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Legal Status

February 2021

1. Employment
2. Energy
3. Litigation

EMPLOYMENT

The interpretation of the employment safeguard clause in ERTEs

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On January 27, 2021, Royal Decree-Law 2/2021 on the reinforcement and consolidation of social measures in defence of employment came into force. This Royal Decree-Law includes measures that represent an extension of the measures adopted in the previous Royal Decree-Law 30/2020, of September 29, on social measures in defence of employment, and simplifies management for the companies that may benefit from the measures included in it.

One of the most relevant aspects that has been maintained since Royal Decree-Law 8/2020, of March 17, has been the so-called safeguarding of employment or maintenance of employment.

General aspects

The safeguard or employment maintenance clause is a measure aimed at those companies that have carried out a temporary labour force adjustment plan (ERTE) due to force majeure or due to economic, technical, organizational and production causes (ERTE ETOP) linked to Covid19 and that have benefited from exemptions from social security contributions. Therefore, the maintenance of employment is required for a period of 6 months from the date of resumption from the first disaffection.

Beneficiaries

The clause forbidding the dismissal of employees only affects companies that have carried out an ERTE and have benefited from exemptions from social security contributions. In this regard, this obligation to maintain employment does not prevent per se the dismissal of employees, but rather to assume the return of the exemptions received, as well as a surcharge and eventual penalty for the undue receipt of the same. All this, as long as the dismissal is not considered to be justified or not linked to the economic causes caused by Covid19.

It is worth noting that the three employment maintenance clauses agreed are those contained in the Sixth Additional Provision of Royal Decree-Law 8/2020, which only affects force majeure ERTEs, that of Article 5 of Royal Decree-Law 30/2020, and the last and most recent one in Article 3 of Royal Decree-Law 2/2021, which extends the content of Royal Decree-Law 30/2020 and is provided for all types of ERTEs that have or will be exempted.

Calculation for the 6-month period for safeguarding employment

The count of the six months must be analyzed in relation to the three previous clauses referred to in the commitment of Royal Decree-Law 8/2020. The counting begins

from the time the first employee effectively returns to work, either full time or part time. Thus, the company must maintain the same level of employment as at the beginning of the ERTE.

For the second and third commitments to maintain employment, it is essential to check whether there was already a previous commitment to safeguard employment. If this is the case, the counting begins when the first or second of the commitments has ended, provided that any employee affected by the new ERTE with exemptions is disaffected.

And in the case that the company is not affected by a previous commitment, it will begin when the first employee is disaffected by the ERTE for which exonerations are received. In this case, it will also be mandatory to keep all employees affected by the ERTE.

"Regarding the consequences of non-compliance [...] the obligation arises to return all the exonerations received, not only of the employee affected, but of all the employees involved with a surcharge of 20% and the interest generated up to the date of return"

Finally, in the case of ERTE ETOPs carried out under Royal Decree-Law 24/2020 and which have exonerations to the Social Security, the 6-month term of commitment to safeguard employment begins on June 26, 2020, and not before, even if the company has partially or completely disaffected any employee.

Scenarios of non-compliance with the employment commitment

As stated in the Sixth Additional Provision of Royal Decree-Law 8/2020, of March 17, 2020, the commitment to safeguard employment will be deemed to have been breached if any of the persons affected by the previous ERTEs are dismissed or their contracts are terminated.

On the other hand, it will not be deemed to have been breached when the employment contract is terminated due to fair disciplinary dismissal, due to the resignation, death, retirement or total, absolute, or severe permanent disability of the employee, or due to the end of the call of persons with permanent-discontinuous contracts, when it does not involve a dismissal but an interruption.

Specifically, in the case of temporary contracts, the commitment to maintain employment will not be understood to have been breached when the contract is terminated due to the expiration of the agreed time or the performance of the work or service for which it is intended, or when the activity for which the contract was entered into cannot be performed immediately.

Consequences of non-performance and exceptions to the general rule

With regard to the consequences of non-compliance by the Companies with the 6-month employment maintenance, in the terms referred to above, the obligation arises to return all the exonerations received, not only of the employee affected, but of all the employees involved with a surcharge of 20% and the interest generated up to the date of return.

Therefore, each commitment to maintain employment must be individualized for the purposes of the amount to be returned, so that if the second commitment is not fulfilled, the exonerations of the first must not be returned.

Royal Decree-Law 18/2020, which applies to the employment maintenance clause assumed with the exonerations as from February 1, 2021, established two exceptions to the general rule to be complied with by the companies, regarding the prohibition to dismiss:

The first one relates to the fact that the courts may make assessments on a case-by-case basis, taking into account the specific characteristics of the different sectors and the applicable labour regulations, considering, in particular, the specificities of companies that present a high variability or seasonality of employment. The second exception applies to those companies in which there is a risk of insolvency proceedings.

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ENERGY

New Royal Decree on the access to and connection of electric power generation projects

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On December 31, 2020, Royal Decree 1183/2020, of December 29, 2020, on the access and connection to the electricity transmission and distribution networks (hereinafter, the "RD 1183/2020") came into force. It aims to establish the criteria and the procedure to apply for and obtain the permits for access and connection to the electricity networks, to be observed by producers, transporters, distributors, consumers and owners of storage facilities.

RD 1183/2020 activates and develops Article 33 of Law 24/2013, of December 26, 2013, on the Electricity Sector (hereinafter, the "LSE"), the effects of which were temporarily suspended by its eleventh transitory provision.

In a future issue we will cover the publication of the new Circular 1/2021, dated January 20, of the National Markets and Competition Commission ("CNMC"), which establishes the methodology and conditions for access and connection, which was pending approval in accordance with the provisions of Article 33.11 of the LSE.

I. Scope

RD 1183/2020 will be applicable to the parties involved in the application for and granting of access and connection permits, i.e.: (a) applicants; (b) owners of distribution or transmission networks, and (c) system operator and network manager.

However, it shall not apply to: (a) storage facilities in electricity systems in non-peninsular territories owned by the system operator and those that are fully integrated components of the transmission grid, and (b) storage facilities that do not transmit power into the transmission or distribution grids, and (c) cases in which a grid owner must access their own grids.

II. Main general developments in the procedure for access and connection to the network

a. Procedure for obtaining access and connection permits

A procedure is established for jointly obtaining access and connection permits, in which the system operator acts as a single point of contact for the applicant during the entire procedure.

Furthermore, network operators are required to have web platforms dedicated to the management, processing and information of access and connection requests available within a maximum period

of three months from the entry into force of RD 1183/2020, which will make it possible to know the existing access capacity of each node.

"Parties that are obliged to obtain an access and connection permit must submit an application to the operator of the network to which they wish to connect in order to obtain the permits, which must be made under the terms and with the content established by the CNMC in the Circular"

b. Criteria for the granting of permits

The general criterion will be time. However, two exceptions are established: (i) access capacity calls for tenders in new nodes of the transmission grid or in those nodes where a power capacity is released or arises, and (ii) in cases of hybridization of existing facilities.

For the purposes of determining the aforementioned time priority, the date and time to be taken into account shall be that of the filing of the application for the granting of the access and connection permit with the grid operator or, in the event that such application requires correction, the date and time on which all the required documentation and information has been correctly submitted.

If the date and time of admission of two applications coincide, the time priority will be established based on the time of having sent a copy of the receipt accrediting that the financial guarantees have been adequately deposited to the competent administration to authorize the installation.

c. Grounds for the inadmissibility and rejection of applications

RD 1183/2020 establishes the following causes for inadmissibility:

i. Failure to accredit the presentation of the financial guarantee deposit, and a lack of authorization from the competent body stating that said guarantee is adequately constituted.

ii. That the granting of access to said node was regulated in a specific procedure approved by the Government.

iii. Failure to provide or correct the required information within the terms and deadlines and with the content established in the CNMC Circular Letter.

iv. That it is presented for nodes in which the existing available access capacity is null, in accordance with the information stated in the web platforms that must be enabled by the network managers.

The grounds for refusal of access and connection requests shall be those established in the CNMC Circular Letter. The rejection of the application for reasons not attributable to the applicant will entail the

recovery of the financial guarantees provided.

Denial of admission or refusal shall entail, where appropriate, the recovery of the guarantees provided.

III. Procedure for the obtaining of permits

a. Opening - Application

Parties that are obliged to obtain an access and connection permit must submit an application to the operator of the network to which they wish to connect in order to obtain the permits, which must be made under the terms and with the content established by the CNMC in the Circular Letter.

Preconditions: (a) payment of the corresponding amounts for access and connection studies; (b) in the case of electricity generation facilities, deposit of a financial guarantee equivalent to €40/kW installed, with the exception of facilities with power equal to or less than 15 Kw or those generation facilities intended for self-consumption, unless these form part of a group whose power is greater than 1 MW and (c) signed agreement in the case of cogeneration or self-consumption facilities in which the generation facilities share connection infrastructures with a consumer and in which the permit applicant is different from the supply owner.

b. Assessment of the request

The grid operator shall assess the existence of access capacity and its owner shall assess the feasibility of connection at the requested point.

Where the granting of an access permit may affect the transmission or upstream distribution grid, the system operator must request an acceptability report from the upstream system operator on these possible effects and the restrictions arising therefrom.

c. Pre-proposal

The grid operator shall submit a pre-proposal to the applicant (together with a maximum of 5, 15, 30 or 40 days depending on the voltage level of the connection point to the distribution network for which permits are requested, or 60 days in the case of a connection point to the transmission grid.

This pre-proposal shall be accompanied by information on other electricity generation facilities with access granted at the same node or position where prior agreement with the operators of such facilities for the shared use of the transmission facilities may condition that access to the network becoming effective.

d. Acceptance of the proposal

The applicant shall have a maximum of 30 days to inform the system operator whether or not it accepts the proposal. However, if the applicant does not agree with the technical and/or financial proposal, the applicant shall have the possibility of requesting the grid system operator to review specific aspects of the technical or financial conditions, and the grid system operator shall respond within a maximum of 15 days.

In the case of generation or demand facilities at voltage points equal to or lower than 36 kV, the proposal shall not be considered accepted until the applicant has signed a payment agreement for the infrastructure to be developed by the grid operator.

e. Issuance of access and connection permits

Following acceptance of the proposal by the applicant, the grid operator and owner shall issue the relevant access and connection permits and notify the applicants within a maximum of 20 days after the operator has been notified of the applicant's acceptance or, where applicable, the payment agreement has been signed.

f. Signing of a technical grid access contract

Once the necessary access and connection permits have been issued and the administrative authorisations for the facilities provided for in Article 53.1 of the LSE have been obtained, consumers, generators and electricity distributors must sign a technical contract for access to the grid within a maximum period of 5 months.

IV. Abbreviated procedure and exemptions

In the abbreviated procedure, the deadlines are reduced by half for (i) producers with installed capacity not exceeding 15 kW; (ii) low-voltage consumers requesting a connection point with a capacity not exceeding 15 kW, and (iii) low-voltage consumers requesting a capacity extension of an existing supply whose final capacity does not exceed 15 kW.

The following are exempt from obtaining access and connection permits: (i) the generation facilities of consumers that use the self-consumption modality without a surplus; (ii) in the self-consumption modality with surplus, production facilities with power equal to or less than 15 kW that are located on urbanised land that has the facilities and services required by urban planning legislation, and (iii) new grid extension facilities necessary to meet new supplies or the extension of existing supplies of up to 100 kW at low voltage and 250 kW at high voltage on urbanised land.

V. Calls for tenders to obtain permits

The Ministry for Ecological Transition and the Demographic Challenge may, by ministerial order, call for tenders for access capacity at a specific node of the transmission grid for new electricity generation facilities using renewable primary energy sources and for storage facilities**.**

VI. Expiry of access and connection permissions

The expiry of access and connection permissions shall occur:

i. In general, five years after they have been obtained for facilities that have not obtained administrative authorisation to operate within this period, except in the case of pumped-storage hydroelectric technology, in which case the period may be extended to seven years at the request of the licensee.

ii. In the case of facilities built and in service when there is a cessation in the delivery of energy to the grid for a period of more than three years.

iii. Failure to comply with the administrative requirements set out in Article 1 of Royal Decree-Law 23/2020, within the deadlines established therein.

iv. Failure to make payments for actions carried out on the transmission or distribution grids after obtaining access and connection permits for electricity generation facilities at voltage points above 36 kV.

VII. Hybridisation of the installations

Owners of generation facilities with access and connection permits may update their permits and hybridise the facilities by incorporating electricity generation modules that use renewable primary energy sources or by incorporating storage facilities, being able to transmit the electricity produced using the same connection point and the access capacity already granted.

RD 1183/2020 regulates the characteristics that the generation facility resulting from hybridisation must have and establishes the requirements applicable to applications for access permits for hybrid electricity generation facilities that include various technologies (provided that at least one of them uses a renewable primary energy source or incorporates storage facilities).

VIII. Elimination of the single nodal interlocutor figure

RD 1183/2020 eliminates the single node interlocutor, so that the applicant is the one who deals directly with the transmission system operator. However, a transitional period is provided for in which the interlocutors already designated may continue to perform their functions until the completion of the access and connection procedure.

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LITIGATION

The new consumer protection regime

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The entry into force of Royal Decree-Law 1/2021, of January 19, 2021 entails an increase in terms of consumer's protection. This new regulation came into force on January 21, 2021 and amends several articles of the *Ley General para la Defensa de Consumidores y Usuarios* (Law for the Defence of Consumers and Users), now including a new category of "consumer".

The most remarkable aspect of this amendment is the inclusion of a new category of consumer called "vulnerable consumers", which is difficult to define and which will undoubtedly give rise to controversy as to its interpretation.

However, its definition attempts to generically include various categories of persons who, according to the Government, are at a disadvantage in relation to the company:

(...) *"those natural persons who, individually or collectively, due to their characteristics, needs or personal, economic, educational or social circumstances, find themselves, albeit territorially, or temporarily, in a special situation of subordination, defencelessness or lack of protection that prevents them from exercising their rights as consumers under equal conditions".*

Thus, persons with functional disabilities (whatever their degree), whether physical, cognitive, or intellectual, as well as minors, the elderly or those who do not have access to schooling or who are experiencing economic difficulties, will enjoy a higher level of protection by the public authorities, which will regulate (through the corresponding Regulations) the pertinent actions and means of protection aimed at guaranteeing their rights.

> "Companies will have to ensure not only that consumers are aware of all the information concerning the product consumed but will also have to ensure that they facilitate access to this information for those who, due to their personal situation, may be at a disadvantage or in an unequal position"

This new measure, which is added to the large number of new regulations in different sectors and which have been conceived within the framework of social protection - derived from the world health situation- will result in an increase in the pre- and post-contractual information to be provided by any company to consumers who, according

to the Government, may fall within any "vulnerable group".

Thus, companies will have to ensure not only that consumers are aware of all the information concerning the product consumed but will also have to ensure that they facilitate access to this information for those who, due to their personal situation, may be at a disadvantage or in an unequal position.

The fact that the information supplied to consumers by the company must be truthful, clear, understandable, and sufficient in both its legal and economic conditions does not constitute a novelty in this new regulation. It seems that the purpose of this new modification will focus on facilitating access to this information in a simpler way for those considered more vulnerable due to their socioeconomic situation.

Likewise, these new policies will focus on establishing simpler mechanisms for the resolution of disputes arising between the vulnerable consumer and the company, with all the information relating to the management of complaints and customer service having to be provided in advance.

Despite the fact that all the above might seem to have been the object of a broad and accurate modification of the Law, the truth is that the measures contained in this new regulation (which, as we say, will be developed through the corresponding Regulations) are, to this moment, impractical and not very rigorous, since this new wording is far from establishing precisely the requirements to be considered "vulnerable consumer" and does not detail the specific policy measures to avoid potential situations of inequality that may arise between companies and consumers.

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