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What tools do employers have at their disposal to manage a strike?

While the press has reported in recent months various blockages of industrial sites – such as the Amazon site in connection with the social movement of yellow jackets – and although these blockages are not necessarily linked to professional claims or even caused by the employees of the relevant site, we thought it would be interesting to elaborate this month on the right to strike in France and the means available to company managers to handle a strike situation.

The right to strike is the pet peeve of French employers... and for good reasons. France is the champion of strike actions: between 2005 and 2014, it lost between six and eight times more working days than the United Kingdom or Germany; in 2016 it experienced no less than 801 strikes.

The right to strike is a fundamental right but it is also a subject of controversy and conflict, particularly on the thorny issue of so-called "abusive" strikes. Paragraph 7 of the 1946 Preamble states that "*the right to strike shall be exercised within the framework of the laws governing it*". However, there is no framework law regulating it, but rather scattered laws governing specific sectors such as the public sector, air transport, and the case law of the *Cour de Cassation*(French Supreme Court). This may explain why companies established in France often express their feeling of legal uncertainty on the strike issue. How to define and where to draw the borderline of abuse? Is a political strike without professional claims lawful in France? What means of action does the employer have at its disposal in the event of a blockage of its company? What means of action not only with regard to striking employees but also to safeguard the interests of its company?

These are the questions that will be addressed in this article. After recalling the contours of the exercise of the

employees' right to strike (**1**), we will focus on the means of action available to the employer vis-à-vis employees who abuse this right (**2**), and finally on the possible levers to safeguard the interests of the company (**3**).

1. What are the contours of the right to strike?

A. How to distinguish between a lawful strike and an unlawful demonstration?

Exercising the right to strike broadly takes the form of "*a collective and concerted work stoppage to support professional claims*"[1].

As such, the lawful exercise of the right to strike requires the combination of three elements:

1° A complete work stoppage: the so-called "go-slow strike" during which employees do not stop working but deliberately perform their work in a defective manner is not lawful.

2° A collective and concerted work stoppage: in companies with more than one employee, the work stoppage must involve at least two employees.

3° The existence of professional claims: as such, a "political" strike unconnected with the interests of the profession is not valid. Similarly, a solidarity strike action to support an employee of the company is not valid either, unless this action also drives professional claims.

As a matter of fact, without the combination of these three cumulative elements, the exercise of the right to strike is not lawful.

Even when the aforementioned three criteria are met, the right to strike can be abusively exercised by employees. This is the case for example if the strike gives rise to wrongdoings: blocking access to sites and/or blocking access to the company's information system, diversion of equipment, damage to the premises, power cut, blocking the pricing system, etc. In such a case, the employer can take a number of actions against the employees, as further explained below.

B. What are the characteristic features of the right to strike?

- No notice requirement: employees are not subject to any notice requirement to exercise their right to strike in the private sector.
- Employees do not have the obligation to inform the employerthat they join or disjoin a strike action.
- The exercise of the right to strike entails the suspension of the employment contractsof the striking employees.
- During the strike, the employer does not pay the striking employees(unless the strike has been initiated because of a fault/misconduct by the employer, such as for instance the non-payment of the salaries).
- The exercise of the right to strike by employees must not result in any discriminatory practiceson the part of the employer, such as for instance the allocation of a bonus to non-striking employees.

- The “lock out”, i.e. the temporary shutdown of the company at the initiative of the employerto prevent or to respond to the strike action, is, as a matter of principle, prohibited under French law. However, the shutdown can be sometimes unavoidable in adverse circumstances.
- During the strike, the employer may not use its disciplinary authority against striking employees, unless in case of willful misconduct. As such, it may not sanction or dismiss a striking employee just because such employee exercises his/her right to strike (unless he/she makes an abusive use of such right).

2. Actions available to employers against employees in case of unlawful demonstration?

A. Possible disciplinary sanctions in case of abusive exercise of the right to strike

While the employer may not exercise its disciplinary authority against striking employees just because they (lawfully) exercise their right to strike, it may however sanction or dismiss one or several striking employees whenever the exercise of the right to strike is abusive.

The employer must demonstrate that the striking employee(s) has/have/had the intention to harm the employer or the company (i.e. the intention to disrupt the company). In other words, it must demonstrate that the striking employees have engaged into a willful misconduct. If there is no willful misconduct, the employer will not be entitled to sanction or to dismiss the striking employees.

As such, dismissing a striking employee for willful misconduct requires the combination of the following elements:

- Precise identification of the striking employee(s) (the use of a bailiff is highly recommended in this respect);
- demonstration of the intentional and personal nature of the misconduct.

Examples of “wrongdoings” likely to justify a dismissal for willful misconduct include sequestration of the employer, damage to the company’s property, infringement of non-striking employees’ freedom of work, for instance by preventing them to access the company’s premises, voluntarily endangering others, etc.

B. Eviction of striking employees in case of abusive exercise of the right to strike

In case of illegal occupation of the site (i.e. within the entire site, both inside buildings or outside like on the parking lots), the employer may file a request for eviction before the **Summary Judge**in order to obtain an **eviction order**.

It is recommended to use a bailiff to identify the employees who have initiated the illegal occupation of the site.

Whenever an eviction order had been issued by the Summary Judge and striking employees refuse to obey and to vacate the site, the employer may ask the *Préfe*t (local representative of the Government) to enforce the eviction order with the assistance of the police.

3. Actions available to employers to safeguard the interests of the company during a strike action

A. Actions to ensure the continuation of the business activity

- Possibility to make internal transfers

The employer may make internal transfers to ensure the continuation of the business activity, which means that it may transfer a non-striking employee to the position of a striking employee with the same responsibilities. This transfer is considered as a simple change in the working conditions and does not, therefore, require the consent of the relevant employee.

- Adaptation of the working hours

During the strike action, the employer may have non-striking employees work overtime hours after completion of an information/consultation procedure with the Social and Economic Committee or, if there is no Social and Economic Committee, the staff delegates.

After the strike action, the employer may not ask for the recovery of striking hours but it may, however, ask to make up for such hours through overtime.

- Other actions

During the strike action, the employer may not use precarious employment contracts such as fixed-term employment contracts or temporary employment contracts. However, it my hire employees under a permanent employment contract.

The employer may also use sub-contractors (but not through a temporary employment agency) and volunteers.

In addition, if the company is part of a group, the employer has the possibility to transfer to the other subsidiaries of the group the business activities that have been interrupted as a result of the strike.

B. Exceptional temporary suspension of the company's business activity

The employer has the possibility of temporarily shutting down the company in the context of a strike by putting employees on a specific type of forced leave called *chômage technique*. However, it can do so only for one of the following legitimate reasons:

– Forced shutdown following a complete or partial blockage of the company / business sector.

– The strike creates a situation that presents serious risks of danger to the safety of people or property.

On the other hand, in the absence of one of the above-mentioned legitimate reasons, the "lock-out", i.e. the temporary shutdown of the company at the initiative of the employer solely to prevent or to respond to the strike action, is strictly prohibited under French law.

C. Procedures for the resolution of the strike

The exercise of the right to strike can result in the negotiation of an end-of-conflict protocol between the employer and the employees through representative trade-unions or, if there is no representative trade-union, a group of employees, either when applicable collective agreements include provisions to that effect, or when the concerned parties take such initiative.

Whenever negotiations prove to be impossible, applicable legislation provides for the possibility to turn to persons or bodies not involved in the conflict through three separate procedures: conciliation, mediation or arbitration.

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In April 2018, the National Assembly had tabled a bill aimed at "*regulating the right to strike*".

With regard to the private sector, this bill planned to:

– define clear reasons for the use of strike action, which could have facilitated the recognition and sanction of an abusive/unlawful strike.

– introduce a mandatory strike notice period, which would have made it easier to fight against surprise strikes.

However, it appears that this bill has fallen into oblivion…

In the meantime, notwithstanding the absence of a law that specifically regulates strikes in the private sector, there are still, as developed above, various means by which business leaders/managers can limit the negative consequences of a strike.

The key for the business leader/manager confronted with a strike action is to act with caution, discernment and possibly, after having received reliable advice, set up targeted actions tailored to the specific situation.

[1]Labor Chamber of the *Cour de Cassation*, October 23, 2007, n° 06-17.802.