

# COVID-19: PRESSURE POINTS: RIGHT VS OBLIGATION TO FILE FOR INSOLVENCY (SPAIN)

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Legal Briefings

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In Spain individuals and entities have an obligation to file for insolvency if they are unable to regularly meet their obligations within two months of the position of insolvency coming to light. Breach of that obligation could lead to civil (and even criminal) liability.

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The legal obligation imposed by the Spanish Insolvency Law 22/2003, of 9 July (the “**Spanish Insolvency Law**”), has been modified by Royal Decree-law 8/2020 (the “**RDL**”), of 17 March, on extraordinary measures to tackle the economic and social impact of COVID-19.

According to article 43 RDL, companies or individuals facing financial difficulties due to the current situation and that are in insolvency during the state of emergency do not have an “obligation” to file for insolvency, according to article 5 of the Spanish Insolvency Law.

As such, the RDL has not only postponed the obligation to file for insolvency for as long as the state of emergency is in place, it has also established until when the exoneration from doing so will last: until two months have elapsed after the end of the state of emergency.

However, a distinction should be drawn between two concepts that are often confused: “current” insolvency and “imminent” insolvency.

On the one hand, in accordance with article 5 of the Spanish Insolvency Law, “current” insolvency carries with it an obligation to file for insolvency within two months following the date on which the position of insolvency was known or ought to have been known. On the other hand, “imminent” insolvency is a situation whereby, as defined by article 2.3 of the Spanish Insolvency Law, a debtor is unable to meet its payment obligations regularly and in a timely manner.

In other words, the literal wording of the RDL seems only to refer to cases of “current” insolvency, in reference to article 5 of the Spanish Insolvency Law, thus removing the “obligation” of debtors to file for voluntary insolvency. However, it does not seem to remove a debtor’s right to file for insolvency when in a position of imminent insolvency.

That is because, in certain situations, a debtor may need or wish to avail of the benefits and protections afforded by filing an early insolvency petition (such as an early proposal of creditors arrangement) and not to prolong a situation that could otherwise make it impossible for the debtor to avoid liquidation in the context of insolvency proceedings.

Ultimately, the underlying purpose of the Spanish Insolvency Law is to ensure companies’ survival and avoid job losses by adopting mechanisms to prevent companies being liquidated, with the resulting detriment to the insolvent debtor’s assets caused by reaching that phase.

It should also be taken into account that cancelling the obligation to file for insolvency during the state of emergency does not also suspend the accrual of legal and conventional interest, for example if insolvency were ordered in accordance with article 59 of the Spanish Insolvency Law - with the exception of debts secured by in rem guarantees, in which case they would be enforceable up to the amount of the respective guarantee.

The Second Additional Provision on the suspension of procedural deadlines in Royal Decree 463/2020, of 14 March, which declares the state of emergency to tackle the health emergency caused by COVID-19, froze and interrupted all procedural deadlines and time periods in courts of all jurisdictions. Although subject to that provision, the RDL establishes that a judge or court may decide that proceedings shall go ahead if they are necessary to prevent irreparable damage to the legitimate rights and interests of the parties to the proceedings.

On that basis, it could be understood that, if a voluntary insolvency petition is filed by an insolvent debtor - whether that be “imminent” or “current” - and grounds are submitted that an immediate insolvency order is necessary to prevent damage to the company and workers that, but for the order, could become irreparable, this would fall within the exceptional scenario that would allow proceedings to go ahead; as such the commercial court should admit such a petition for consideration during the state of emergency and start proceedings accordingly.

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## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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