



## **COMPLIANCE WITH SAFETY AND HEALTH STANDARDS AT WORK AND CRIMINAL LIABILITY OF THE EMPLOYER WITH REGARD TO COVID - 19 (CORONAVIRUS)**

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The way of working is changing, in fact it has already changed.

The crisis situation known by all of us worldwide as "COVID-19" has awakened -or intensified, at best- the use of corporate technology, in order to ensure maximum safety for workers. However, we cannot forget that most professions nowadays require the physical movement of workers to their workplace, with the consequent exposure of contagion, mainly in the service sector.

### **What are the employer's obligations regarding workers health and safety?**

The employer has the duty to guarantee the hygiene and safety conditions of its workers in conditions whereby they do not endanger their health and physical state during the performance of their daily work.

Furthermore, the employer "must guarantee" said protection by adopting "as many measures as necessary", developing a "permanent action plan" to improve and adapt prevention measures (*article 14.2 of the Law on the Prevention of Occupational Risks, hereinafter "LPOR"*).

In this regard, Operational Criterion n° 102/2020 of the Directorate of the State Agency for Labour and Social Security Inspection provides various preventive actions: i) positions in which there is a hazard of professional exposure to COVID-19, a risk assessment must be carried out each time conditions change or new cases are detected, in any case following the guidelines established by the Ministry of Labour; ii) positions that do not imply a risk of professional exposure, whose measures shall be aimed primarily at allowing teleworking, updating emergency continuity plans, promoting flexible hours and interacting via video conference.

## **Can the employer be criminally liable for non-compliance with the established occupational health and safety measures to prevent the contagion or spread of the virus?**

Yes. Article 316 of the Penal Code states that if found liable the employer can be faced with prison charges for a duration of six months to three years and fine from six to twelve months for those who "breach the rules on labour risk prevention, being legally obliged, do not provide the necessary resources for the workers to carry out their activity with the appropriate health and safety measures, so that they seriously endanger their life, health or physical integrity, shall be punished with". Similarly, article 318 of the Penal Code, by reference to article 129 of the same Code, imposes measures such as the closure of the establishment and / or suspension of business activity for a period of up to 5 years, among the most significant.

Thus, this crime can only be committed by the employer as the person legally obliged to provide the security and hygiene measures or, where appropriate, by the person in charge, provided that they have sufficient autonomy for it.

In summary, this crime can be committed by the mere omission of preventive measures to which the employer is bound by law, thereby endangering the life, health or physical integrity of its workers, even recklessly (article 317 of the Penal Code), and even if the result of contagion or, in the worst case, the death of any worker, never occurs, which (in this case) would also lead to the crime of injuries or reckless homicide, respectively.

For example, resolution of ***Audiencia Provincial de Murcia nº 96/2016, of March 22***, sentences for this crime, in addition to injuries, several employers for the contagion of 17 workers in a slaughterhouse, having had perfect knowledge of the several infraction records drawn up by the Labour Inspector; also, resolution of ***Audiencia Provincial de Salamanca nº 48/2001, of June 6***, sentences an employer (for the same crimes) for the contagion of 7 of his 15 workers, due to the absence of masks and glasses, due to serious recklessness by allowing the workers to carry out their activity without taking the appropriate preventive measures.

## **What are the regulations that the employer is obliged to in order to contain exposure to the coronavirus?**

The obligations regarding occupational safety and health are regulated, mainly, in (i) LPOR; (ii) Royal Decree 39/97, of January 17, which enacts the *Regulation of Prevention Services* (hereinafter "RD 39/97"); and (iii) *Royal Legislative Decree 2/2015, of October 23, which enacts the Labour Code* (hereinafter, "LC").

In addition, in this concrete case, Royal Decree 463/2020, of March 14, "declaring the state of alarm for the management of the health crisis situation caused by COVID-19", is especially relevant; also, *Royal Decree-Law Ley 8/2020, of March 17*, "on extraordinary urgent measures to face the economic and social impact of COVID-19"; as well as other behavioral standards such as the "Procedure of action for occupational risk

prevention services against exposure to the new coronavirus (SARS-COV-2)" issued by the Ministry of Health on March 5, 2020 (hereinafter, the "Procedure for action"), and the "Guide for action in the workplace in relation to the new coronavirus" issued by the Ministry of Labour (hereinafter, "The Guide"), notwithstanding any others that are approved.

## **The steps that employers must comply with in accordance with the aforementioned regulations include:**

1. risk assessment of exposure (*art. 16 LPOR and arts. 3 to 7 RD 39/97*); and
2. implementation of a procedure to deal with the coronavirus (*art. 15 LPOR and arts. 8 and 9 RD 39/97*), following the guidelines and recommendations designed by the Health Authorities.

This procedure to deal with the coronavirus must include:

- i. the purposes of the plan;
- ii. those responsible for management, during the period of action of the virus;
- iii. general preventive measures; and
- iv. the way to act in the case of detecting symptoms of the disease.

## **The prevention measures that employers must adopt include:**

• Information (art. 18 LPOR) and training (article 19 LPOR and 19.4 of LC), as they are considered (Case Law) as "necessary means for workers to carry out their activity with adequate safety and hygiene measures". In this sense, the "Action Procedure" of the Ministry of Health and "The Guide" of the Ministry of Labour establishes that:

– Workers will have at their disposal written instructions in their workplace in order to avoid situations of social contact, without the need to put a stop to their activity.

– However, when workers are, or may be, exposed to serious and imminent risk while working, the employer shall be obliged to (i) inform as soon as possible about the existence of said risk and (ii) adopt the measures and give the necessary instructions so that, in case of serious, imminent and inevitable danger, their workers can stop their labour activity and, if necessary, immediately leave the workplace (in accordance with the provisions of arts. 20 and 21 LPOR).

As additional measures for the containment of COVID-19, the "Action Protocol" issued by the Ministry of Health and "The Guide" of the Ministry of Labour indicate the following:

- Limitation of people in the workplace and of the time of exposure to the risk.
- Maintenance of the safety distance between workers and between any other third parties.
- Extreme personal hygiene measures.
- Structural protection elements in the work space.
- Encouragement of flexible hours, teleworking and videoconferencing.

**What should the employer do if the prevention regulations that he/she usually applies in the workplace are incompatible with the specific ones established for coronavirus? Which ones prevail?**

The employer is obliged to continuously evaluate the risks to which the worker is exposed and take the necessary measures to combat these risks (article 14 LPOR).

Therefore, the protection measures must be adjusted and applied depending on the activity carried out and the risks to which the worker is exposed, including biological risks (coronavirus), prevailing those measures which involves little or no danger (article 15.1.f LPOR).

**Should those activities in which the safety of workers cannot be guaranteed (in the light of this incompatibility) be halted?**

Yes. Article 21 LPOR states that when workers are or may be exposed to a serious and imminent risk on the occasion of their work, the employer shall give the necessary instructions so that, in case of serious, imminent and inevitable danger, workers can interrupt their activity and, if necessary, leave the workplace immediately.

Consequently, if the incompatibility of these measures generates a situation that exposes workers to serious, imminent and inevitable danger, the employer will be obliged to interrupt their activity.

Thus, in the said Guide it is stated that "companies must proceed to but a stop to work activity in the event that there is a risk of contagion by coronavirus in the workplace, despite the activation of measures that allow the development of work activity alternatively or, if necessary, the adoption of measures to temporarily suspend the activity".

**Can workers be forced to stay in their workplace, even if they request to be quarantined for fear of becoming infected?**

No. The worker shall have the right to interrupt his or her activity and leave the workplace, if necessary, when he considers that said activity involves a serious and imminent risk to his life or health, the mere suspicion or

alarm not being sufficient for said interruption (article 21.2 LPOR).

If the employer does not adopt or does not allow the adoption of the necessary measures to guarantee the safety and health of the workers, the worker would have the right not to go to the workplace. In these cases, the legal representatives of the workers may agree, by majority of their members, to cease the activity of the workers affected by said risk.

If a positive case of coronavirus is detected in the workplace or there is a suspicion that it may be, what should be done?

If the first symptoms appear, the employer must proceed to:

- Preventive isolation of the worker who presents the symptoms.
- Isolation of those workers who have come into contact with a detected case.
- In both cases, policies must be established for cleaning and disinfecting the workspace.

Can workers be forced to be tested for the coronavirus in order to dismiss contagions in the workplace?

The general rule is that this is not permitted, but this case is one of the exceptions. Article 22 LPOR states that the employer may only carry out medical examinations on workers based on the risks inherent in the job, when they give their consent. However, exceptions to this rule, are the cases in which this tests are needed in order to evaluate the worker's health status. Considering that this virus was declared a pandemic, the worker would be required to undergo the test, in accordance with the requirements established in the regulations applicable.



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