



## *Moratorium on payment of rents of commercial leases while the state of alarm declaration is in force*

## **Moratorium on payment of rents of commercial leases while the state of alarm declaration is in force**

The Government has approved the Royal Decree-Law 15/2020, of 21 April, on urgent complementary measures to support the economy and employment, by virtue of which certain measures are established to alleviate the operating costs of the entrepreneurs and companies affected by the COVID-19 Crisis and, specifically, because of the suspension of commercial, leisure, restaurant and tourism activities established by the Declaration of the State of Alarm.

The first of these measures is the establishment of a right for industrial tenants (hotels and petrol stations, for example) and tenants of properties other than housing (business premises, warehouses, offices) to request their landlord for a moratorium of the payment of the accrued rent while the Declaration of the State of Alarm is in force.

To that end the following **requirements** must be met:

- **The tenant must be a self-employed person or a SME.** The self-employed person is understood to be a natural person who is registered with the social security system or with one of the RETA's substitute mutual insurance companies. An SME means a company that meets the conditions for drawing up a shortened balance sheet under Article 257(1) of the Companies Act (i.e. for two years meet at least two of the following three requirements: assets not exceeding 4 million EUR, annual turnover not exceeding 8 million EUR, no more than 50 employees).

In both cases it must be fulfilled that its activity has been suspended by the Declaration of the state of alarm or by orders issued by the competent authority under the said declaration. In the event that the activity is not directly suspended, proof must be provided of a reduction of at least 75 per cent in the turnover of the calendar month prior to that to which the postponement is requested, in relation to the average monthly turnover of the quarter to which that month belongs of the previous year.

- **The landlord must be a large owner**, that is, a company or public housing entity, or a natural or legal person that owns more than 10 urban properties, excluding garages and storage rooms, or a built surface of more than 1,500 m<sup>2</sup>. In making a comprehensive approach of this rule, we understand that it will also apply to several companies belonging to one group that can be considered a large owner. If the landlord does not comply with these requirements, the tenant's right is not excluded but is limited to the possibility of requesting a postponement without content, as we will see below.

These subjective requirements show that the Government wanted to intervene only in those private contracts in which it presumes that the parties, due to their different size, do not have the same bargaining power and, therefore, the tenant by himself does not have the capacity to reach agreements in order to balance the extraordinary and severe situation of contractual disruption, which was unforeseeable and not imputable to the tenant (event which enables the *rebus sic stantibus* doctrine/hardship doctrine).

Therefore, contracts concluded with large office users and with restaurant, commercial and hotel chains de facto fall outside of the scope of this regulation. It is, however, more likely that contracts with their franchisees shall be covered by the law.

***The tenant must be a self-employed person or a SME***

As for the **scope of the right of postponement**, a moratorium on the payment of rent is established for the period of time that the state of alarm and its extensions last. This period may be extended to the following monthly payments, extendable month by month, if that period is insufficient in relation to the impact caused by COVID-19. It may, however, not exceed a period of maximum four months. The rent will be postponed, without any penalty or interest, payable as of the next (ordinary) rental payment, by means of the division of the instalments into two years, to be counted as of the moment the situation mentioned above has passed, or from the end of the four-month period. If the rental contract has a duration of less than two years, the recovery-installments will be adapted to the remaining number of months.

In more practical terms, the rule adopted by the Government means that:

- The tenant is allowed not to pay the rent, but must pay the additional expenses that he owes under the contract (land tax "IBI", community charges, supplies and others).
- The moratorium only affects rents due after the declaration of the State of Alarm and up to a maximum of four months from its date. The rent of the month of March may be considered excluded from this benefit and, in our preliminary opinion, a tenant who failed to pay the rent (or who reversed the payment) may be excluded, because the landlord has cause to urge termination of the lease and a claim for payment of rent that should be due until the end of the lease.
- In relation to the non-payment of the rents affected by the moratorium, the landlord is not entitled to demand payment, nor ordinary interests or interests on arrears, nor, although it is not expressly stated, can he terminate the contract and initiate legal proceedings. However, it appears that he is entitled to apply the security deposit to the payment of rent (but not any other guarantee he may have). We say "it seems" because this provision is included in the article concerning the postponement that can be requested from landlords who are not large holders, but it refers to the regulation contained "in the previous paragraphs".
- The tenant only is entitled to postpone the rent payment. Unlike the regulation approved for housing leases, there is no mention of a 50% rent reduction, which is, however, the criterion that has already been followed by many landlords of commercial leases.
- This right to postpone is limited to the duration of the effects of the Declaration of the State of Alarm, with a maximum of four months.

***The scope of the right of postponement, a moratorium on the payment of rent for the period of time that the state of alarm is in force, with a maximum time of four months***

- With regard to the period for repayment of the debt, the rule is not entirely clear. It begins to be repaid in the first monthly payment following the end of the exceptional situation. We understand that the debt must be divided by the estimated number of monthly payments due until the end of the contract, with a maximum of two years. If the contract ends earlier, all outstanding payments should be accrued until that time.

- The Royal Decree-Law creates additional uncertainty: if the landlord had made use of the legal deposit, as this rule now allows, it must be returned by the tenant within one year. If the deposit in these contracts is two monthly payments and less than four are deferred, the tenant's rights would be reduced in this way.

If the tenant finds himself in a situation where his or her landlord is not a large holder, he or she can only request a postponement. The Royal Decree-Law does not establish the content of this right, but we believe that this does not make it non-existent. In practice, the reference in the preamble to the rule to the *rebus sic stantibus* doctrine will mean that the landlord cannot refuse to grant a postponement or offer one without content and will have to justify why he cannot reach the terms set out in this rule. In any case, the landlord does not offer or accept anything, we consider that the courts will not admit him an action for contract termination based exclusively on the non-payment of rents during this period.

Finally, there are **other aspects** of the regulation that should also be considered:

- Although the moratorium is in effect as of the Declaration of Alarm Status, its retroactive application must be requested by the tenant within one month of the approval of this rule.
- It is a subsidiary regime so it can only be activated by the tenant if there are no other agreements, whether more beneficial to the tenant or not.
- The tenant must prove fulfilment of the requirements by providing certain documentation, issued by public administrations. However, given that the concurrence of the qualifying assumption is quite obvious and that the administrations at this time are not fully operative, we believe that this list should not be considered exclusive of other equally conclusive means of proof. To do otherwise would be to place an excessive burden on the tenant that could prevent him from obtaining this benefit in clearly justified cases.
- However, if the tenant "misleads" the landlord, he must, as already stated in Article 1101 of the Civil Code, compensate him for all the caused damages. Does this mean that the landlord cannot terminate the contract in this case and can only claim immediate payment of the rent with interest or bring criminal proceedings?

*If the landlord is not a large owner, the tenant can request a postponement, the substance of which is not defined yet*

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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.**

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