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Companies' obligation to guarantee the health of their employees in the workplace: latest factual and case-law developments

With respect to health in the work place and more precisely to the so-called ***obligation de résultat***[1] imposed on employers, companies must pay a particular attention not only to legal and case-law developments but also to the constant evolution of working conditions – whether such evolution is due to technological development or societal or organizational changes – and must permanently analyze the impact thereof on their labor- and employment- related obligations.

To escape liability, companies must, each time there is a change in the individual or collective organization of working conditions, identify the relevant prerequisites before engaging the contemplated process, including the consultation of the Health, Safety and Working Conditions Committee ("HSWCC"), and ensure that all risks to which their employees might be exposed have been duly assessed.

The fundamental legal basis

Pursuant to Article L.4121-1 of the French Labor Code ("FLC"):

"The employer takes necessary measures to **ensure the safety and protect the physical and mental health of its employees**.

These measures include:

1. *Steps to prevent occupational risks;*
2. *Provide information and training;*
3. *Put in place an adequate organization and the necessary means.*

The employer ensures that these measures are adapted so as to take into account any change in circumstances and improve existing conditions."

Article L.4121-2 of the FLC sets forth the general principles that must be applied by the employer:

- Avoiding risks;
- Assessing the risks that cannot be avoided;

- Combating risks at source;
- Adapting work to man, especially for the design of workstations, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and reducing their effects on health;
- Adapting to technical progress;
- Replacing the dangerous by the non-dangerous or the less dangerous;
- Developing an overall coherent prevention policy covering technology, work organization, working conditions, social relationships and the influence of factors relating to the working environment, including risks related to moral harassment;
- Giving collective protective measures priority over individual protective measures;
- Providing appropriate instructions to employees.

Case-law

As mentioned in previously published articles, the *Cour de Cassation* (French Supreme Court) has, since 2002 and the so-called "asbestos" decisions, enshrined the principle according to which employers are bound by an *obligation de résultat* with respect to health and safety in the workplace. The consequence could not be simpler: the sole fact that company did not achieve the expected result is sufficient to make it liable.

Since these landmark decisions, French courts have been gradually refining the concept of *obligation de résultat* with respect to health and safety in the workplace and have applied it to various situations.

Some of the decisions that have been rendered are quite interesting as they reflect the extension of the *obligation de résultat* to situations that had not been anticipated by companies.

In a decision dated December 7, 2011 (n° 1022.875) concerning an assault that occurred outside working hours and outside the workplace, the Labor Chamber of the *Cour de Cassation* acknowledged the company's liability vis-à-vis its **expatriate employees**. The *Cour de Cassation* did not enact a general principle in this case but it relied on the fact that the place of performance of the employment contract was "*particularly exposed to risks*" and that the relevant employee had alerted her employer on the increased dangers encountered and requested her repatriation. The employer failed to take measures and was therefore held liable for what happened to the employee.

Given the number of countries that can be considered as presenting such risks, we can only recommend companies to carefully review the prevention and protection policies applicable to their expatriate employees.

In a decision rendered on April 4, 2012 (n° 11-10.570) the Labor Chamber of the *Cour de Cassation* considered that the **assault** of an employee by a third-party external to the company was not to be considered as a force majeure event, the only way to exonerate the employer from liability. In this specific case, the external third party was the wife of the company manager and the victim the accountant secretary. Even though these facts may cause people to smile, the *Cour de Cassation* held that the claim brought by the victim employee (assault committed by the spouse and in the absence of the company manager who had never been warned of the risk

run by the employee) was not an unpredictable and irresistible event (two elements required to establish the existence of a force majeure event). It should be noted in this respect that elements required to establish the existence of a force majeure event are extremely difficult to demonstrate in practice. There are plenty of company managers who cannot exclude the risk of an assault in the workplace as this phenomenon is becoming increasingly common in the daily life.

Companies must therefore consider not only the direct risks to which the employees are exposed in the performance of their contractual duties, but also all indirect or ancillary risks that are not impossible.

Consequently, the risk assessment must extend to the entire work environment.

The employer may also be held liable for the "**sense of insecurity**" felt by employees in the workplace. In a decision dated October 6, 2010 (n° 08-45.609), the *Cour de Cassation* recalled that "*the employer, bound by an* ***obligation de résultat*** *in terms of the health and safety of its employees in the workplace, must ensure that this obligation is effectively fulfilled*". Holding notably that the measures taken by the employer were not sufficient to ensure the safety of the relevant employee in the workplace, the *Cour de Cassation* considered it was needless to seek whether the employee's behavior could have been at the origin of her sense of insecurity. The employer was thus ordered to pay damages for breach of its obligations in terms of safety and security in the workplace.

Lastly, the Labor chamber of the *Cour de Cassation* has laid down the principle according to which the *obligation de résultat* imposed on the employer also extends to the prevention of **moral harassment**. Consequently, as soon as an employee engages in harassment of fellow employees, the employer will be held liable, even if it has not committed any fault and taken measures to stop such harassment from taking place.

It should be recalled that a brutal, aggressive or abusive management mode can be constitutive of moral harassment and that the employer is fully liable therefor. A judgment handed down in March 2012 enlarged the concept of moral harassment resulting from an inadequate management mode and specified that in this case there is no need that a given employee be specifically targeted by the reprehensible management mode.

Lastly, a decision of March 2011 extended the scope of employers' liability with respect to risks of moral harassment to all external contractors who may *de facto* exercise an authority over the company's employees. In that specific case, the external contractor was a trainer responsible for implementing new management tools within the company.

The same trend can be observed in respect of sexual harassment as the Labor Chamber of the *Cour de Cassation* has admitted that sexual harassment could be established even if the facts occurred outside the company and outside working hours.

In this respect, it should be noted that while Article L.1153-1 of the FLC dealing with sexual harassment has not been repealed like Article 222-33 of the French Criminal Code, it could very well be declared unconstitutional for the same reasons, i.e. the absence of precise definition of sexual harassment, which is a breach of the *nulla poena sine lege* principle.

An employer has also been held liable for the car accident of an **external contractor**. The Criminal Chamber of the *Cour de Cassation* found that the company had in fact the **obligation to record in the so-called *Document Unique d'évaluation des risques professionnels*** (occupational risk assessment sheet, hereinafter the "Risk Assessment Sheet") **not only the risks related to the day-to-day activities of the company but also the risks resulting from the works performed on the company's site(s) by external contractors**, such works being also assessed in the prevention plan to be jointly prepared by the company and its external contractors. Even though the FLC only stipulates that the Risk Assessment Sheet must be made available to the employees (Article R.4121-4 of the FLC) who must be informed of the conditions in which they may consult it through the posting of an information notice within the company's premises, the Criminal Chamber held that since the risks associated with the relevant works had not been recorded in this Risk Assessment Sheet and since such document had not been made available to the company employees, the latter were unable to inform the external contractor of the risks to which it was exposed while performing its assignment. As such, the company was held liable for the accident.

As can be seen, companies must go beyond the mere provisions set forth in the FLC and must, as a general course of action, perform a far-reaching analysis of all risks to which all people working on their site(s) may be exposed.

Potentially risky situations that may be underestimated

Work performed at home by the employee

The evolution of work organizations, the costs of premises and the aspirations of employees may lead a company to develop – or simply authorize – teleworking or the partial performance of works at home.

While these two situations are factually very similar, they must, however, be distinguished. Teleworking conforms to a precise definition recently incorporated into the FLC whereas the occasional – but authorized by the employer, even tacitly – performance of works at home is a *de facto* situation that is not regulated. The FLC only regulates work at home, as defined in Article L.7412-1 of the FLC, i.e. the performance at home, against a lump sum remuneration, of a work entrusted by one or several employers, providers of work, or their intermediary, being specified that the home worker can be helped by his spouse, partner, common-law partner or dependent children.

Whatever the circumstances in which work is performed at home, companies must never forget that they are fully liable for the conditions in which their employees perform their job and must carry out the assessment of all occupational risks. As soon as the employer implements a work-at-home organization or authorizes an employee to work at home, it becomes fully liable for the risks to which the employee may be exposed.

Companies must, therefore, remain particularly vigilant and make sure they do not accept – even tacitly – or implement teleworking or work at home without having consulted, as the case may be, the HSWCC, and without having checked that the furniture/equipment and/or working conditions of the relevant employee(s)

are duly compliant.

Stress at work

Employees regularly seek the liability of their employer for the excessive stress they suffer. Without going as far as dramatic consequences that have hit the headlines such as suicides or heart attacks in the workplace, indemnification claims based on an anxio-depressive syndrome attributed to working conditions are becoming quite usual. Under French law, companies are liable for protecting the mental health of their employees and must now be particularly attentive in this respect because employees, based on medical certificates asserting the existence of a link between their working conditions and the damage to their mental health, bring their action before the Labor Court, not before the Tribunal of Social Security Affairs.

The procedure is faster, simpler (no need for the recognition of a an occupational disease or accident) and often more efficient as companies may be easily blamed for not having fully fulfilled their obligations in terms of risk prevention: e.g. not having implemented a real monitoring and follow-up of the employees' workload or simply not having granted a request of the HSWCC or not having responded to one of its observations.

Working environment

This includes notably the risk of assault and the sense of insecurity, as addressed above.

Driving a motor vehicle

Companies must take all necessary prevention measures to ensure the safety of their employees who drive a motor vehicle in the performance of their duties. They should not forget that they have the obligation "*to give appropriate instructions to employees*" (Article L.4121-2 of the FLC), after having assessed the risks and taken the required measures. Companies should therefore set rules concerning, for instance, the consumption of alcohol before driving a vehicle, and implement a method to control the work schedules so that such schedules could not be used to prove that an employee was forced to take some risks (e.g. fast driving, excessive driving time, etc.) to meet the objectives that had been assigned, even tacitly. Where the company becomes aware of certain elements or facts (work schedules, activity reports, police certificates reporting a road traffic offense, etc.), it must analyze them to detect, as the case may be, the abnormal or dangerous nature of the situation.

In summary, the ever-increasing liability of companies with respect to safety and physical/mental health of their employees must be a focal point of concerns, whatever the number of employees. While small- and medium-businesses, that constitute the majority of employers, will obviously have more difficulty to put in place the required protection than large companies, they must still treat this issue as a priority in the near future.

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[1] In respect of health and safety at work, companies have under French law an ***obligation de résultat*** and

not only an ***obligation de moyens***. With an ***obligation de résultat***, a party must fulfill a specific obligation or arrive at a specific result. With an ***obligation de moyens***, the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result. In other words, concerning safety and health at work, the employer will be presumed liable from the sole fact that a professional risk occurred and caused harm to its employees.