

SPANISH INSURANCE AND EMPLOYMENT LAW IN TIMES OF COVID-19

Since the declaration of the state of emergency in Spain, we have received numerous queries regarding the legal implications of the COVID-19 crisis. This note summarizes some key aspects of the main Royal Decrees approved in the past weeks, with special emphasis on employment and insurance law - areas in which we specialize. We begin with the Royal Decree-Law 463/2020 (RD 463/2020 hereinafter), issued on March 14th and amended by subsequent decrees, which declared the state of emergency and informed the public how to tackle legal issues arising from the pandemic.

COVID-19 AT THE WORKPLACE

Since assuming the state of emergency, one of the first questions we addressed in relation to employees with COVID symptoms was how the government defined this as a work injury. Article 4 of the RD 463/2020 expressly, though unconventionally, considers that becoming infected with COVID is considered a workers' compensation related injury. RD 463/2020 states that the employee's compensation is assimilated by the Social Security system, and will have the consideration of temporary disability, receiving the applicable benefits for this eventuality. It is important to note that this provision, contracting the disease and it being equivalent to temporary disability, will only give the worker the right to social security benefits, while excluding other benefits generally received in such cases (of temporary disability). Under Article 4, employees will not be allowed to claim any damages to employers based on the provision that COVID affected workers are considered temporarily disabled.

Different rules will apply in cases of negligence from the employer's unwillingness to take normal precautions to prevent injuries, such as the workers becoming infected with coronavirus in the workplace. As a result, regular workers' compensation procedures apply. An employee can claim that he or she contracted the illness in the course and scope of employment, thus holding the employer responsible for the hardship. The employer must then prove he is not liable. Spanish Civil Code article 1101 can be applied broadly, forcing persons who incur in willful misconduct or negligence to compensate for damages caused. Employment rules are more stringent, adding an extra layer of protection in cases where employer's negligence causes injuries to workers. Under this reasoning, liability extends to any existing insurance policy, notwithstanding specific viral exclusion clauses. Litigation activity will inevitably increase.

On April 11, the Spanish Government issued a *Best Practices Guide* for businesses to follow, summarizing generic rules of Law 31/1995 on Prevention of Occupational Risks. The guide—which we analyzed in a previous article— contains 3 major sections: commuting to and from work; generic rules to follow while at work; and hygiene measures. Though the guide exists, the criteria is difficult to implement, something we believe will result in numerous claims against businesses, administrations and insurance companies. To access the guide, visit the Spanish Health Ministry's website.

MEASURES TO EASE FILING FOR TEMPORARY LAYOFF (ERTE)

Royal Decree-law 8/2020 (RD 8/2020), released on March 17, provided clarity on some of the major questions raised by RD 463/2020 involving employment. Among some of the measures, one of the most prominent involved the filing of Temporary Layoffs (ERTE), which allows companies to temporarily lay off employees or reduce hours, while allowing them to collect unemployment benefits. A company may file if it meets any of the following qualifications: force majeure, economic, technical, or organizational reasons. As a direct result of the state of emergency, filing Temporary Layoffs due to force majeure has been simplified to help companies cope with mandatory foreclosures.

UNEMPLOYMENT SUPPLEMENTAL MEASURES & RECOVERABLE PAID LEAVE

Royal Decree-law 9/2020 (RD 9/2020 hereinafter), passed on March 27, adopted supplementary measures in the unemployment sphere due to the great number of Temporary Layoffs filing. We summarize with a legal perspective some of the changes introduced in the regulation:

- I. Restriction on layoffs: even though layoffs are not prohibited, employers are banned from laying off workers via the objective dismissal procedure (economic, technical, or organizational reasons) contemplated in the Spanish legal system. Therefore, if a company decides to discharge an employee, it will result in a higher severance pay since all dismissals are considered wrongful. We believe this measure will eventually increase employment disputes as many companies will be in need of disruptive measures in order to save their business.
- II. Restrictions regarding Temporary Layoffs (ERTE) as well as sanctions: Temporary Layoffs filed and attributed to the current COVID situation will only apply during the declared state of emergency. RD 9/2020 enables the administration to review all filings in order to verify they comply with the rules and procedures pertaining to the closed case scenarios exposed in the decrees. Sanctions will be imposed to those companies committing fraud and falsely claiming Temporary Layoff benefits.

Two days after RD 9/2020, Royal Decree-law 10/2020 (RD 10/2020 hereinafter), regulated a recoverable paid leave for employees providing non-essential services, from March 30th to April 9th, inclusive. Under this decree, companies were compelled to apply a paid leave during those dates and forced to agree with employees on a plan to recover hours before the year ended. The decree also included a list of services and activities where this leave would not apply. In the decree's prologue, the executive justified the measure, rationalizing that it alleviated the escalation of confirmed COVID cases in Spain. The rule applied to workers, both in the public and private sector, not providing essential services whose businesses were still operating at the moment the decree was issued. RD 10/2020 will create more problems than solutions for the time it was enacted, and will force companies to adjust work schedules, ultimately resorting to litigation.

INSURANCE CONTRACTUAL OBLIGATIONS & ARTICLE 20 OF THE INSURANCE CONTRACT ACT

RD 463/2020 has also affected how and when contracts are enforced, meaning, in many cases, the impossibility and impracticability of performance. Scenarios are endless, especially in the insurance sector. Imagine for instance a construction site, which the developer has insured to be completed by December 20th. With delays caused by this pandemic, and the subsequent suspension of the non-essential activities established by RD 10/2020, the performance and timely completion of the work becomes impracticable, and likely impossible. In this scenario, can the developer extend the deadline without penalization? Our Civil Code expressly establishes the principle of *pacta sunt servanda* (the nonfulfillment of respective obligations is a breach of contract), but there are exceptions in cases of force majeure.

We understand that the developer's failure to comply cannot be considered a breach of contract, therefore, the insurance provision should not have effect in the present case. We consider this to be a force majeure situation, because the developer made reasonable efforts to fulfill their contractual obligations, now impossible or impractical. Finally, the lack of reasonable foreseeability—a third element of force majeure—would exempt the developer from the performance of the contract. Other principles apply, such as *ad impossibilia nemo tenetur* (no one can be bound to perform impossibility) and *rebus sic stantibus* (current situation). In this scenario—and endless others—we can reasonably conclude that all obligations be suspended to resume after the state of emergency is lifted, and furthermore, deadlines could be modified.

Moreover, we briefly analyze article 20 of the Insurance Contract Act 50/1980 (LCS hereinafter), regarding delinquency interests in cases where the insurer fails to compensate the insured. Spanish Courts and relevant case law clearly establish that insurers have the obligation to timely and promptly compensate losses, sanctioning those who do not comply. This entails considerable due diligence in resolving insurance investigations. Problems emerge during a state of emergency, since the insurers work capacity can be limited. Being that the case, insurance companies must prove the obvious, that their operations are clearly being affected by the current situation (Article 20.8 LCS). Of course, this cannot be an excuse for insurance companies to delay compensation on losses already processed.

PROCEDURAL DEADLINES SUSPENSION, NOW WHAT?

It is important to understand that the current situation has forced Courts to suspend all procedural deadlines. However, RD 463/2020 enables some courts to hear urgent matters to protect fundamental rights. Similarly, the Spanish administration bodies have also suspended all office procedures. Deadlines will be enforced once the state of emergency ends.

Our coverage and analysis is ongoing, and we'll keep you posted on the legal implications posed by COVID-19 as the situation continues evolving.

EVERLAW team