New employment measures relating to COVID-19:

Royal Decree-Law 9/2020 of 27 March 2020 and Royal Decree-Law 10/2020 of 29 March 2020

Legal Alert

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The COVID-19 crisis continues to throw up new pieces of employment legislation, leaving us with no choice but to reread all of it in its entirety, while keeping a close eye on any rulings forthcoming from the employment authorities, in view of their importance as regards the manner in which the relevant legislation is to be interpreted.

This Legal Alert includes the content of Royal Decree-Law 9/2020 of 27 March 2020, adopting supplementary employment measures to mitigate the effects of COVID-19 (Royal Decree-Law 9/2020) and Royal Decree-Law 10/2020 of 29 March 2020, regulating recoverable paid leave for salaried workers not providing essential services, with a view to reducing the mobility of the population within the context of the fight against COVID-19 (Royal Decree-Law 10/2020), which serve to supplement the regulations under Royal Decree-Law 8/2020 of 17 March 2020, on extraordinary urgent measures to address the economic and social impact of COVID-19 (Royal Decree-Law 8/2020), introducing a range of new developments, notable examples of which include:

(i) A prohibition on terminating employment contracts on grounds or as a result of the impact of COVID-19 on business activities.

(ii) Setting in place of anti-fraud regulations governing the conduct of the furloughing procedures envisaged in Royal Decree-Law 8/2020, with a particular emphasis on those carried out on grounds of force majeure, while also envisaging, aside from the relevant administrative penalties, an obligation on companies to bear the cost of any unemployment benefits unduly enjoyed by their workers. This review process will involve both a direct review of the procedures implemented by the companies and an indirect review of the unemployment benefits enjoyed by their workers.

(iii) Streamlining of unemployment formalities, with responsibility for processing the benefits of workers affected by furloughing procedures implemented under Royal Decree-Law 8/2020 falling to the employer.

(iv) Implementation *ex lege* of "paid leave" from 30 March through 9 April, with the preservation of all salary-related rights, for all workers rendering their services at companies required to discontinue their activities per Royal Decree-Law 10/2020 as they are not considered essential according to the list of activities annexed to such Royal Decree-Law. Workers working remotely at such companies are exonerated from the paid leave obligation, unless agreed otherwise with the workers' representatives or, in the absence of such representatives, with the workers themselves.

Aware of the uncertainty caused by this barrage of legislation, we set out below an analysis that is designed to be as "practical" as possible and which, while it may not clarify all doubts, we trust will be of assistance when first considering any decisions to be taken.

Supplementary employment measures to mitigate the impact of COVID-19 (Royal Decree-Law 9/2020)

Continuation of the activity of health centres and care homes for the elderly

For the duration of the state of emergency and any extensions thereto, publicly or privately owned health centres and care homes for the elderly, dependent persons and the disabled are to be considered essential services and their activity may only be reduced or suspended as stipulated by the competent authorities.

Any breach of or resistance to this limitation may be punished with a fine or imprisonment, as provided for by law.

Extraordinary measures to protect employment

Termination of employment on objective grounds (article 52.d WS), collective dismissals and termination on grounds of force majeure (Art. 51 WS) are prohibited where they are due to the causes envisaged in articles 22 and 23 of Royal Decree-Law 8/2020.

Measures to streamline the processing and payment of unemployment benefits

Companies must request contributory unemployment benefits for their workers, in the case of both furloughing and reduction of working hours, by means of a collective application and using the official form.

The following information must be provided for each of the affected work centres:

a) Name or business name of the company, domicile, taxpayer identification number, and social security contribution account number to which the workers subject to the furloughing or working hour reduction application are assigned.

b) Name and surname, taxpayer identification number, telephone number and email address of the company's legal representative.

c) Case file number assigned by the employment authority.

d) Details of the measures to be adopted, as well as the date as of which each of the workers will be affected by them.

e) In the case of a reduction to working hours, details of the percentage by which such hours are reduced with respect to the daily, weekly, monthly or annual base.

f) For the purposes of evidencing the representation of workers, a solemn declaration stating that authorisation for such representation has been obtained.

g) Any such supplementary information as may be determined by the Directorate-General of the State Public Employment service.

The company must report any variations to the data initially reported, and in all cases where they relate to termination of the relevant measure, within 5 days of the application for furloughing on grounds of force majeure, or from the date on which the company notifies the employment authorities of its decision where other circumstances exist.

Where the relevant request was filed prior to the entry into force of this Royal Decree-Law, the five-day deadline will be counted as from the filing date.

Failure to provide the above information will be considered a serious breach (art 22.13 Labour and Social Security Infringements and Penalties Law)

Extraordinary measure applicable to cooperative entities for the adoption of resolutions in furloughing procedures

Where a lack of resources prevents the General Assembly of cooperative entities from calling a virtual meeting, the Governing Board shall assume powers to approve the total and/or partial furloughing of its members and shall issue the relevant certificate for processing.

Interruption of the maximum term of temporary contracts

The duration of the contracts of workers affected by furloughing who are employed under temporary contracts will cease running.

Limitation on the duration of furloughing on grounds of force majeure

Furloughing on grounds of force majeure will cease to be effective when the state of emergency is lifted, regardless of whether or not the relevant procedures have been expressly authorised.

Regime governing penalties and repayment of undue benefits

Any applications filed by companies that contain false or inaccurate data shall be subject to the relevant penalties.

Penalties shall also be applied to companies applying for employment measures that are unnecessary or insufficiently linked to the grounds on which they are requested, where they give rise to the generation or receipt of undue benefits.

Undue awarding of benefits to workers for reasons not attributable thereto and which are the result of any of the above breaches shall trigger an ex officio review of the decision awarding the benefits in question.

In such cases, notwithstanding the applicable administrative or criminal liability, the company must pay the management body the amounts received by the workers, deducting them from the relevant salaries not received, up to a maximum of the total amount of such salaries.

The obligation to repay benefits, as an ancillary penalty, may be enforced until the statute of limitations has run on the infringements referred to in the Labour and Social Security Infringements and Penalties Law (4 years).

Effective date

Furloughing on economic, technical, organisational or productive grounds may not be applied retroactively beyond the date on which the employer notifies the labour authorities of its decision to proceed with this measure.

Collaboration of the employment benefit management entity and the Employment and Social Security Inspection Authority

Where the management entity considers that there is evidence of the use of fraud to obtain unemployment benefits, it shall notify the Employment and Social Security Inspection Authority for the pertinent effects.

The Employment and Social Security Inspection Authority working in conjunction with the State Tax Agency and the State Security Forces and Agencies shall include among their action plans checks on the effective existence of the grounds cited in applications for and notices of furloughing procedures.

Amendment of Royal Decree-Law 8/2020

The extraordinary measures concerning unemployment contributions and protection apply to those affected by furloughing and working hour reduction procedures authorised or commenced prior to entry into force of the above Royal Decree-Law (18 March 2020), provided they are a direct result of COVID-19.

Modification of Royal Decree-Law 7/2020

Modification of article 16 of Royal Decree-Law 7/2020 of 12 March 2020, adopting urgent measures to address the economic impact of COVID-19 , as regards public-sector contracts.

Entry into force and validity

This Royal Decree-Law enters into force on 28 March 2020 and is valid throughout the state of emergency and any extensions thereto.

Recoverable paid leave for workers rendering non-essential services (Royal Decree-Law 10/2020)

Workers rendering services in companies whose activities have not been suspended owing to the state of emergency declared by Royal Decree 463/2020 of 14 March 2020, are to take mandatory recoverable paid leave from 30 March to 9 April 2020.

The above leave does not apply in the case of the following workers:

- ✓ Persons rendering services in the sectors listed in the annex to Royal Decree-Law 10/2020, be it directly or via divisions or production lines.
- ✓ Persons hired by companies that have applied for or are in the process of implementing a furloughing procedure, in line with Royal Decree-Law 8/2020.
- ✓ Persons hired by companies upon implementation of a furloughing procedure (workers already hired at that date are entitled to the leave).
- ✓ Persons able to continue working under teleworking arrangements or rendering their services by other remote means.
- ✓ Persons at companies awarded public-sector contracts for workers, services and supplies that are indispensable for the maintenance and security of buildings and the appropriate provision of public services, including where such services are provided remotely.

Where necessary, companies required to implement this paid leave may establish the minimum number of workers or shifts that are indispensable in order to continue with their essential activity. For such purpose, essential activity shall be defined having regard to the activity carried on over an ordinary weekend or public holiday.

Where it is impossible for companies to immediately interrupt their activity, their workers are permitted to engage in essential tasks on Monday 30 March, with a view to avoiding irremediable or disproportionate detriment to the resumption of the business activity.

Workers in the transport sector who are providing services upon entry into force of this Royal Decree-Law shall commence their recoverable paid leave upon completion of the service underway, and the relevant return operation, as the case may be, shall be deemed included within such service.

The above leave implies that workers shall retain entitlement to the remuneration to which they would have been entitled had they been providing their services in ordinary circumstances, including their basic salary and salary supplements, as well as any other social security contribution and PIT obligations.

Working hours may be recovered between the day after the state of emergency is lifted and 31 December 2020.

Such recovery must be negotiated during a consultation period commenced for such purpose by the company and the workers' representatives, which shall last a maximum of 7 days.

Where there are no legal representatives, the negotiating committee will be formed by one person from each of the most representative trade unions in the industry in which the company operates with standing to form part of the negotiating committee of the applicable collective bargaining agreement.

Otherwise, the committee shall be made up of 3 workers from the company itself, elected per article 41.4 of the Workers' Statute.

In all of the above cases, the representative committee must be formed within a non-extendable period of five days.

During the consultation period, the parties must negotiate in good faith with a view to reaching an agreement.

Such agreement shall require the approval of a majority of the legal representatives or, failing that, a majority of the members of the representative committee provided that in both cases, they represent a majority of the workers affected by this leave obligation, based on the applicable representative majorities.

The parties may, at any stage, agree to substitute the above consultation period with the mediation or arbitration procedures provided for in the cross-industry agreements.

The agreement reached may regulate:

- ✓ The recovery of all or some of the working hours affected by this leave;
- ✓ The minimum notice with which workers must be informed of the date and time on which the relevant work is to be performed.
- ✓ The reference period for the recovery of working hours not worked.

Where no agreement is reached during the above consultation period, the company must notify workers and the representative committee within 7 days of the end of the above period, of the decision regarding the recovery of working hours not worked during implementation of this leave.

Recovery of the relevant hours may not entail a breach of the minimum daily and weekly rest periods or advance notice of less than 5 days, may not cause the maximum envisaged annual working hours to be exceeded, and must ensure respect for the right to a work-life balance.

Contacts

Javier Hervás
Partner
KPMG Abogados S.L.P.
+34 91 456 59 33
jhervas@kpmg.es

Francisco Fernández
Partner
KPMG Abogados S.L.P.
+34 91 451 30 87
franciscofernandez@kpmg.es

Jordi Garcia Viña
Director
KPMG Abogados S.L.P.
+34 93 253 29 00
jordigarcia@kpmg.es

KPMG Offices in Spain

A Coruña

Calle de la Fama, 1
15001 A Coruña
Tel: + 981 21 82 41
Fax: + 981 20 02 03

Alicante

Edificio Oficentro
Avda. Maisonnave, 19
03003 Alicante
Tel: + 965 92 07 22
Fax: + 965 22 75 00

Barcelona

Torre Realia
Plaça de Europa, 41
08908 L´Hospitalet de Llobregat
Barcelona
Tel: + 932 53 29 00
Fax: + 932 80 49 16

Bilbao

Torre Iberdrola
Plaza Euskadi, 5
48009 Bilbao
Tel: + 944 79 73 00
Fax: + 944 15 29 67

Girona

Edifici Sèquia
Sèquia, 11
17001 Girona
Tel: + 972 22 01 20
Fax: + 972 22 22 45

Las Palmas de Gran Canaria

Edificio San Marcos
Dr. Verneau, 1
35001 Las Palmas de Gran Canaria
Tel: + 928 33 23 04
Fax: + 928 31 91 92

Madrid

Torre de Cristal
Paseo de la Castellana, 259 C
28046 Madrid
Tel: + 91 456 34 00
Fax: + 91 456 59 39

Malaga

Larios, 3
29005 Málaga
Tel: + 952 61 14 60
Fax: + 952 30 53 42

Oviedo

Ventura Rodríguez, 2
33004 Oviedo
Tel: + 985 27 69 28
Fax: + 985 27 49 54

Palma de Mallorca

Edifici Ca´n de Segura
Avda. del Comte de Sallent,
2 07003 Palma de Mallorca
Tel: + 971 72 16 01
Fax: + 971 72 58 09

Pamplona

Edificio Iruña Park
Arcadio M. Larraona, 1
31008 Pamplona
Tel: + 948 17 14 08
Fax: + 948 17 35 31

San Sebastián

Avenida de la Libertad, 17-19
20004 San Sebastián
Tel: + 943 42 22 50
Fax: + 943 42 42 62

Seville

Avda. de la Palmera, 28
41012 Sevilla
Tel: + 954 93 46 46
Fax: + 954 64 70 78

Valencia

Edificio Condes de Buñol
Isabel la Católica, 8
46004 Valencia
Tel: + 963 53 40 92
Fax: + 963 51 27 29

Vigo

Arenal, 18
36201 Vigo
Tel: + 986 22 85 05
Fax: + 986 43 85 65

Zaragoza

Centro Empresarial de Aragón
Avda. Gómez Laguna, 25
50009 Zaragoza
Tel: + 976 45 81 33
Fax: + 976 75 48 96