

Covid 19 - Rent deferrals in commercial and industrial lease agreements in Spain

23 April 2020

Following the approval of rent deferrals for residential lease agreements due to Covid-19 outbreak in March, the Spanish Government has now approved on 21 April 2020, the Royal Decree-law 15/2020 regulating, among others, certain measures on deferral of rent in commercial and industrial lease agreements (**RDL 15/2020**). The rent deferral measures included in RDL 15/2020 can be summarised as follows:

Summary of key measures

Moratorium on rent payments applying to institutional landlords

Applicable to public entities, legal entities or "institutional property owners" (grandes tenedoras), defined as companies or individuals owning, at least, (a) 10 urban properties in Spain (excluding parking spaces and storages) or (b) property(ies) with a constructed surface exceeding 1,500 sq. m.

The tenant is entitled to request to the landlord, within a maximum term of one (1) month as of 23 April 2020 (i.e. one day following the publication of RDL 15/2020), a moratorium on rent payments. Once requested, the rent payment

moratorium will be applied automatically during the state of alarm period decreed by the Government, and if the negative impact on the activity of the tenant remains in place after the lifting of the state of alarm, also during the following monthly payments due, extendable one by one, but with a maximum overall moratorium period of 4 months. No reference is made to service charges so payment of these amounts will not be subject to the moratorium.

Tenants will have the right to distribute the rent amounts subject to the moratorium (without any penalty or delay interest being applicable): (i) amongst the rent payments of the following 2 years after the moment the moratorium term has lapsed or, if shorter, (ii) during the period running up to the end of the term of the lease agreement (including extensions).

RD 15/2020 suggests that if the landlord and the tenant have already reached an agreement different from the above in relation to rent discounts or moratoriums, this agreement will prevail over the abovementioned moratorium. It is not clear whether a tenant that has agreed a moratorium of less than 4 months will be able to obtain from the landlord a further moratorium up to the 4-month period pursuant to the aforementioned provisions.

Moratorium on rent payments applying to other landlords

Applicable to landlords different from those set out in previous section above

The tenant under a commercial or industrial lease agreement may request from the landlord, within one month from the entry into force of RDL 15/2020, the temporary and extraordinary postponement in the payment of rent. RDL 15/2020 does not provide for the obligation of the landlord to agree to such request, so we understand the agreement is voluntary as no compulsory moratorium is imposed for these landlords. Although this may initially look unnecessary, it sets out the basis for the application of the rules governing the use of security deposits set out below.

Within the negotiations, the parties may agree to use, totally or in part, the legal security deposit delivered by the tenant upon signing the lease agreement (an amount equal to twice the rent) in order to pay one or more rent installments. In such event, the tenant must replace the amount of the security deposit (in order to reinstate it) within one year following the moment the agreement reached or, in any event, before the lapse of the lease term. Given that legal rent deposits must be deposited by landlords with the relevant regional authorities at the outset of the lease term, we understand (but RDL 15/2020 is silent on that so it is unclear) that both parties must enter into a written agreement for the application of the deposit to the rent payment and in that case, the regional authorities will have to release such amounts in favour of the landlord.

Tenants who may request the rent moratorium

RDL 15/2020 states that the tenants that are eligible to request the application of the abovementioned measures are:

- Self-employed individuals ("autónomos") when they meet the following requirements:

- be affiliated and registered, on the date of the state of alarm declaration, under the relevant Special Social Security Regime applicable to the same; and
 - its activity has been suspended as a result of the state of alarm declaration or subsequent governmental orders (e.g. hotels activity was prohibited through a special order); or
 - in the event that tenant's activity is not directly suspended as a result of declaration of the state of alarm, the tenant proves the reduction of the billing corresponding to the month immediately preceding the month in which the moratorium is requested in at least 75% as compared to the average monthly billing of the quarter (in the previous year) to which that month belongs.
- Small and medium enterprises meeting the following requirements:
 - the limits set out in article 257.1 of the Spanish Companies Act, which are not to exceeded: during 2 consecutive years (a) the total current assets of the company are not above € 4 million, (b) net amount of its annual turnover does not exceed € 8 million, and (c) average number of workers employed during the year does not exceed 50. It is not clear if the 3 or only 2 of such requirements must be met, given that the above referred article 257.1 deals with companies that can issue abbreviated accounts if they meet 2 out of the 3 requirements; and
 - the tenant's business activity has been suspended as a result of the entry into force of Royal Decree 463/2020, declaring the state of alarm in Spain, or subsequent governmental orders; or

- in the event that tenant's activity is not directly suspended, the tenant proves the reduction of the billing corresponding to the month immediately preceding the month in which the moratorium is requested in at least 75% as compared to the average monthly billing of the quarter (in the previous year) to which that month belongs.
- the suspension of activity will be accredited by means of a certificate issued by Tax Authority or the competent body of the relevant Regional Government, as the case may be, based on the declaration of cessation of activity filed by the tenant.

There is no reference to the way the tenant will have to attest the rest of the requirements.

RDL 15/2020 also contemplates that tenants requesting the abovementioned measures without fulfilling the applicable requirements described above, will be held liable for damages.

Documents attesting the compliance with the requirements

Compliance with the requirements applicable in order to request the moratorium will have to be proven by the tenant by submitting the following documentation to the landlord:

- a statement whereby the tenant declares the 75% reduction of its billing. In any case, if the landlord so requests, the tenant shall provide its accounting books in order to prove the reduction of the activity.

CONTACT INFORMATION

Santiago de Vicente
Partner, Madrid
+34 91 782 9858
santiago.devicente@allenoverly.com

Juan Hormaechea
Partner, Madrid
+34 91782 9845
juan.hormaechea@allenoverly.com

Jimena Urretavizcaya
Partner, Madrid
+34 91782 9857
jimena.urretavizcaya@allenoverly.com

Marta Orce
Senior Associate, Madrid
+34 91 782 9861
marta.orce@allenoverly.com

Andrés Candela
Associate, Madrid
+34 91782 9945
andres.candela@allenoverly.com

Lina Kondrushkina
Associate, Madrid
+34 91782 9780
lina.kondrushkina@allenoverly.com

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2020. This document is for general guidance only and does not constitute definitive advice.