to provide those data to the SEPE.

This "responsible statement" is a challenge for companies as it obliges them to obtain their employees' consent to this transfer of data to the SEPE within a very short period of time (5 days) and with the staff confined to their homes.

The Regulation also establishes, that the time limit for the company to send this documentation forms to the SEPE is five working days from the time it requested authorisation from the ERTE company due to force majeure. In the case of "traditional" ERTE's, this five-day period begins when the company notifies the labour authority of its decision to apply the ERTE after the mandatory consultation period.

For those cases in which the ERTE application was submitted prior to the publication of the law, the 5-day period begins March 28, 2020.

The company's failure to submit these data and documents to the SEPE within the established 5-day period is considered (article 3.4 of the Norm) as a serious infringement of article 22.13 of the Law of Infractions and Sanctions in the Social Order (*Ley de Infracciones y Sanciones en el Orden Social*).

Regarding any variations that occur on the initial communication and that affect the unemployment benefit it will be the company's obligation to notify them to the SEPE.

The date of effects of the unemployment benefit derived from these ERTes will be the date of the causal event (in those of force majeure), even if it is retroactive or the date of application of the ERTE, in the case of ERTes for economic, technical, organizational or production causes linked to the crisis of the COVID-19 (which here we will call "traditional ERTes" for short).

Penalty regime.

The great avalanche of temporary employment regulation procedures (ERTes) that the COVID-19 crisis is causing has completely overwhelmed the administration.

It is in this context that all the rules that seek to involve companies in the management of the ERTes themselves should be interpreted, eliminating, de facto, the current administrative control (for example, with the positive silence in only five working days, derived from force majeure cases) or the conversion into "optional" (before it was obligatory) of the request for reports to the labour inspection by the labour authority in the ERTes linked to the COVID-19. This is also the context in which the obligations that the regulation places on companies with regard to the processing of unemployment benefits should be understood, converting them almost into administrative sections of the unemployment offices themselves.

The government, aware that this lack of effective control of the administration is occurring, has wanted to reinforce and remind in the law the sanctioning regime that will be applicable to the cases of noncompliance by the company of the regulations referred to the ERTes by COVID-19.

Thus, the second additional provision of the law states that there will be penalties

- a) for companies that provide incorrect or false data,
- b) those companies, that apply for employment-related measures, which are not necessary or have insufficient connection with the cause of the measures.

This wording, because its vagueness and comprehensiveness, gives the administration the power to sanction *a posteriori*, on the basis of subjective criteria, a circumstance that is highly worrying. This capacity seems to extend to the analysis of the causes and circumstances of the companies to apply the ERTes.

In the end, it is a question of the administration strengthening its control capacities. It is thus recalled that an administrative control, which should be prior to the implementation of the ERTE measures, will become an ex-post control.

In addition, the regulation states that if, due to non-compliance by the company, undue unemployment benefits are granted, the company will be responsible for reimbursing them to the SEPE up to the limit of the wages that the worker should have received during that period (in addition to any other penalties that may apply).



Summary of the Royal Decree-Law 9/2020

Marimón Abogados is a law firm founded in 1931 that offers legal services in all areas of law and has offices in Barcelona, Madrid and Seville.

For further information, please get in touch with our lawyers, all the members of our law firm are available to assist you.

Barcelona -

Aribau, 185
08021
Tel.: +34 934 157 575

Madrid -

Paseo de Recoletos, 16
28001
Tel.: +34 913 100 456

Sevilla -

Balbino Marrón, 3
Planta 5ª-17
(Edificio Viapol)
41018
Tel.: +34 954 657 896

www.marimon-abogados.com

This document contains legal information produced by Marimón Abogados. The information included herein does not constitute legal advice. The intellectual property rights concerning this document are held by Marimón Abogados. This document may not be reproduced, distributed or used in any way, whether in its entirety or in part, without prior written authorization from Marimón Abogados.