

focus

Covid 19 and Occupational Health & Safety: a stress test

Juan Carlos Álvarez Cortés

The so-called “social shield” in Spain during pandemics: special attention to the prevention of occupational risks

Contents: **1.** Introduction. **2.** Modifications of social security benefits in times of pandemic. **2.1.** Temporary incapacity. **2.2.** Unemployment benefits. **3.** Occupational Health and Safety during the pandemic. **3.1.** Legislative framework for the employer’s obligations to ensure OHS with a reference to working time. **3.2.** Isolation of workers during Easter 2020. **3.3.** Promoting teleworking. **3.4.** Vaccination requirements.

1. Introduction

The aim of this contribution is simply to describe in a synthetic way several regulations that were adopted in Spain during the pandemic to protect workers and their families.

The number of deaths due to COVID-19 in Spain (103,721 people as of April 17, 2022), or the number of COVID-19 cases in Spain (11,736,893 people as of April 17, 2022), remind us that our lives will no longer be the same.

The rules in prevention of labour risks during pandemic, maybe by influence of ILO, WHO or EU standards or recommendations are similar in all of countries of European Union. In fact, is something that we could confirm examining the legal regulations adopted during the pandemic in the different EU Member States.

For that reason, in this brief contribution the point of view will be changed. First of all, we are going to focus on how in Spain Social Protection System has helped to prevent the massive spread of the COVID-19 through the labour market. Subsequently, we will review the specific rules on occupational risk prevention during the pandemic (or how those already in place in Spain have been adapted).

This is because the combination of the two measures has succeeded in

protecting the population not only from the risk of illness and death, but also in providing an income for families during a period when industrial, professional or occupational activity had been limited in order to prevent the spread of COVID-19 viruses.

2. *Modifications of social security benefits in times of pandemic*

This came about with the special regulation in pandemic period of two Social Security benefits:

Temporary incapacity and
Unemployment benefit (also, for independent workers).

2.1. *Temporary incapacity*

As in other European countries, when the workers become ill or suffer an accident they can obtain, if meet requirements, a social security benefit during sick leave.

In Spain, it means that workers must have to pay at least 180 days of contributions in the event of common illness (never in case of accident or illness due to work).

Obviously, if it is proven that the disease (COVID-19) was contracted exclusively through work, it will be classified as an accident at work. But, unfortunately, because the difficulty or impossibility of proving that the contagion occurred at work, all such requests were rejected or were denied by the public General Practitioner.

The novelty in the regulation of this protection during the pandemic was the consideration of Sick leave due to COVID-19 contagion as an accident at work.

a) For staff working in health or social-health centres, the law classifies as an accident at work, (without proof) for all purposes, the infection of the SARS-CoV2 virus during the pandemic period.

In Spain, when an employer doesn't offer Personal Protection Equipment for their workers, if they get a disease or suffer an accident at work, they have to pay then a special surcharge of the temporary incapacity benefit, between 30 and 50% plus.

As everybody knows during the first months of pandemic, there weren't

enough face masks, gloves, Personal Protection Equipment’s for workers in essential services (who never stopped their activities, even in pandemic). However, Labour Inspectorate never sanctioned employers for that breach, because the inspectors knew that it was impossible to obtain PPE in the first moment of pandemic time.

b) Exceptional situation of assimilation to an accident at work for temporary incapacity.

In the beginning of pandemic, a special law established an exceptional situation of temporary incapacity in the case of a worker or self-employed person contracting COVID-19, this disease would be considered as an accident at work.

Periods of preventive isolation or true contagion of workers caused by the COVID-19 virus.

In the first of cases, it referred to a symptomatic isolation, established by public General Practitioners. A PCR test was not necessary.

- When the competent authority would have prohibited freedom of movement of workers to certain locations to prevent transmission of the virus. And those workers couldn’t telework from their homes.

In both cases, temporary incapacity was considered as an occupational contingency:

- Special benefit payment (75% of wages)
- No need for a previous contribution period.

This improved, on the one hand, the amount of the financial benefit for temporary incapacity and, on the other hand, facilitated access to this benefit by “relaxing” the requirements that had to be met in order to obtain this benefit.

2.2. Unemployment benefits.

Like most other countries, to avoid spreading the contagion, the Spanish Government banned commercial or trading activity, in non-essential activities.

Employers could suspend or reduce working hours of contracts by *force majeure* (massive contagion) or by economic, organization or production-related causes (also linked with pandemic).

In those cases:

- employers didn’t have to pay contributions and

- workers could get unemployment benefits with no requirements (only the had to be hire before 14 of March 2020).

The idea was to protect all the employees in Spain, despite they didn't pay enough social security contributions.

In Spain, the government adopted 9 types of specials unemployment benefits to avoid spread the virus and preserve the life of workers:

a) For workers in companies affected by procedures of suspension of reduction working hours caused, directly or not, by COVID-19 (including part-time workers and permanent seasonal employees).

b) Extraordinary unemployment benefits for domestic employees – only during the pandemic. This group highly feminised was the first time in its history obtaining these benefits. A recent ruling by the European Court of Justice condemns Spain for discrimination for not providing unemployment protection for this group. Recently, Spain has adopted Royal Decree-Law, September 6th, for the improvement of working conditions and Social Security for domestic workers, protecting this group with unemployment benefits.

c) Exceptional unemployment benefit at the end of a temporary contract (in special conditions).

d) Unemployment protection for finishing contracts during the trial period.

e) Unemployment benefits for artists in public performances.

f) Exceptional unemployment benefit for technical and auxiliary personnel in the culture sector.

g) Extraordinary unemployment benefits for bullfighting professionals.

h) Special unemployment benefit for persons not entitled to other benefits.

i) Protection of the self-employed due to cessation of activity during pandemic.

The common feature of all of them was to relax eligibility requirements for unemployment benefits and to improve the amount and duration of unemployment benefits to prevent extreme poverty among families during the pandemic.

3. *Occupational Health and Safety during the pandemic*

Our Constitution, in Article 40.2, entrusts the public authorities with ensuring occupational health and safety (in reality it refers to “hygiene” at work, the prevailing terminology at the time of its adoption). This right is related to another fundamental right “the right to life and physical integrity”, established in article 15 of the Spanish Constitution and the right to health protection in article 43 of the Spanish Constitution.

3.1. Legislative framework for the employer’s obligations to ensure OHS with a reference to working time.

Royal Decree No. 463/2020 entailed the declaration of a state of alarm in Spain on March 14, 2020, due to the management of the health crisis caused by COVID-19. Three days later, Royal Decree-Law No. 8/2020 was enacted, which implied the establishment of measures to alleviate the economic and social impact of COVID-19, while establishing various measures to prevent contagion in the workplace.

a) “*Plan me cuida*” (plan for the reconciliation of work and family life during the pandemic)

It supposed the rights of adaptation and reduction of legal working hours, extending them to cover exceptional circumstances originated by the COVID-19. This plan was aimed at workers who accredited care duties with respect to the spouse or common-law partner, as well as relatives by blood up to the second degree (parents, children, siblings, grandparents, grandchildren) of the worker, provided that any of these situations concurred:

- Reasons of age, illness or disability requiring personal and direct care as a consequence of COVID-19.
- Due to the closing of schools or educational centres that provide care or attention to the person who needs it.
- When the person responsible for the direct care or assistance could not continue to do so for justified causes related to COVID-19.

This plan provided for the adaptation of the working day, through an agreement between the company and the worker, in which the working

time could be modified, altering or adjusting it to allow the worker to provide care and attention for the aforementioned cases. The reduction of the working day implies the proportional reduction of the salary with the maintenance of the guarantees included in the contract, Workers' Statute or other regulations.

b) Temporary suspension of contracts and reduction of working hours (provisional employment restructuring procedure).

Similarly, Royal Decree-Law No. 8/2020 imposed exceptional measures related to the suspension of contracts and reduction of working hours, both for *force majeure* and for economic, technical, organizational and production reasons.

The temporary suspension of the contract or reduction of working hours was not only provided for employees but also for self-employed workers (who were protected because they had to give up their activity due to the Decree regulating confinement or because of the reduction of income due to limitations in the mobility of persons and clients in the State of Alarm).

As we said, for both groups, the government established both special unemployment protection.

c) Special measures in workplaces

Law No. 2/2021, of 29 March, on urgent prevention, containment, and coordination measures to deal with the health crisis caused by COVID-19, which regulates measures in workplaces. However, it must be said that since the beginning of the pandemic, preventive measures have been adopted in the workplace in accordance with the Law on Occupational Risk Prevention and the guidelines given by the epidemiological specialists of the World Health Organisation. Actually, numerous standards have been enacted since the declaration of the State of Alarm, succeeding one another or complementing each other, so that we can find an amalgam of legal texts in relation to the measures that sought to mitigate the effects of the pandemic.

Thus, in addition to complying with the occupational risk prevention regulations and the rest of the applicable labour regulations, the owner of

the economic activity or, where appropriate, the manager of the centres and entities, should take a number of different measures¹.

Also, persons who presented symptoms compatible with COVID-19 or who were in home isolation due to a diagnosis of COVID-19 or who were in a home quarantine period due to having had close contact with a person with COVID-19 should not go to their workplace.

3.2. Isolation of workers during Easter 2020

Established in Law No. 4/2021, of April 12, regulating a recoverable paid leave for employees who do not provide essential services in order to reduce the mobility of the population in the context of the fight against COVID-19. It was intended for employed persons providing services in public or private companies or entities and whose activity was not paralyzed as a result of COVID-19.

This leave was mandatory between March 30 and April 9, 2020. The right of retirement that would have corresponded to them if they had been providing services on a regular basis was retained.

The companies that had to apply this leave could establish the minimum number of staff or work shifts required to maintain the activity.

3.3. Promoting teleworking

Royal Decree-Law No. 8/2020 (Article 5) established the preference for teleworking as an alternative to the temporary suspension of the contract or reduction of working hours. In this remote work, the legislator was also concerned with the prevention of occupational hazards, for that reason it also referred to risk assessment, understood as carried out when the worker himself carries out a voluntary self-assessment.

¹ - Ventilation, cleaning and disinfection measures appropriate to the characteristics and intensity of use of the work centres.

- Provide workers hydroalcoholic gels or disinfectants with virucidal activity.

- Safety distance of 1.5 meters between workers, adapting working conditions, including the arrangement of workstations and the organization of shifts. If not possible, workers should be provided with protective equipment appropriate to the level of risk.

- Adopt measures to avoid the massive coincidence of people, both workers and clients or users, in the work centres.

- Promotion of the use of teleworking when this is possible due to the nature of the work activity.

This rule is anchored in four premises:

a) As a form of remote activity, outside the work centre, tried to eliminate the risk of contagion in the contacts with the work mates, clients and users or in the journeys especially if workers had to use public transport.

b) Telework is imposed on a mandatory basis for both parties to the employment relationship (workers and employers), provided that two very lax requirements are met:

- It had to be “technically and reasonably possible” and
- The effort of adaptation had to be “proportionate”.

c) Preference is given to the teleworking system against the secondary resource to the provisional employment restructuring procedure.

d) In those companies in which teleworking was not foreseen prior to the State of Alarm, it was understood that the business obligation to carry out the evaluation of occupational risks through a simple self-assessment carried out voluntarily by the worker himself by answering a standard form had been fulfilled.

Several months later, the most important regulation on this was established by Royal Decree-Law No. 28/2020, of September 22, on teleworking, (currently replaced by the Act No. 10/2021 of 9 July).

This Royal Decree-Law, and the Act No. 10/2021 now in force, are applicable to workers or employees.

The entry into force of those laws meant the return to the voluntary nature of teleworking, since until that time (September 22, 2020), teleworking was mandatory in all cases in which it could be applied, as a way to prevent transmission of the virus. The signing of the so-called teleworking agreement was required, and it established the impossibility of the termination of the employment contract or the substantial modification thereof in case the worker refused to work remotely.

This Royal Decree-Law was an urgent regulation, which intends, with the endorsement of the social dialogue, to correct the mistakes of the previous hasty regime and to establish some basic principles. Then and now, with Act No. 10/2021 on teleworking the fundamental principles are:

Teleworking returns to be voluntary demanding the conformity of both parts of the contract.

It can be developed in the domicile of the worker or in any other place chosen by this one as it can be a telecentre.

It requires compliance with the “regularity” parameter, so that the non-

face-to-face work “in a reference period of three months”, reaches “a minimum of thirty percent of the working day”.

Attributes to remote workers the right to adequate health and safety protection, with the provisions of the Law on Occupational Risk Prevention and its implementing regulations being fully applicable. Especially psychosocial, ergonomic and organizational factors.

It recognizes the right to time registration (to note down the start and end time of the work activity) and the right to digital disconnection. Must correctly reflect the time that the teleworker devotes to the work activity, indicating the time of commencement and termination of the working day.

It establishes an exhaustive protection of the worker’s right to privacy and data protection.

It insists on the idea of avoiding, involving the equality plans, that teleworking is used as a refuge or, better, as a trap for women with family responsibilities.

It respects the previous conventional regulation.

It establishes a guarantee of remuneration, since the expenses derived from the “performance of remote work” will be “borne or compensated by the company”, both for the equipment and for the tools and means used for the development of their work activity.

3.4. Vaccination requirements

In Spain, vaccination is not mandatory.

Besides, companies cannot impose an obligation on their employees to declare whether they have been vaccinated.

Vaccination is personal health information that is not obligatory to disclose. That is, there is no obligation to answer if they have been vaccinated against the coronavirus, as this could affect their right to privacy, as stated in Article 18 of the Spanish Constitution.

Although the powers of management and control of the company and the workers’ right to privacy may conflict, preference must be given to the latter.

In addition, as established in art. 9.1 EU, regulation No. 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and the free movement of such data, the processing of data relating to health is prohibited,

except for the exceptions provided for in the regulation itself. In our country there is also no obligation to state whether one has been vaccinated as a condition for being hired, in selection processes, because vaccination against COVID-19 is part of the candidate's privacy and should never be included in a job interview. This would also be a very serious infringement.

Abstract

This paper provides a brief overview of the labour regulations adopted during the pandemic in Spain, with special reference to all those that made it possible to safeguard workers' health and prevent the spread of the virus.

Keywords

COVID-19, temporary incapacity, Occupational Health and Safety, Pandemic, Teleworking, unemployment benefits.

