

## Tax

# Extension of ERTes and new ERTes: contribution exemptions linked to in-company training

Royal Decree-law 18/2021 of 28 September (Official Journal of Spain [BOE] of 29 September) on urgent measures for employment protection, economic recovery and labour market improvement, includes, among other actions, the 6th Social Agreement to Defend Jobs (ASDE), providing for the extension of ongoing temporary collective redundancy procedures (ERTes), the conducting of new ones and aid both for those in paid employment and, especially, those who are self-employed. At the same time, some of the existing limitations (safeguarding of employment, fiscal transparency and payment of dividends, inter alia) are extended.

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**1. Extension of ERTes linked to pandemic crisis, not automatically but subject to prior request**

- 1.1. By virtue of Title I of Royal Decree-law 18/2021, which contains the 6th Social Agreement to Defend Jobs (Arts. 1 to 7), temporary collective redundancy procedures (ERTes) ongoing as of 30 September 2021 are extensible on the basis of the provisions of Articles 1 and 2 of Royal Decree-law 11/2021 of 27 May (extension of ERTes owing to force majeure and those owing to impediment to or limitations on business activity) or of Article 23 of Royal De-

cre-law 8/2020 of 17 March (extension of ERTes owing to economic, technical, organisational or productive reasons) where applicable, at the request of the company (not automatically).

To this end, between 1 and 15 October 2021, the company or legal person must submit the appropriate application, accompanied by the required documentation, to the labour authority that authorised or processed the relevant procedure. If the application, accompanied by the required documentation, is not submitted within the established period, the temporary collective

redundancy procedure will be deemed terminated and will cease to apply as from 1 November 2021. The documentation consists of a list of the hours or days of work suspended or reduced during the months of July, August and September 2021 in respect of each of the workers, duly identified in relation to each of the workplaces. If such procedures were due to economic, technical, organisational or productive reasons (Art. 23 of Royal Decree-law 8/2020), a report from the worker representatives with whom the ERTE was negotiated shall also be attached.

The labour authority, without prejudice to issuing the relevant decision, must send the ERTE to the Labour and Social Security Inspectorate should any action be appropriate. The said labour authority must issue its decision within ten working days of submission of the application by the company, which decision will uphold and extend the aforementioned procedure until 28 February 2022, provided that the required documentation has been submitted. In the absence of an express decision, the request for extension will be deemed to have been granted.

- 1.2. It should be noted that this is an extension, not a new conferment, whereby the rule is based on authorisation, even if there is no express decision, provided that the relevant documentation is submitted. It is true that, unlike other extensions, an automatic deferral is not established here, but rather it requires the employer's request, which must also include the identification of the workforce and the workplaces that remain affected by the relevant ERTes.

The extension will be reach 28 February 2022, this period being the maximum one, with the company being able to request a shorter extension.

## 2. **New ERTes owing to impediment to or limitations on business activity and movement between the two**

- 2.1. The new piece of legislation also considers the situation of companies and entities affected by new restrictions and health containment measures related to coronavirus adopted by the competent authorities between 1 November 2021 and 28 February 2022.

In such cases and if these circumstances arise, an ERTE owing to an impediment to or limitations on normalised business activity under the terms set forth in Article 2 of Royal Decree-law 30/2020 of 29 September may be requested. These companies and entities may benefit, with respect to the workers assigned to and registered in the social security contribution classification of the affected workplaces, from the exemption percentages provided for each type of procedure in this new Royal Decree-law 18/2021, provided that they meet the rest of the requirements. In the absence of an express decision, the request for an ERTE will be deemed to have been granted.

And not only that, but companies that obtain the relevant authorisation for an ERTE owing to an impediment to or limitations on normalised business activity or that have received a favourable resolution of the request for an extension of a procedure owing to an impediment to or limitations on

normalised business activity may move from the situation of impediment to that of limitation and vice versa as a result of the modulations in the health restrictions adopted by the competent authorities, without the processing of a new ERTE being necessary. However, the applicable exemption percentages provided for these types of procedures will depend at all times on the nature of the situation of force majeure in which the company finds itself.

These companies, whose situation has been modified, must communicate this change, the date of effect and the workplaces and workers affected to the labour authority that had approved the ERTE and to the statutory body of worker representatives within the company. Companies that have notified the labour authority of such change of situation must submit a statement to the Spanish Social Security Agency under the terms established in Article 2(3) of Royal Decree-law 30/2020 (a statement for each social security contribution classification and for each month of accrual); such statement must be sufficient for the application of the appropriate exemption percentages depending on the impeditive or limitative nature of the situation of force majeure in which the company finds itself at any given time. The labour authority will transfer this communication to the Labour and Social Security Inspectorate for the purposes of conducting the control actions that may be determined concerning the correct application of the exemptions in the payment of Social Security contributions.

2.2. This is a provision for the future that attempts to address two possible situations: that of companies that are surprised by new restrictions from November onwards and that of others that have requested and obtained the extension of an existing ERTE. Both have a common element, namely, the possibility of moving between ERTes of a different nature - of impediment or limitation and vice versa -, by virtue of new future health restrictions, without the need for the processing of a new procedure. And with a single condition - in addition to the already existing one regarding the submission of a statement on the real situation of the staff and workplaces affected by the said procedure-: that the exemptions from Social Security contributions be adjusted, at all times, to both the ERTE and the regulation in force.

### **3. Exemptions from Social Security contributions**

3.1. In accordance with the provisions of Article 4 of Royal Decree-law 18/2021, ERTes owing to limitations on the normalised business activity may benefit from the following percentages of exemption from Social Security contributions:

For companies that have had ten or more employees or equivalent registered with the Social Security on 29 February 2020, the percentages of exemption from the employer's contribution accrued in November and December 2021 and January and February 2022 will be different depending on whether or not they carry

out training activities for the persons whose employment contract is suspended or whose working hours are reduced in the period indicated: a) 40% if they do not carry out such training activities, and b) 80% if the company does carry out training activities. For their part, companies with fewer than 10 persons under the above conditions will receive these exemptions: (a) 50% if the company does not carry out training activities, and (b) 80% if the company does carry out training activities.

The ERTes of the following companies may also benefit from these exemption percentages: (a) companies referred to in paras. 1 and 2 of the first additional provision of Royal Decree-law 11/2021 - companies belonging to sectors with a high rate of ERTes and a low rate of recovery of business activity - whose procedure is extended in accordance with the provisions of this new regulation; b) companies referred to in letter a of paragraph 2 of the first additional provision of Royal Decree-law 11/2021 which, between 1 October 2021 and 28 February 2022, move from a force majeure ERTE based on the grounds set out in Article 22 of Royal Decree-law 8/2020 to one based on economic, technical, organisational or productive reasons; and c) companies which, having been classified as subsidiaries or members of the value chain in accordance with the provisions of the first additional provision of Royal Decree-law 11/2021, move, in the period between 1 October 2021 and 28 February 2022, from a force majeure ERTE based on Article 22 of Royal Decree-law 8/2020 to one based on economic,

technical, organisational or productive reasons.

Companies and entities of any sector or activity that have been authorised ERTes owing to an impediment to the business activity may benefit, with respect to workers whose activities are suspended in the affected workplaces, during the periods and in the percentages of working hours affected by the suspension, from an exemption of 100% of the employer's contribution accrued from November 2021, during the period of closure, and until 28 February 2022.

All these exemptions will be applied, with respect to workers whose activities are suspended between 1 November 2021 and 28 February 2022 and in relation to the periods and percentages of working hours affected by the suspension, to the payment of the employer's contribution, as well as to that relating to the contributions under joint collection items. The procedure and requirements for the application of these contribution exemptions will be those established, in general, in Article 2 of Royal Decree-law 30/2020.

The exemptions will be applied, as a general rule, by the Spanish Social Security Agency at the request of the company, after notification of the identity of the workers benefiting from the training action and the period of the suspension or reduction in working hours. This notification will constitute a statement of the company's commitment to carry out the training actions linked to these exemptions. In order for the exemption to be applicable, such notification and

statement must be submitted before requesting the calculation of the settlement of the contributions for the period of accrual of the first on which the said statement has effect. If the notification and statement are made after the last request for the calculation of the settlement within the period of submission within the appropriate regulatory period, these exemptions will only be applied to the assessments submitted subsequently, but not to the periods already settled. The notification and statement must be made, by means of the transmission of the data established by the Spanish Social Security Agency, through the electronic data forwarding system within the scope of the Social Security (RED system).

Pursuant to the eleventh additional provision of Royal Decree-law 18/2021, the established exemptions from Social Security contributions will have no effect on employees, in general terms, and the period in which they are applied will continue to be considered as the period in which contributions are actually paid. Without prejudice to the specific provisions of this piece of legislation, the fourth additional provision sets out as an essential requirement for the application of the extraordinary contribution measures and for the recognition of unemployment benefits the submission by the companies of a list of the affected workers.

- 3.2. A permanent feature of the different ERTes, the exemption from the contribution is resolved here with different percentages depending on the size of the company and the nature of the procedure. This measure is intended to

promote the recovery of the contract suspended or working hours reduced by the procedure, to which is now added - as will be explained below - the interest of the company in acting on the employability of its workers by means of their continuous training. These exemptions will not affect, in general, the social protection of the workers and, in any case, are conditioned by the variations in the data formally or actually submitted by the companies affected.

#### **4. Training actions linked to Social Security contribution exemptions**

- 4.1. The great novelty of this agreement and of the new regulation on temporary collective redundancy procedures is contained in Article 3 of Royal Decree-law 18/2021, which relates the suspended contracts or reduced working hours with the training of the affected workers. In this line, it is recognised that the exemptions in the contribution will be conditioned - as stated above - by the completion of the appropriate training actions by the workers. And, thus, both the companies whose ERTE is extended and those that have one due to limitative situations must develop training actions for each of the workers affected by said procedure between 1 November 2021 and 28 February 2022. The aim of these actions will be to improve the professional skills and employability of the workers affected by these ERTes. Priority will be given to the real training needs of companies and workers, including those linked to the acquisition of digital skills and those that enable requalification, even if the

training activity is not directly related to the work activity carried out in the company.

These actions will be developed through any of the types of training provided for in the Vocational Training for Employment in the Workplace Act 30/2015 of 9 September. The deadline for the effective provision of training actions will end on 30 June 2022. The minimum number of hours of training to be completed by each worker for whom the company has applied exemptions is established according to the size of the company and as from ten people on the payroll. Thus, from ten to forty-nine workers in a company, it will be thirty hours and, in companies of fifty or more, forty hours.

These are training actions that must be carried out during the application of the reduction of working hours or the suspension of the contract within the scope of the ERTE. In any case, the legally established breaks and the right to a work-life balance must be respected. The statutory body of worker representatives within the company, if any, must be informed of the proposed training actions.

Once the maximum period for the execution of the training actions has elapsed, the Spanish Social Security Agency will communicate to the National Employment Service the list of the workers to whom the companies have applied the appropriate exemptions during the period between 1 November 2021 and 28 February 2022. The National Employment Service, for its part, will verify that the training actions have been carried

out. If this cannot be verified, the appropriate sanctioning and settlement proceedings will be initiated for the difference between the amounts applied and those established for each of the workers for whom these actions have not been carried out. If the company proves that it has made the training actions available to the workers, it will not be required to reimburse the exemptions when the worker has not taken them.

Without prejudice to the benefits in terms of exemptions provided for and their conditioning to training, companies that train people affected by ERTes will be entitled to an increase in the credit facility for the financing of programmed training actions in the amount indicated below depending on the size of the company: a) from one to nine workers, 425 euros per person; b) from ten to forty-nine workers, 400 euros per person; c) from fifty or more workers, 320 euros per person.

- 4.2. This is a very necessary relationship between those who remain in an ERTE and their investment in training. Although the regulation does not resolve some questions, particularly the relationship between this corporate “obligation” and the “right” to paid leave of twenty hours a year that every worker has, as per Article 23(3) of the Workers’ Statute Act, it is certainly a firm commitment to avoid the obsolescence of those whose work has been affected in recent years by the effect of the pandemic. However, the company may or may not act along these lines, since, as has been shown, and even though this provision sets it out as an obligation, the exemption from the contribution will be greater or

lesser not only depending on the size of the company, but also depending on whether or not the company initiates training activities. It is a profitable investment if we take into account that, in addition to the credit facilities already available for such action, the amounts included in this new regulation are now added for each worker trained during the duration of the ERTE.

## 5. Extension of other measures linked to the ERTE

- 5.1. Pursuant to Article 5 of this new Royal Decree-law 18/2021, companies that on 31 October 2021 are applying an ERTE due to force majeure may process the procedure provided for in Article 23 of Royal Decree-law 8/2020 (for economic, technical, organisational or productive reasons) during the term of the same. In this case, the effective date of the latter will be backdated to the date of termination of the former.

Otherwise, they remain in effect until 28 February 2022:

- a) The limits and provisions relating to the distribution of dividends referred to in Article 4 of Royal Decree-law 30/2020 with regard to all cases authorised prior to or by virtue of this regulation to which the exemptions provided for in this new regulation are applied. The Tax Authorities will provide the Spanish Social Security Agency with the identification of the companies that have failed to comply with this requirement with respect to the exemptions applied in each of the years in which they have ap-

plied them. Likewise, the Spanish Social Security Agency will provide the Tax Authorities with a list of the companies that have applied exemptions in their contributions.

- b) The limits and provisions related to fiscal transparency referred to in Article 4 of Royal Decree-law 30/2020 in relation to all procedures, authorised before or by virtue of this new regulation and in the same terms as the previous case.
- c) The limits and exceptions related to overtime and new hires and outsourcing referred to in Article 7 of Royal Decree-law 30/2020; they shall also apply to all ERTes authorised under Royal Decree-law 18/2021.
- d) Articles 2 (employment protection measures) and 5 (interruption of the calculation of the maximum duration of temporary contracts) of Act 3/2021 of 12 April.

For its part, the safeguarding of employment will be applied in accordance with the provisions of Article 5 of Royal Decree-law 30/2020 in relation to the previous periods and with the one deriving from the benefits included in this regulation and in accordance with the appropriate time limits.

Finally, both Article 6 and Article 7 of this Royal Decree-law recognise the extension of unemployment protection for persons affected by an ERTE. However, it is provided that companies that are authorised to extend one of these proce-



dures in accordance with the provisions of Royal Decree-law 18/2021 must, in general terms, make a new collective application for unemployment benefits within fifteen working days following 1 November 2021 or the date of notification of the express decision of the labour authority approving the extension or of the certificate evidencing administrative silence in the event that it is subsequent to 1 November. In the case of new ERTes, the collective application must be submitted within fifteen working days following notification of the express decision of the labour authority approving the extension or of the certificate evidencing administrative silence. For the rest, the companies that take out some or all of the workers must notify the Social Security managerial body of the cancellation of the benefits of those who are no longer

affected by the suspension or reduction measures prior to their effectiveness. The MECUIDA Plan is also extended until 28 February 2020, together with other grants and subsidies provided for in previous legislation, especially in Royal Decree-law 11/2021 and, in general terms, also until 28 February 2022.

- 5.2. A *status quo* that seems to be extended until 28 February 2022 with limitations on business action similar to those already in place. However, all the measures related to the ERTes, with the new exemptions from contributions and the new requirements on training actions, which attempt to combine the need to maintain this instrument suspending the contractual relationship with the progressive disattachment of workers from the ERTes in effect, stand out.