

## Spain

### Managing HR Through COVID-19

### A Practical Guide for Multinational Employers

Prepared by Pérez-Llorca

*As at April 27, 2020*

## Overview

This guide will help employers manage HR legal and practical issues arising from COVID-19.

It covers:

- [Good Practice Guidance – giving high-level consideration](#);
- [An Action Point Checklist drilling down into the detail](#); and
- [Answers to Key Questions facing employers in Spain](#).

This publication has been coordinated by Mayer Brown and forms part of a wider Mayer Brown Guide for Multinational Employers, [which is available here](#).

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## Good Practice

There are a number of key good practice points that employers across all jurisdictions will want to consider in connection with COVID-19:

## **1. Keep up-to-date with accurate information**

It is difficult for an employer to make proper decisions based on rumors, assumptions and “fake news”. Therefore, it is important for an employer to stay up-to-date with accurate information and make decisions based on facts. Employers should monitor official sources, including government advisories and the World Health Organization (“WHO”) website, and check that the information they receive is factually correct.

## **2. Know where your employees are and where they have been**

An employer cannot keep its employees out of harm’s way if it does not know where they are and where they have been. As outbreaks of COVID-19 occur in various parts of the world, keep track of which of your employees could be at risk.

## **3. Communicate with your employees**

Employers should communicate openly and often with their employees so that they have the information they need to help keep themselves educated and updated about the coronavirus. Employers should not assume that all employees will educate themselves or have access to the same sources of reliable information. Putting everyone on the same page will help the employer and its employees move together in a timely manner as a business. Open and timely communication will help build trust and reduce the spread of rumors that may cause anxiety in the workplace.

## **4. Provide a safe platform for employees to raise concerns**

Employers should give employees a *safe* platform where they can raise concerns on all aspects related to work, from mental health to the risk of having contracted COVID-19. This is not just good employee relations, but early detection and doing something about it can help to reduce the spread of the virus. It is one thing to have an employee assistance plan and ask employees to report issues, but if those who report are stigmatized or treated with contempt, employees may be deterred from reporting.

There may be nervousness and anxiety in the workplace, and possibly even conflicts, given concerns about the virus. Employees should be given avenues to communicate such anxiety to their employer, so that concerns are addressed earlier and do not balloon into bigger issues.

## **5. If you can be flexible, then be flexible**

Employers should understand that this is a time of stress for all parties, including employees. Recognize that employees will have different needs depending on their circumstances (e.g., those with school-age children may need more time off as school classes are suspended).

This time of uncertainty will pass but employees will remember how their employer treated them long after the threat of the virus has disappeared. A disgruntled employee may try to make it known to the world how badly their employer treated them. This may affect the employer’s brand and ability to attract and retain talent. The employer may then have to wait for another crisis or challenging time to get the opportunity to prove itself as a good employer.

## **6. One size may not fit all**

While consistency in treatment is generally to be favored, be conscious that one size may not fit all. For example, “work from home” or remote working may not work for everyone. The implementation of general directives should be checked against legal obligations under the contract of employment and local law.

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## Action Point Checklist

In general terms, the steps an employer needs to be taking now relate to four categories: **Review**, **Communicate**, **Update** and **Travel**. No list of action points will be comprehensive for all employers, but the following will form a good starting point.

### 1. Review

- Review business continuity plans and how these would be maintained if employees are suffering from coronavirus absences.
- Review existing sickness policies and procedures. Are they adequately disseminated to staff? Do they need amending?
- Review contracts of employment. It may be relevant to establish whether or not individuals can be asked to undertake different work or at different locations or at different times from the norm.
- Review the employer’s emergency procedures, e.g., if there is an infection and the workplace is closed on a temporary basis. If appropriate, carry out a test run of an emergency communication to see how robust the process is.
- Ensure contact details for all staff are up-to-date.
- Undertake a risk analysis of high-risk groups of employees, and what steps can be taken to try and reduce risks for those groups. These groups may include:
  - those who travel frequently to countries where there is currently or may well in future be a risk of infection.
  - those with health issues, such as asthma, diabetes, cancer, or those who are pregnant, who are more likely to suffer adversely if they become infected with the virus.
- Review procedures in the office for preventing the spread of the virus, e.g., increased cleaning, availability of hand sanitizers and tissues etc.
- Review planning for the possibility of large scale absenteeism. For example:
  - Identifying the essential positions within the business, what needs to carry on during an emergency, and what is the minimum number of employees required?
  - Identifying employees with transferable skills so that these essential positions can always be temporarily filled.
  - Considering flexible work patterns, such as employees working from home.
  - Identifying those employees who have the necessary IT infrastructure to work from home (e.g., remote access to the office computer systems).

## 2. Communicate

- Identify an appropriate person as spokesperson/communicator of updates on policies etc., with appropriate credibility.
- What, if anything, is said about absence from work for reasons other than ill-health, e.g., where an office is closed?
- Assuming the employer has a health and safety committee, have there been any discussions with that committee about COVID-19 and its potential impact? If there is no such committee, the employer may want to consider setting one up.
- Communicate as a matter of urgency with the high-risk groups identified in any risk review to ensure they are aware of their high-risk status and the measures that are being taken to assist.
- Ensure managers are aware of the relevant workplace policies.
- Consider issuing guidance to employees on how to recognize when a person is infected with the coronavirus. What are the symptoms, and what should one do if one is taken ill at home or at work? It is also important to emphasize that individuals may not recognize that they have the virus and so may not be exhibiting symptoms. Employees should be informed of the reporting procedure within their employer if they have a potential infection as well as any official reporting process.
- Provide advice to encourage individuals to take a degree of responsibility for their own health and safety and to slow the spread of the virus. For example, advice on handwashing and use of sanitizer gels, coupled with a willingness to self-identify where it is possible that individuals have come into contact with individuals with the virus, have become infected themselves or have returned from private travel abroad to an area which turns out to be affected by the virus.
- Make clear that where staff are ill, they must not come to work regardless, i.e., "struggle through".

## 3. Update

- Initiate a system to keep up-to-date, especially given the speed at which infection is spreading.
- Consider establishing a committee on the employer's side to coordinate responses and engage with any staff consultative forum, and with particular responsibility for staying up-to-date with public health updates.
- How will employers communicate to employees regular updates on the coronavirus and its spread? As news develops, it is extremely important for an employer to be issuing fact-based updates, to avoid the possibility of fear being used by worried employees to make decisions about whether or not to come to work, whether to travel abroad, etc.
- Who will have the authority to determine changes to policy and issue any new communications to staff?

## 4. Travel

- Log employee travel before it is booked and check against the latest travel protocols.
- Ensure staff know that this applies to personal travel as well as business travel.
- Encourage staff to tell you if close family members with whom they share a house are travelling to infected areas.
- Replace face-to-face meetings (especially those involving travel) with video conferences,

telephone conferences, etc.

- Consult/communicate about whether to encourage varied work patterns to avoid travelling on public transport at rush hour.

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## Country Overview

*As at April 27, 2020*

Update:

On Saturday March 14, 2020, the declaration of the state of alarm was published in the Official State Bulletin ("**BOE**") as a response to the public health crisis caused by COVID-19 through Royal Decree 463/2020 (the "**RD 463/2020**").

The RD 463/2020 established a series of extraordinary measures to protect the health and safety of citizens, contain the spread of the disease and strengthen the public health system by, among others, restricting freedom of movement and stopping certain activities. These measures were adopted to facilitate short hours procedures and limit the possibility of carrying out dismissals due to COVID-19.

On March 29, 2020, Royal Decree 10/2020 ("**RDL 10/2020**"), was published in the BOE, regulating recoverable paid leave for employees who do not provide essential services in order to reduce the movement of the population in the context of the fight against COVID-19.

Employees working for companies or entities in the public or private sector, whose activity has not been halted as a result of the state of alarm established by RD 463/2020, were granted compulsory recoverable paid leave from March 30 to April 9, 2020 inclusive.

The leave meant that these employees would retain the right to the wages they would have been entitled to if they were providing services as usual, including their base salary and salary supplements.

In this regard, the recoverable paid leave did not apply to:

1. Those working in the sectors which are identified as essential in the schedule to RDL 10/2020.
2. Those working in divisions or on production lines in sectors identified as essential in the schedule to RDL 10/2020.
3. Employees of (i) companies that have requested or are implementing temporary workforce restructuring plans to suspend contracts and (ii) companies for which a temporary workforce restructuring plan to suspend contracts is authorised during the period of the leave provided for in RDL 10/2020.
4. Employees who are on temporary incapacity leave or whose contract is suspended on another legal basis.
5. Employees who can continue to carry out their activity as usual by working remotely.

As a consequence of the above, the recovery of the working hours not worked during the paid leave term would start from the day following the end of the state of alarm until December 31, 2020 through a period of consultation between the company and the workers' representatives, which will last for a maximum of 7 days.

In the event that there are no workers' representatives, the representative commission will be composed of the most representative trade unions of the sector the company belongs to and which have standing to be part of the negotiating commission of the applicable collective bargaining agreement. Notwithstanding the above, in the event that this representation is not possible, the commission will consist of three of the company's employees, elected in accordance with article 41.4 of the Workers' Statute, and established within a non-extendable period of 5 days, in any case.

On April 22, 2020, Royal Decree 15/2020 ("RDL 15/2020"), was published in the BOE, adopting additional urgent measures to support the economy and employment, which expand and enhance those already adopted through the Royal Decree-Laws approved in recent days, as well as RD 463/2020.

The most relevant labor-related measures are the following:

- Extension of the preferential nature of remote working and the right to adapt timetables and reduction of working hours. These measures will be extended for three months after the end of the State of Alarm and may be extended subsequently.
- Extension of the legally unemployed status in the event of termination of the employment relationship during a trial period.
- Extension of the suspension on the grounds of *force majeure* to essential services. The force majeure may be partial and may not extend to the entire workforce in those companies that carry out activities considered essential during the COVID-19 crisis.
- Exceptional availability of pension schemes in situations arising from the health crisis.
- Suspension of all deadlines and terms in Labor and Social Security Inspection procedures.
- Amendment of the provisions relating to the penalty regime and the refund of incorrectly paid benefits related to applications submitted by companies that contain misrepresentations or inaccuracies in the data furnished.

Taking in consideration the above, please find below answers to some of the key questions for employers:

### **1. What are an employer's main legal obligations?**

In general, companies are obliged to ensure the health and safety of their employees in the workplace. Therefore, it is reasonable to conclude that they must prevent their employees from exposure to the risk of infection by COVID-19. Consequently, employers must adopt the measures that are available to them in order to reach this objective, while remaining conscious of the limits that exist both in employment regulations and in the area of data protection in relation to the privacy of the employees.

In any case, companies must take preventive measures, of an individual or collective nature, as indicated by the prevention of accidents service based on a risk assessment, i.e., according to the type of activity, its organization and specific characteristics of the activity carried out by the company.

Among the measures that can be adopted according to the guidelines of the health and safety service, and always in accordance with the recommendations established by the health authorities, are the following:

- Organize the work in such a way as to reduce the number of exposed workers, establishing rules to avoid and reduce the frequency and type of face-to-face contact.
- Ensure that interpersonal distance is guaranteed in the common areas and in any case crowds of people should be avoided at these points.
- Take specific measures, where appropriate, for particularly vulnerable employees.
- Provide information on hygienic measures, such as frequent hand washing, the need to refrain from sharing objects, ventilation of the workplace, and cleaning of surfaces and objects.
- Provide personal protective equipment when risks cannot be avoided or cannot be limited sufficiently by technical means of collective protection or through work organization measures or procedures.

In this regard, employers should make the necessary hygienic equipment available to employees (especially gloves and masks) and adopt the necessary cleaning protocols.

The Health Ministry has also established a set of guidelines relating to health and safety in the workplace and the necessary preventative measures of a collective, individual or hygienic nature. These guidelines are included in the following link:

[https://www.mscbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov-China/documentos/PrevencionRRLI\\_COVID-19.pdf](https://www.mscbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov-China/documentos/PrevencionRRLI_COVID-19.pdf)

## **2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?**

There is no legal obligation regarding the duty of employers to prepare a plan to deal with COVID-19 but Spanish legislation requires all companies to comply with Law 31/1995 on the Prevention of Occupational Risks, which defines the safeguards and responsibilities necessary to protect the health of employees against risks arising from working conditions.

In this regard, the transmission of COVID-19 is one of the risks that require action by employers to prevent their employees from being exposed to it. Bearing this in mind, and noting the seriousness of the risk, we consider that employers do have an obligation to prepare and implement a workplace plan to deal with COVID-19. For the elaboration of such a workplace plan, the prevention delegates or workers' representatives must be consulted.

## **3. What should a workplace COVID-19 response plan cover?**

The COVID-19 response plan should include the objectives of the plan, those responsible for its implementation, general preventative measures and what to do if symptoms of the disease are detected in the workplace.

The objectives of this plan are:

- to minimize the effects on the health of the staff; and
- to ensure the normal functioning of the business, preparing for staff absences from the

workplace, whether due to isolation, temporary incapacity or remote working.

A management group with well-defined responsibilities should be formed, to deal with planning and response tasks during the period of the risk of infection by the virus. The team will have the role of giving instructions to implement the measures set out in the plan.

For general guidance on the contents of a workplace COVID-19 response plan, please see the [Appendix](#), along with the [Action Point Checklist](#).

#### **4. Can I direct my employees to go home or stay at home if there is an outbreak?**

Please note the potential relevancy of the 'Update' note at the beginning of this publication.

Remote working seems to be one of the most appropriate measures to protect the employees' health, provided that it is compatible with the nature of the services provided. Following RDL 15/2020, the preferential nature of remote working and the right to adapt timetables and reduce working hours will be extended for three months after the end of the state of alert and may be extended subsequently.

Moreover, companies can assess the possibility of offering adjustments to working hours, paid leave with future working hours recovery, unpaid leave or the taking of holidays, by evaluating, on a case-by-case basis, the possibility of imposing these measures unilaterally.

If such measures are insufficient and there is a clear risk of infection or it is impossible to continue with the company's activity for organizational or production reasons, the company may initiate a procedure for the temporary suspension of employment contracts and/or reduction of working hours. In this case, it will be necessary to analyze whether (i) there is a technical or operational cause, in which case a period of consultation of 15 days must be arranged with the workers' representation, or (ii) it is possible to establish the suspension on the grounds of *force majeure* which will allow the company to request the suspension of the contract directly from the employment authority, without a period of prior consultation and with the employment authority having to adjudicate on the issue within a period of five days. As mentioned, RDL 15/2020 adds that *force majeure* of an essential activity may be partial and therefore not extend to the entire workforce of a company.

#### **5. Can I direct an employee to see a doctor?**

Regarding the employer's power to oblige its employees to undergo medical tests, both in the workplace and outside it, the reality is that such power is again restricted by the employees' right to privacy. However, insofar as the legislation itself includes certain exceptions to the voluntary nature of medical examinations, it could be argued that in the event of a clear risk of infection and in the absence of a less burdensome measure to limit that risk, the company could impose such tests.

#### **6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?**

Yes. The contract of employment will continue during a COVID-19 outbreak unless the employment ends. An employer cannot refuse to pay wages simply because the employee is unable to attend the workplace or perform work because of an outbreak.

If the employer cannot perform its obligations due to the COVID-19 emergency, there are several temporary employment regulation measures, such as temporary redundancies or reduced hours, that the employer may take for reasons of *force majeure*, or for economic, technical or organizational reasons due to COVID-19.

Please also refer to the 'Update' note at the beginning of this publication regarding recoverable paid leave.

### **7. Can I quarantine certain staff to certain parts of an office or send them to a different office?**

Yes. The company may take necessary and reasonable measures to safeguard the health of its employees, including measures to redistribute the workforce by remote working from home or from different workplaces, provided that the distances involved do not exceed those which could substantially change the employees' working conditions.

### **8. Can I direct my employees to report suspected cases of COVID-19?**

Yes, in the event of a COVID-19 outbreak, in our view, it would be lawful and reasonable to ask employees to report if they suspect that they have COVID-19.

In this regard, the workplace plan to deal with COVID-19 must include an action plan for dealing with this scenario (e.g., communicate to the National Health Service the specific situation and to act on medical advice) so that the person in charge can implement the COVID-19 protocol established to protect the workforce.

### **9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?**

In this case, Article 21 of the Law 31/1995, on the Prevention of Occupational Risks, which regulates serious and imminent risk, states that the employee "*has the right to interrupt his work and leave the workplace, if necessary, when he considers that such activity involves a serious and imminent risk to his life or health*". In this regard, Article 4(4) of Law 31/1995 defines this as "a risk that is reasonably likely to materialize in the immediate future and that may result in serious harm to the health of workers".

Again, there is no general rule here, so each specific case would have to be analysed. However, if employees can prove that continuing to work exposes them to infection, they can decide not to go to work or to leave.

This is an individual right, it adds, but there are cases in which joint action can also be taken. If the employer is aware of a positive test for COVID-19 and does not quarantine its workers, violating the imposed protocols, the workers' representatives or the safety delegates may stop the activity of the staff at risk.

### **10. Can I screen employees and customers before allowing them to enter the workplace?**

It is not possible to answer this question in general terms as each specific case will have to be analysed. As a starting point, indiscriminately taking the temperature (which is ultimately personal data) of people from a certain group (employees, potential customers of a shopping mall, etc.) could be unlawful because it does not have a legal basis. Furthermore, the analysis will vary according to each

group, due to the position that the group may have with the data controller.

However, in the current state of the crisis, which has been classified by the WHO as a “pandemic”, it could be considered that, in certain circumstances and on the basis of “public interest” or “vital interest” of unnamed persons, such procedures may be lawful, even without the consent of the persons concerned.

As noted above, in such cases it is essential to carry out a detailed analysis of each case and, in the event that the processing is carried out, to guarantee compliance with the rest of the obligations and guiding principles of the General Data Protection Regulation. Indeed, the obtained data must serve the specific purpose of containing the spread of the COVID-19, and be limited to that purpose and not extended to other purposes.

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## Appendix: Workplace COVID-19 Response Plan

A plan should deal with the following:

### BEFORE AN OUTBREAK

- Preventive measures.
- Disinfecting the workplace regularly.
- Maintaining good indoor ventilation.
- Making sure that employees, suppliers and customers are aware of the employer’s plans in the event of an outbreak.
- Ensuring sufficient supplies of appropriate masks, alcohol wipes, gloves, paper towels, thermometers, disinfectants, etc.
- If employees are required to travel to areas known to have the virus, whether such travel is necessary.

### DURING AN OUTBREAK

- The steps the employer will take to ensure the safety of employees while at work during a COVID-19 outbreak include how an employer will identify risks of employees becoming infected and how to minimize such risks. The employer may also wish to seek advice from government/official sources as to what steps need to be taken, e.g., quarantine requirements.
- Communication strategies such as how and what information will be communicated to employees, suppliers and customers.
- Where employees will work, e.g., home, in the office or in alternative temporary offices.
- At what stage will the workplace be closed and who will decide that.

- How to deal with infection and/or deaths of colleagues, e.g., counselling.
- A mechanism for determining whether employees, suppliers and customers will be allowed access to the workplace, especially if they show symptoms of being infected by COVID-19.
- What to do with high-risk/exposure staff (e.g., pregnant, key employees and employees who travel).

## **AFTER AN OUTBREAK**

- Ways to ensure that employees and customers have fully recovered before they are allowed back into the workplace.
- Rehabilitation for sick employees returning to the workplace.

Communication with employees and flexibility on enforcing requirements imposed on employees under their contract of employment will be important in maintaining employee relations and reducing anxiety and panic during an outbreak. Therefore, subject to local legal obligations and requirements, and depending on the circumstances, employers may wish to:

- Discuss with staff the possibility of a workplace closure prior to closing.
- Allow employees to take annual leave or unpaid leave once sick leave has been exhausted.
- Allow employees to work from home.
- Explore salary reduction or unpaid leave as an alternative to termination of employment where business has slowed down.

Employers should make visitors to its offices aware of any health and safety hazards associated with entering the workplace before any intended visit, where reasonably practicable.

***This publication by Pérez-Llorca provides information and comments on legal issues and developments that may be of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.***