



CECA MAGÁN
ABOGADOS

CORONAVIRUS WITH REGARDS TO ERTES

**Labour Law matters regarding
Royal Decree 8/2020, of 17-3 (BOE 18-3-20)**

19th March 2020

MATTERS RELATING TO ERTES

Does the law provide for exceptional measures in the area of extinctive collective dismissals?

No. The law only refers to temporal employment dismissals caused either by force majeure or ETOP causes (economic, technical, organizational and productive). In this sense, extinctive ERTes keep their previous legal regime.

Does the rule override existing regulations in this regard?

No. It only provides for special measures for the exceptional circumstances that exist at the present time due to the current health crisis and for as long as they last.

The law analyzes ERTes that have a direct cause with the current situation, and what if this is not the case?

In this case, the procedure previously provided for in the labour law system regarding ERTes must be followed.

To which ERTes does the Royal Decree apply?

Only to those initiated or communicated from 18th March 2020 onwards, who are caused by the emergency crisis due to Covid-19. Those initiated or communicated previously will be governed by the legal regime prior to the Royal Decree. Even if they are caused by Covid-19.



ISSUES REGARDING ERTEs (I)

If no alternative measure to teleworking are taken beforehand, and these where possible, will the adoption by the company of an ERTE no longer be justified?

Although Article 5 of the Royal Decree states that the adoption of alternatives, particularly facilitating teleworking, should take priority over temporary cessation or reduction of activity, this does not seem to be the case. At least when the Labor Authority finds the existence of force majeure or when the exceptional circumstances of the ETOP cases are accredited.

Who must prove the existence of the circumstances that would justify force majeure?

The company in its application to the Labour Authority. However, until the Labor Authority decides on the existence of force majeure, the company shall not be obliged to specify the decision to suspend contracts or reduce working hours. Such determination may be made once the situation of force majeure has been established by the Labor Authority.

Are the situations specifically contemplated by the Royal Decree by force majeure, *numerus clausus*?

Probably not, as the current situation may justify new government measures or new decisions taken by health authorities of diverse content and scope.



MATTERS RELATING TO ERTES (II)

The ERTes that according to the Royal Decree are not considered force majeure, what consideration do they have?

Economic, technical, organizational or production causes depending on the circumstances of each case. If such circumstances are derived from Covid-19, these ERTes shall be entitled to the provisions of the Royal Decree, if not, the previous regulation on ERTes shall apply.

Can self-employed workers benefit from ERTes?

Yes, if they have the status of employers of employees. But only in that capacity.

Are companies required to make a profit from ERTes?

No. It is sufficient to have the status of employer in order to benefit from the measures provided for in the Royal Decree, if the requirements are met.

Could an ERTE be processed without the Labour Inspection report?

Yes, since this report is an optional application for the competent Labour Authority.



MATTERS RELATING TO ERTES (III)

In the event that the Labor Authority does not respond within the time limit regarding the existence of force majeure, could the concurrence of positive administrative silence be understood?

Since this was not expressly provided for either in the Royal Decree nor in the previous legislation, it would appear from the application of the common rules on administrative procedure that such silence is positive.

When there are no legal workers representatives in the ERTes due to ETOP causes, how should the negotiating commission be constituted?

Firstly, it would appear that it must be formed with the most representative trade unions that are entitled to apply the collective bargaining agreement that applies to the company in question. Failing that, an *ad hoc* committee must be set up under the terms of Article 41 of the Workers Statute.

The reference in the ERTes ETOP to the most representative or representative trade unions of the sector to which the company belongs and with legitimacy to be part of the commission of the collective agreement of application, what exactly does it refer to?

Certainly, to the trade unions that, by virtue of the provisions of Article 87 of the Workers Statute, are legitimized to negotiate the sector's collective bargaining agreement that is applicable to the company.

If, on the other hand, a company collective bargaining agreement is applicable in that company, it seems that an *ad hoc* committee will have to be set up.

MATTERS RELATING TO ERTES (IV)

If, following the application of the extraordinary measures provided for in the Royal Decree, employment cannot be safeguarded, will the use of the benefits exercised by the firms and provided for in the Royal Decree, have to be reviewed retroactively?

In this respect, the 6th additional provision of the Royal Decree Law expressly establishes that the extraordinary measures established in the labour field will be subject to the commitment of the company to maintain employment for 6 months from the resumption of the activity. This commitment will be subject to subsequent review, especially by the TGSS (General Social Security Treasury) or the SEPE (State Employment Services).

Once an ERTE is approved, can the company recover full-time services from certain workers in response to competing needs?

Yes, there is nothing to prevent the duration of the ERTes from being less than that initially requested. In fact, it is the employer's responsibility to reduce the suspensive effects as much as possible.

Once an ERTE is approved, can the company subject new workers that were not previously included in it?

No. In that case the company will have to start a new ERTE affecting those workers.

If a working person does not prove to have contributed the minimum period required to qualify for unemployment benefit, will he or she be deprived of such protection during the application of the ERTE?

No. The Royal Decree provides precisely for the protection of these workers affected by the ERTes derived from Covid-19.

MATTERS RELATING TO ERTEs (V)

If before the initiation of an ERTE a person is in a situation of temporary disability, how does it affect him/her?

Such person shall continue to be temporarily disabled for all purposes until his or her medical discharge. If the ERTE then affects him/her, he/she will be placed in the situation derived from it.

What types of ERTEs would be affected by the exemption from social security contribution under the terms of the Royal Decree?

Only to the ERTEs by force majeure that derive from the Covid-19. The planned exemptions would therefore not affect ERTEs ETOP.

Is there any difference according to the size of the company in relation to the exemption of contributions in ERTEs due to force majeure?

Yes, if the company has less than 50 employees by the 29th February 2020, the exemption from social security contributions is higher in percentage (100%) and in concept (company and joint collection fees). If the company has more than 50 employees on that date, the exemption is lower in percentage (75%) and in concept (only company contribution).

For the purposes of computing the number of workers in the company on the 29th February 2020, who would you compute?

All the workers who were in the company on that date. This, of course, refers to workers who are temporarily disabled.

MATTERS RELATING TO ERTES (VI)

To which types of ERTE, do the extraordinary measures on unemployment refer?

Both ERTes due to force majeure and those due to ETOP causes whose origin derives from Covid-19.

What regulations should apply to matters not covered by the Royal Decree?

The general provisions provided by the labour laws for ERTes, contributions and unemployment benefits. This also applies to legal challenge procedures.

If an ERTE was launched before the 18th March 2020, could it be withdrawn in order to benefit from the new extraordinary measures on ERTes?

It seems to be so, as nothing is said to the contrary. Nevertheless, a new ERTE should be initiated when there is no doubt that there are new reasons (not only convenience) to support such a procedure.



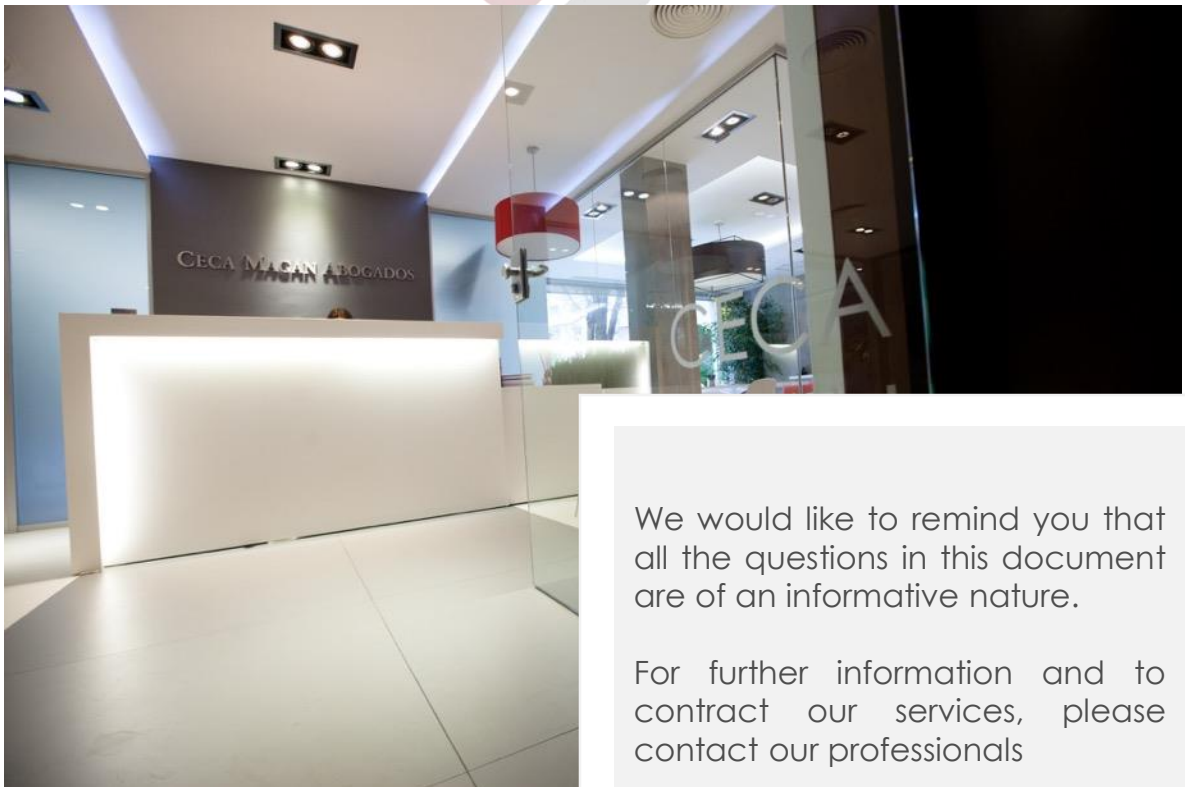
Can we help you?



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We would like to remind you that all the questions in this document are of an informative nature.

For further information and to contract our services, please contact our professionals

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