



NEW EMPLOYMENT PROTECTION LAW

Most relevant aspects of the new Employment Protection Law

On April 6, 2020, a law authorizing access to benefits of unemployment insurance of Law No. 19,728 in exceptional circumstances, also known as the “Employment Protection Law” (hereinafter, the “Law”), was published in the Official Gazette.

What is the purpose of the Law?

To protect job stability and the income of those employees who, as a result of the sanitary emergency caused by COVID-19, are unable to perform services or need to adjust their working hours.

What particular situations does the Law regulate?

The Law regulates three situations: a) suspension of the employment contract as a consequence of an act or declaration of authority that totally prevents or prohibits the provision of the contracted services; b) pacts for temporary suspension of the employment contract; and c) pacts for temporary reduction of the working hours.

A) SUSPENSION OF THE EMPLOYMENT CONTRACT AS A CONSEQUENCE OF AN ACT OR DECLARATION OF AUTHORITY THAT TOTALLY PREVENTS OR PROHIBITS THE PROVISION OF THE CONTRACTED SERVICES

Under what conditions does it operate?

For this suspension to operate, the two following conditions must concur: (i) existence of “*an act or declaration of the competent authority that establishes sanitary or internal security measures for the control of the disease denominated COVID-19, involving the cessation of activities in all or part of the country’s territory and which totally prevents or prohibits the provision of the contracted services*”; and (ii) the dictation by the Undersecretary of Finance, also executed

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by the Undersecretary of Labor, of a “*founded resolution establishing the areas or territories affected by the act or declaration of authority* (the one referred to in point (i) above) *and, where appropriate, the activities or establishments excluded from the stoppage of activities*”.

How does it operate?

Except if the parties have expressly agreed to continue the employment relationship, “*the act or declaration of authority [...] will result in the temporary suspension, as a matter of law and by sole application of law, of the contracts governed by the Labor Code in the applicable territory(ies)*”. Such suspension will last for the period of time that the authority determines.

Employees who, after the declaration of State of Catastrophe of March 18, 2020, but before the Law came into effect, stopped their activities by mutual agreement with their employers or as a consequence of an act or declaration of authority, or who agreed the continuity of the provision of services, may have access to the benefits of the temporary suspension, once the resolution by the Undersecretary of Finance is issued.

What effects does this suspension of the employment contract produce?

The suspension will cause the temporary cessation of the obligation of the employee to provide services, and of the employer to pay the remuneration and other assignments which are not remuneration. Notwithstanding the above, the employer shall still pay all social security contributions borne by the employer and the employee, except for the contributions established by Law No. 16,744 –on work accidents and occupational diseases–, which will be calculated on 50% of the remuneration that serves as basis for the calculation of the benefit. Additionally, employees will be exceptionally entitled to withdraw against their Unemployment Individual Account or against the Unemployment Solidarity Fund (benefits established in articles 15 and 25 of Law No. 19,728 which establishes the Unemployment Insurance) in the conditions set forth therein.

Who is benefited?

All employees affiliated to the Unemployment Insurance of Law No. 19,728, as far as they “*have three continuous contributions paid in the last three months immediately prior to the act or declaration of authority*” or “*who have a minimum of six monthly continuous or discontinuous contributions paid during the last twelve months, provided that at least they have the last two contributions paid with the same employer in the two months immediately prior to the act or*

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declaration previously mentioned”.

The following employees do not have access to the benefits: (i) those who, at the time of issuance of the act or declaration of authority, signed a pact with their employer that ensures the continuity of the provision of services during the term of this event (including pacts for temporary reduction of working hours) and who will continue to receive all or part of their monthly remuneration; and (ii) those who, in this same period, receive a disability allowance regardless of the nature of the medical leave or medical reason that gave rise to it, during the time they receive such allowance.

How to access the benefit?

The employer must request it to the Unemployment Fund Management Company (*Sociedad Administradora del Fondo de Cesantía* (“*AFC*”)), submitting a simple affidavit stating that the relevant employees are not in any of the situations that prevents them from accessing the benefit, and providing the information required to make the payment to each employee. The employees that are not included in the aforementioned request may make the request directly, individually or collectively, submitting the relevant affidavit.

How is the benefit determined and financed?

The amount of the benefit is calculated considering the average of the taxable remunerations accrued in the last 3 months prior to the commencement of the act or the declaration of authority, where contributions were paid (not considering those that may be agreed by pacts to reduce working hours or to ensure the continuity of services).

The amounts will be withdrawn from the unemployment individual account of the employee, in the percentages and months established in article 15 of Law No. 19,728, and when these are insufficient, from the Unemployment Solidarity Fund in the percentages, months and subject to the maximum values for each month established in article 25 of the aforementioned law.

The benefit will accrue from the date that the act or declaration of authority is enforced and is paid on a monthly basis, at the end of the relevant period. If, after a benefit has been granted to an employee, he or she is granted a medical leave with the right to a disability allowance, the payment will be suspended and will be resumed once the period of leave has ended.

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What is the duration of the suspension of the employment contract?

The validity of the suspension will be limited to the period determined by the authority.

Can an employee be laid off while the temporary suspension of the employment contract is in force?

Yes, but only by application of the grounds established in article 161 of the Labor Code (“needs of the Company” or “written notice”, where applicable).

B) PACTS FOR TEMPORARY SUSPENSION OF THE EMPLOYMENT CONTRACT

How and when can they be agreed?

The pact can be agreed between an employer whose activity is totally or partially affected by the health emergency and his or her employees who are affiliated to unemployment insurance - personally or after consulting the union organization to which they are affiliated-. The pact must be executed at least from the first day of the month following its signature (deferred execution is not allowed).

This pact can only be executed outside of the periods where a suspension of the employment contract operates due to an act or declaration of authority, as referred to in section A) above. If such acts or declaration of authority occurs while the pact is in force, the Law provides that the pact will be suspended during that time and will continue in full force once the effect of the act or declaration of authority ends.

What effects does this suspension of the employment contract produce?

In general terms, it produces the same effects as those described in the suspension by act or declaration of authority.

What is the duration of the suspension of the employment contract?

These pacts may be agreed for 6 months from the entry into force of the Law.

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C) PACTS OF TEMPORARY REDUCTION OF WORKING HOURS

What do they consist of?

Employers in certain situations and employees affiliated to the Unemployment Insurance of Law No. 19,728, personally or by means of the union organization to which they belong –if applicable- may agree on the temporary reduction of the working hours, which by no means can be higher than 50% of the relevant working hours.

The pact has to be executed through the online platform created by the Labor Directorate for these purposes, and it will be understood as an Annex to the employment contract. In order to access the remuneration supplement referred to below, the Labor Directorate must report the pact to the AFC.

When can the employer agree to this type of pacts?

The pact can be executed by employers who are in any of the following situations:

- a) They are taxpayers of VAT pursuant to article 3° of Sales and Service Tax Law (*Ley sobre Impuesto a las Ventas y Servicios*) who, starting October 2019 have had a decrease in the average of the sales declared to the Internal Revenue Service (*Servicio de Impuestos Internos*) in any period of 3 consecutive months that exceeds 20% calculated against the average of the sales declared in the same period of 3 consecutive months of the previous year;
- b) They are currently in a bankruptcy proceeding of reorganization pursuant to a resolution published in the Bankruptcy Bulletin;
- c) They are in an insolvency economic advisory procedure, as stated in the certificate issued and validated in the terms of articles 17 and 18 of the Law of Reorganization or Closure of Micro and Small companies in Crisis contained in article 11 of Law No. 20,416, which sets special rules for smaller companies; or
- d) Employers whose companies, establishments or works have been exempted from the act or declaration of authority or resolution referred to in article 1 of the Law who need to reduce or redistribute the ordinary working hours of their employees in order to maintain their operational continuity or to effectively protect the life or health of their employees.

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When can an employee agree on this type of pacts?

The pact may be agreed by an employee who has 10 monthly contributions paid in the Unemployment Fund, continuous or discontinuous, in the case of employees with indefinite contract, and 5 monthly contributions paid, continuous or discontinuous, in case of employees with a fixed term contract or contract by a specific work, task or service, in both cases from their affiliation to the unemployment insurance or from the accrual of the last unemployment withdrawal they may have been entitled to. To access benefits under the Solidarity Unemployment Fund, such contributions must have been paid in the last 24 months prior to the date of execution of the relevant pact. Additionally, the employee shall have the last three contributions continuous with the same employer with whom he is executing the pact for temporary reduction of working hours.

In case of letter d) mentioned in the answer to the previous question, the employee shall have the number of contributions required to access the benefit in case of suspension of the employment contract as a consequence of an act or declaration of authority analyzed in section A) herein.

Employees enjoying labor protection may not agree to the temporary reduction of the working hours.

What is the effect of the pact?

The employee shall be entitled to a remuneration borne by the employer equivalent to the reduced working hours and to a supplement that will be paid from his individual unemployment account and, once this one is finished, it will be paid from the Solidarity Unemployment Fund. In addition, the employee will have the right to continue receiving the benefits that should be paid during the pact, such as allowances, bonuses and other exceptional or sporadic concepts, and any other consideration that does not constitute remuneration.

All social security contributions will be paid and contributed by the employer based on the taxable remuneration agreed in the pact.

What is the duration of these pacts?

They may be agreed while the Law is in force for a minimum period of 1 month and a maximum of 5 continuous months for employees with an indefinite employment contract, and of 3 continuous months, for employees with a fixed term employment contract or contract for a particular work, job or service. Deferred execution of the pact cannot be agreed.

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Can the employer hire new employees?

In principle, if the temporary reduction of the working hours has been agreed with one or more employees, the employer may not hire new employees and must first offer the vacancy to those who, complying with the requirements of the position, are under the modality of temporary reduction of working hours.

What happens if one of the parties terminates the employment contract during the term of the pact for temporary reduction of working hours?

The legal or agreed compensation that the employee has the right to receive will be calculated in accordance with the remuneration and contractual conditions in force prior to the signing of the pact.

OTHER RELEVANT ASPECTS TO CONSIDER

- ❖ During the term of 6 months or, during the State of Catastrophe decreed by the President of the Republic, **it will not be possible to terminate the employment contracts on the grounds of fortuitous event or force majeure, invoking as reasons the effects of the pandemic of COVID-19.**
- ❖ If the parties have terminated an employment contract between the declaration of the State of Catastrophe on March 18, 2020 and the entry into force of the Law, on whatever ground, **said termination may be cancelled** and the parties can benefit from the provisions of the Law.
- ❖ Employees who access the benefits contemplated in the Law will have the right to execute insurance or unemployment clauses in credit contracts of any nature, in the understanding that the employee is in an involuntary unemployment situation.
- ❖ Companies that, having contracted or entered into agreements that are financed entirely from the public sector budget law receive the relevant payments from the services or institutions, **may not use the benefits of the Law.**

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- ❖ The Law also establishes **criminal penalties** for those who access the benefits contemplated therein by simulation or deceit, as well as for those who obtain a benefit greater than the one they should be entitled to and for those who provide the means for the commission of such crimes. ***"Employers who are legal entities will be responsible for the crimes indicated in the previous paragraph that were committed directly and immediately in their interest or for their benefit, by their owners, controllers, managers, chief executives, representatives or those who carry out administrative and supervision activities, provided that the commission of such crimes is a consequence of the non-fulfillment, by the legal person, of the duties of direction and supervision, and they will be sanctioned with a fine for tax benefit corresponding to double the amount of the benefit improperly received and with a prohibition to execute acts and contracts with the State for two years. Under the same assumptions as the previous paragraph, employers who are legal persons will also be responsible, when said crimes are committed by natural persons who are under the direct direction or supervision of any of the subjects mentioned in the previous paragraph [...]. During the term of this law, the fact provided for in the preceding paragraphs shall be those that give rise to the criminal liability of legal persons. For the determination and imposition of their sentences, as well as the other pertinent norms, it will be understood that it is a simple crime"***.
- ❖ Regarding **private home employees** (i) in the event of an act or declaration of authority that results in the suspension of the employment contract analyzed in letter A) above or (ii) in case of a suspension pact analyzed in letter B) above, they will have the right to request the payment of the all event severance payment that would accrue upon the termination of their employment contract (letter a) of paragraph 5 of article 163 of the Labor Code). In that case, the Pension Fund Administrator ("AFP") will be able to withdraw from the employee's account the equivalent of 70% of their monthly taxable remuneration or the total balance, if lower. If the effects of the act of authority or the pact would last more than 30 days, the AFP may withdraw until the 5th month, on a decreasing scale of 55%, 45%, 40% and 35%, respectively. For the above, the employee must submit an affidavit to the AFP. In such cases, the employer will only be obliged to pay health and disability and survival insurance contributions.
- ❖ No interest, adjustments and fines established in article 19 of the D.L. 3,500 will apply in case of non-payment of mandatory contributions and commissions during the first 6 months of the Law and which are paid within the 12 months following the expiration of the aforementioned 6 months.

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- ❖ **Limited validity of the Law.** Those provisions related to the suspension of the employment contract as a consequence of an act or declaration of authority that totally prevents or prohibits the provision of the contracted services, pacts of temporary suspension of the employment contract and pacts of reduction of working hours in the case of employers exempt from acts of authority and who need to reduce the working hours to maintain their continuity or protect the life and health of their workers, will be valid for **6 months** from the date of publication of the Law in the Official Gazette. Pacts for the temporary reduction of working hours, in other cases, will last **10 months**.

The information contained in this newsletter was prepared with educational and information purposes only and it does not constitute legal advice. If you have any doubts or comments, please contact us.

MORE INFORMATION

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