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Extended temporary collective redundancy procedures… and more

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The Second Employment Agreement to Protect Jobs ("II Acuerdo Social en Defensa del Empleo") maintains extraordinary measures adopted during the "state of alarm", but with a progressive adaptation to the recovery phase.

bs signed by the Government, employers' organisations and trade unions, aimed at maintaining extraordinary measures adopted during the alarm period, but with a progressive adaptation of these measures to the recovery phase. The main features of the most important measures are set out below.

1. Extension of temporary collective redundancy procedures due to force majeure already applied for subject to conditions (no overtime, no new hiring, no outsourcing of activity)

1.1. In accordance with Article 1 of the new legislation, it is provided that, as from the entry into force of this new Royal Decree-law 24/2020 of 27 June, only temporary collective redundancy procedures ("*ERTEs*") based on Article 22 of Royal Decree-law 8/2020 of 17 March (*BOE* of 18 March) - ERTEs due to force majeure derived from the coronavirus - which *have been applied for before* the entry into force of this new law will be applicable until 30 September 2020 at the latest. The companies and entities affected by these procedures *must reinstate* the affected workers as needed for the carrying on of their activity, giving priority to adjustments in terms of reduced working hours. And they will have to communicate to the labour authority the total waiver, if it is the case, of the authorised ERTE within a period

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of fifteen days from the date the aforementioned waiver took effect. Likewise, they must report to the National Employment Service the variations that refer to all or part of the affected persons, either in the number of these, or in the percentage of partial activity of their individual working hours, when the activity of the company allows for reinstatement of these persons to their work.

In these companies or undertakings, *no* overtime or outsourcing of the activity may be carried out and no new hiring, whether direct or indirect, may be arranged during the application of the ERTE regulated here. This prohibition may be exempted in the event that "the regulated persons who provide services in the workplace affected by the new direct or indirect hiring or outsourcing cannot, due to training, qualification or other objective and justified reasons, carry out the functions entrusted to them" and only after the company has informed the statutory body of worker representatives. These actions may constitute infringements by the affected company by virtue of proceedings initiated for this purpose, where appropriate, by the Labour and Social Security Inspectorate.

1.2. Three aspects can be distinguished in this new regulation. The first is that the extension is for those ERTEs based on Article 22 of Royal Decree-law 8/2020 – force majeure resulting from the epidemic -, which were *applied for prior to* this new regulation contained in Royal Decree-law 24/2020 and whose extension will last until 30 September. Although there is room for improvement in the drafting ("ERTEs based on Article 22 of Royal Decree-law 8/2020 of 17 March, which were applied for before the entry into force of the latter" being liable to create doubts as to whether the “latter” refers to Royal Decree-law 8/2020 - which would be somewhat inappropriate if we consider that it is precisely Royal Decree-law 8/2020 that is adopted in order to conduct these ERTEs - or whether reference is here made - as it seems more appropriate - to the new Royal Decree-law 24/2020, even if the expression "latter" is not the most appropriate for referral), the text restricts the extension, at least in this provision, to the ERTE due to force majeure and until the end of September, for the time being.

Now, given this new regulation, the question could be raised as to what happens to ERTEs that include a specific end date or that have used as a generic term the end of the state of alarm or its extension period. Unless another date is specified and admitted as such, the extension now established would only affect the latter for two reasons: First, because it is likely that the others will have already lapsed - normally they would have incorporated a date prior to the end of the period of validity of the extraordinary measures approved for these ERTEs -, so it would not make sense to refer to an extension status of something that does not exist, and, the second, because the fact that this Article 1 of Royal Decree-law 24/2020 refers to the ERTE "applied for" before its validity means that those based on this same cause but applied for later will not obtain the scheme of benefits provided for by it and which is now extended. It is true that, given the wording, this scheme can be extended to those applied for and not yet authorised and - it should also be understood - to those applied for and not authorized, but contested.

The second aspect is the *obligation* of the companies affected by these ERTEs to *reinstate their workers,* although "to the extent necessary for the carrying on of their activity", giving priority to adjustments in terms of reduced working hours. All this means that companies should seek alternatives to the activity - teleworking, reduction of working hours, adaptation of working hours, etc. – before having their workers remain in the ERTE, provided that the company's activity is recovering. To this end, the law provides for different requirements for companies to notify the labour authority of their total waiver within fifteen days from such taking effect so that the National Employment Service can adapt the unemployment benefits to the variations in the relevant ERTE. Similarly, if the waiver is partial - interpreted by the legislator in an ambivalent manner, i.e. whether the measure affects only part of the workers and not all of the workforce or whether it reduces the working hours for all the workers affected by the ERTE or for some of them - it must be notified to both the labour authority and the Social Security managerial body. In any case, it seems that priority should be given to the return to effective work through this type of flexibilization mechanisms rather than to remaining in the ERTE.

And thirdly, *new conditions* - along the lines of those that have been laid down during the pandemic - for the companies that take advantage of this extension stand out. In this sense, they will not be able to work overtime or outsource their activity, nor will they be able to arrange new employment contracts, either directly or indirectly, during the application of the extension. This is an important limitation on the organisational capacity of a company to force it to reinstate workers affected by the ERTE: if a global ERTE, because this type of action would be pointless in the face of the suspension of the contracts of the entire workforce, and if a partial ERTE, because these measures could lead to the continuation of the company's activity despite the continuation of the ERTE, with the corresponding public cost and possibly with savings for the company due to a hypothetical reduction in the costs related to the suspended contracts in the event of their reactivation. With one exception: cases in which new direct or indirect employment contracts or outsourcing - applying it to overtime would be a stretch - cover a gap in activity that cannot be filled by the workers affected or disaffected by the existing ERTE. In this case, authorisation by the company's statutory body of worker representatives will not be required, but the information prior to it will be. Curiously, in neither of the two situations - the carrying out of what is forbidden or the unsuitability of the application of the exception - is an express penalty provided for, only the concurrence of a possible business infringement after proceedinga initiated to that effect, if applicable, by the Labour and Social Security Inspectorate and probably with the proposal of a penalty, among others, consisting of the reimbursement of the aid assigned to the non-compliant company.

2. ERTE for economic, technical, organisational or production reasons started now and until the end of the extension

2.1. ERTEs for reasons other than force majeure derived from the coronavirus and *initiated since the entry into force of this new Royal Decree-law 24/2020 and until 30 September*, will be subject to Article 23 of Royal Decree-law 8/2020 - economic, technical, organisational or productive causes – by virtue of the provisions of Article 2 of Royal Decree-law 24/2020. The conduct of these procedures may be initiated while an ERTE is in effect due to force majeure. When the ERTE for economic, technical, organisational or production reasons starts after the end of an ERTE due to force majeure, the effective date of the same will be retroactive to the ending date of the ERTE. On the other hand, ERTEs in effect will continue to be applicable under the terms provided in the final communication of the Company and until the end date referred to therein.

As in the previous case, also for these ERTEs for economic, technical, organisational or production reasons initiated after this Royal Decree-law 24/2020, prohibitions are established in respect of overtime new outsourcing of the activity and arranging new contracts, whether direct or indirect, during its application and the same exception is provided for as stated above.

2.2. As in the previous section, three elements of this regulation should be highlighted. Firstly, that, unlike the former, in this case, *both ERTEs for economic, technical, organisational or production reasons initiated prior to this new Royal Decree-law 24/2020 and those applied for after it will be governed by the same regulation,* namely that of Article 23 of Royal Decree-law 8/2020.

Secondly, that *the legislator is beginning to consider the natural "reconversion" of ERTEs* due to force majeure into this other type of ERTE. Hence, it allows the latter to be conducted even when the former is in effect, in which case there will be a sequential succession between them, but it is also admitted that one should be extinguished (the ERTE due to force majeure) and another be initiated later (the ERTE for other reasons). If this is the case (if the latter "starts after the end" of the former), the law provides that the effective date of the ERTE for other reasons is retroactive to the date in which the ERTE due to force majeure ended. However, since no maximum or minimum period is determined for this consecutive action of the company, the fact is that, during the period of validity of the law - between 27 June and 30 September -, this "succession" of ERTEs may occur, with a greater or lesser extension of time between both, but with the same consequence, that is, the retroaction of effects to the finalisation of the ERTE due to force majeure. It should be noted, to this effect, that the law does not require that they follow each other in time, but that the ERTE for other reasons "starts after the end" of the ERTE due to force majeure. It is true that the provision refers to the possibility of "conducting" this type of ERTE while an ERTE due to force majeure is in effect and that it would be reasonable that the conclusion of the latter

would mean the beginning of the former, but the provision in question only requires that the ERTE for this type of reasons starts "after the termination" of the ERTE due to force majeure, without requiring any other type of temporal interrelation between them.

It should also be stressed that ERTEs for reasons other than force majeure arising from the coronavirus and still in effect will be maintained under the terms of their initial grant and until the period laid down therein, which means that, in principle, there is no automatic extension for the latter until 30 September 2020. However, this deduction, derived directly from this Article 2 of Royal Decree-law 24/2020, is not in line with the provision in Article 3(2) of the same law. In view of the latter and as will be explained, the management body for unemployment benefits will extend until 30 September 2020 the maximum duration of the rights recognised by virtue of procedures of suspension or reduction of employment regulated in Articles 22 and 23 of Royal Decree Law 8/2020 whose date of commencement is prior to the entry into force of this Royal Decree-law 24/2020. Consequently, also for these cases of ERTE for economic, technical, organisational or production reasons, the extension will be made in the terms set forth and until 30 September 2020.

And finally, *the prohibition and its exception on overtime, hiring or outsourcing is reproduced on the same terms as for the extended ERTE due to force majeure*. An interesting deduction is whether this prohibition applies only to ERTEs for this type of reasons applied for under this Royal Decree-law 24/2020 or also, given the above conclusion, to those in effect and subject to extension. In principle, the response most consistent with the law would be that this type of action restricting business freedom can only be applied to new applications until the conditions for the application of the law are known in advance. This conclusion may be clouded for two reasons: one, because, as has already been explained, benefits are extended, then ERTEs are extended for this type of reasons and the conditions of the extension are found in this new legislation; another, because, expressly, Article 2(5) of this Royal Decree-law 24/2020 extends the prohibition "during the application of the temporary collective redundancy procedures referred to in this article" and which includes both those applied before and after the validity of this new legislation. However, an argument can be added in favour of the non-application of the above-mentioned prohibition, and that is that Article 2(4) of Royal Decree-law 24/2020 itself expressly states that "temporary collective redundancy procedures in effect on the date of entry into force of this Royal Decree-law shall continue to be applicable under the terms provided for in the company's final communication and for the period referred to therein", so the new regulation should not govern its application and, therefore, should not be subject to the above-mentioned prohibition either.

3. Exemption from contributions in ERTEs deriving from coronavirus

3.1. *General rules: ERTEs due to partial force majeure that have been extended and ERTEs for economic, technical, organisational or production reasons.*

3.1.1. In accordance with Article 4 of Royal Decree-law 24/2020, companies which *extend their ERTE due to force majeure* (based on Article 22 of Royal Decree-law 8/2020) and make use of the provisions of Article 1 of the new Royal Decree-law 24/2020 will be exempted from the payment of the company's social security contribution and joint collection, in the following percentages and under the following conditions:

a) With respect to *workers who resume their activity* as of 1 July 2020, as well as those others referred to in Article 4(2)(a) of Royal Decree-law 18/2020 of 12 May, BOE of 13 May - and who were able to resume their activity after the application of the above-mentioned law on 13 May - and to the periods and percentages of the working hours worked from that moment, the exemption will reach *60% of the employer's contribution accrued in July, August and September 2020* when the company has had *fewer than fifty* workers or equivalent to them registered with the Social Security on 29 February 2020. If on that date the company had *fifty or more* workers or equivalent to them registered, *the exemption would reach 40% of the employer's contribution accrued in July, August and September 2020.*

b) For *workers in these companies who continue with their activities suspended after 1 July 2020 and* for the periods and percentages of working hours affected by the suspension, the exemption will reach *35% of the employer's contribution accrued in July, August and September 2020* when the company has had *fewer than fifty* workers or equivalent to them registered with the Social Security on 29 February 2020. If on that date the company had *fifty or more* workers or equivalent to them registered, *the exemption would reach 25% of the employer's contribution accrued in July, August and September 2020.* In this case, the exemption will apply to the payment of the employer's contribution provided for in Article 273(2) of the Social Security (Recast) Act ("*LGSS*"), as well as that relating to contributions for joint collection.

3.1.2. For their part, companies that have decided to *suspend contracts or reduce working hours for economic, technical, organisational or production reasons related to COVID-19,* with the qualifications referred to in Article 23 of Royal Decree-law 8/2020, *prior to* the entry into force of this Royal Decree-law 24/2020, as well as those companies referred to in Article 2(3) of the latter piece of legislation (ERTEs for these reasons *started after the end* of an ERTE due to force majeure), will be exempted from the payment of the employer's contribution to Social Security and for joint collection in the following percentages and conditions:

a) In respect of workers who *resume their activity* from 1 July 2020 and of the periods and percentages of working hours worked from that moment, the exemptions will be applicable under the terms and conditions set out in Arti-

cle 4(1)(a) of Royal Decree-law 24/2020 (60% in July, August and September 2020 for companies with fewer than fifty workers and 40% in July, August and September 2020 for companies with fifty or more workers).

b) In respect of workers in these companies *whose activities were suspended between 1 July and 30 September 2020* and of the periods and percentages of the working hours affected by the suspension, the exemptions will apply under the terms and conditions indicated in Article 4(1)(b) of Royal Decree-law 24/2020 (35% in July, August and September 2020 for companies with fewer than 50 workers or 25% in those months for companies with 50 or more workers).

3.1.3. Article 4 of Royal Decree-law 24/2020 also provides that these exemptions shall be applied by the Spanish Social Security Agency at the request of the company after communication of the identification of the workers and the period of suspension or reduction of working hours and after presentation of a statement of compliance, in respect of each contribution account code and month of accrual, to the maintenance of the validity of each ERTE through the electronic data transmission ("*RED*") system. For the exemption to be applicable, the statements of compliance must be presented before requesting the calculation of the payment of contributions for the period of accrual of contributions over which said statements have effect. Logically, the express waiver of the ERTE presented to the labour authority will determine the end of these exemptions from the date of effect of said waiver, and the company must communicate it to the Social Security Agency. And, as is usual in all emergency legislation, these exemptions in the contribution will not have any effect for the workers, being considered as a period effectively contributed for all purposes.

3.2. *Transitional rules: Extended total ERTE due to force majeure and ERTE due to resurgence*

3.2.1. The above-mentioned regulation constitutes the general rule regarding the exemption of contributions, but the first additional provision of Royal Decree-law 24/2020 contains "temporary measures of transition and accompaniment in matters of contributions".

This support means that the companies and entities that are in a *situation of total force majeure*, under the terms of Royal Decree 18/2020, on 30 June 2020, with regard to the workers assigned and registered in the contribution account codes of the workplaces affected, will be exempt from the payment of the employer's contribution provided for in Article 273(2) of the Social Security (Recast) Ac, as well as that relating to the contributions for joint collection, in the percentages and conditions indicated below:

a) As for *workers in these companies who continue with their activities suspended as of 1 July 2020* and for the periods and percentages of working hours affected by the suspension: *70% of contributions due in July 2020, 60% of contributions due in August 2020 and 35% of contributions due in September 2020* if these companies and undertakings had *fewer than fifty* workers or equivalent registered with the Social Security on 29 February 2020.

b) As for *workers in these companies who continue with their activities suspended as of 1 July 2020* and for the periods and percentages of time affected by the suspension: *50% of contributions due in July 2020, 40% of contributions due in August 2020 and 25% of contributions due in September 2020* if these companies and undertakings had *fifty or more* workers or equivalent, all of whom were registered with the Social Security on 29 February 2020.

3.2.2. For their part, companies and undertakings which, as *from 1 July 2020, are prevented from carrying out their activities by the adoption of new restrictions or containment measures imposed in one of their workplaces* may benefit, in respect of workers assigned and registered under the contribution account codes of the workplaces concerned, from the exemption percentages set out below, *subject to the authorisation of an ERTE due to force majeure in accordance with Article 47(3) of the Workers' Statute Act:*

a) *80% of the employer's contribution accrued during the period of closure, and until 30 September, when the company had fewer than fifty people* workers or equivalent registered with the Social Security on 29 February 2020.

b) If on that date the company had *fifty or more* workers or equivalent registered, the exemption will reach *60% of the employer's contribution during the period of closure and until 30 September.* In this case, the exemption will apply to the payment of the employer's contribution provided for in Article 273(2) of the Recast Version of the Social Security Act, approved by Royal Legislative Decree 8/2015 of 30 October, as well as that relating to contributions for joint collection.

These exemptions will be incompatible with those set out in Article 4 of this Royal Decree-law 24/2020, already described. When these companies and undertakings resume their activity, the measures regulated in Article 4(1) of this law will be applicable to them from that moment until 30 September 2020.

3.3. *The difficulties of agreement on this point and legislative consequences thereof*

3.3.1. Without a doubt, this has been the point of friction in the negotiations between the employers' organisations and trade unions and the Government, with the amount

and extension of the exemptions to companies with ERTEs being the main difficulty in reaching consensus because it was possible to maintain the crisis' initial scheme, reduce the amount of the exemption - as has finally been done - and even debate whether the amount to be paid in the case of workers who remain in the ERTE should be further reduced with respect to those who are unattached and reinstated to the activity. As can be seen, in general, the focus of the regulation is on ERTEs due to force majeure that have been extended, since, in the case of ERTEs for economic, technical, organisational or production reasons, the regulation of exemptions refers to the provisions for the former. However, a distinction is made between the application of the regulation in relation to the size of the company -with more or less than fifty workers- in both cases and, also in both cases, the exemption will be lower in relation to the workers who remain in the ERTE compared to those who are rescued from it.

Although the application of the exemption from social security contributions is not new legislatively speaking, there are some caveats on this point. On the one hand, the exemption is only applicable if the company requests it, so it will not be applied automatically. On the other hand, it will depend on the statement of compliance made by the company under each contribution account code and the month of accrual, which means that the application must be made before the settlement of that period. This is the Social Security Administration's way of controlling the correct exemption in view of the "real" situation of the company with respect to the ERTE and its vicissitudes. And, finally, as is well known, aid to the company in the form of exemption from Social Security contributions will not in any case have an effect on a lower contribution by the worker, which will be considered to have been fully effected for all purposes.

3.3.2. The main regulatory consequence is the complexity of the scheme applicable to the exemptions, since, in principle, there are three different groups of exemptions:

a) companies that extend their ERTE due to partial force majeure (reinstated workers, 60% in companies with less than fifty workers and 40% in the rest of the companies; workers in ERTEs, 35% in companies with less than fifty workers and 25% in the rest of the companies). This scheme is reproduced in the companies that had decided to suspend contracts or reduce the working hours for economic, technical, organisational or production reasons prior to the approval of Royal Decree-law 24/2020 or with ERTE for these reasons that start after the end of the ERTE due to force majeure;

b) companies and undertakings in a situation of total force majeure (for companies with less than fifty employees, 70% in July, 60% in August and 35% in September; for those with fifty employees or more, 50%, 40% and 25% respectively);

c) companies and undertakings that, as of 1 July 2020, are prevented from carrying out their activities by the adoption of new restrictions or containment measures imposed on one of their workplaces and that must conduct an ERTE due to force majeure under the terms of the Workers' Statute Act (80% in companies with fewer than fifty people and 60% in companies with fifty or more workers). As can be seen, this is an incentive to "relocate" ERTE due to force majeure to their original scheme contained in the Workers' Statute Act and which, from now on, may be more flexible in its application.

The implementation of the aforementioned scheme of exemptions (with greater exemptions for more exceptional situations – resurgences or ERTE due to force majeure of the Worker's Statute Act and extended total ERTE due to force majeure - and with lesser exemptions in cases of extension or equivalent - extended partial ERTE due to force majeure or ERTE for other reasons) will be complicated according to the business case and the concurrence of undefined situations, basically because of the sequence of reactivation of each sector and each company, the justification in cases of resurgence and the conduct of each procedure, among other reasons.

4. Other extended measures

4.1. In accordance with Article 3 of this new Royal Decree-law 24/2020: (*a*) the unemployment protection measures provided for in paragraphs 1 to 5 of Article 25 of Royal Decree-law 8/2020 will be applicable until 30 September 2020 to the ERTE resulting from Articles 22 and 23 of the aforementioned law and from the additional provision 1.2 of this new Royal Decree-law 24/2020 (ERTE due to resurgence); (*b*) the extraordinary measures in the field of unemployment protection regulated in Article 25(6) of Royal Decree-law 8/2020 – seasonal workers - shall be applicable until 31 December 2020; (*c*) the management body for the unemployment benefits shall extend until 30 September 2020 the maximum duration of the rights recognised in ERTE based on Articles 22 and 23 of Royal Decree-law 8/2020 whose starting date is prior to the entry into force of this Royal Decree Law 24/2020; (*d*) when the company starts an ERTE for economic, technical, organisational or production reasons based on Article 23 of Royal Decree-law 8/2020, but after this Royal Decree-law 24/2020, it must submit a collective application for unemployment benefits within the period set out in Article 268 of the Social Security (Recast) Act, and (e) in the event that, in the same month, there is an alternation in periods of activity and periods of inactivity or reduced working hours, the company must communicate on a monthly basis, by means of the communication of periods of activity of the certific@2 application, the information on the days worked in the previous calendar month.

4.2. Finally, among other aspects and by virtue of the provisions of Articles 6, 7 and 5 of Royal Decree-law 24/2020, respectively, the commitment to maintain employment is extended

to companies benefiting from exemption from the payment of social security contributions under Article 4 thereof, the validity of Articles 2 and 5 of Royal Decree-law 9/2020 is extended until 30 September (impossibility of termination of employment for the same reasons justifying the ERTE and interruption of the calculation of the maximum duration of temporary contracts) and, finally, the limits related to the payment of dividends and the fiscal transparency of companies or undertakings with ERTE are maintained, incorporating into the scope of this prohibition the companies or undertakings with ERTE for economic, technical, organisational or production reasons - previously not included - and demanding the waiver of the exemptions granted, as well as their reimbursement.