

Covid – 19 coronavirus: France - Criminal liability of the company and its directors in the event of infection of an employee in the workplace

While the health crisis linked to Covid-19 continues, many companies are getting prepared to resume their activity as of May 11, 2020. Directors and corporate officers are wondering about the modalities of this resumption of activity in order to avoid the risks of spreading the virus and contaminating employees in their workplace.

Directors who wish to reopen their companies will have to take a number of measures to ensure the safety of employees and avoid liability, including criminal liability, in the event of infection of one of them in the workplace.

In this regard, the Ministry of Labour recommends that employers refer to the professions advice sheets and guides produced by the Administration to prevent the circulation of the virus in the workplace. These sheets, divided by sector of activity, detail the general measures to be applied but must be adapted on a case-by-case basis. Depending on the size, type of establishment, nature of the activity, whether or not the public is welcomed, the risk assessment will vary greatly.

It should be noted that the Ministry considers that strict compliance with the instructions issued by the health authorities should make it possible to exclude the criminal liability of companies, directors and corporate officers, subject to the sovereign discretion of judges.

Nevertheless, any criminal risk does not seem to be ruled out. That is why the Senate voted an amendment concerning the mitigation of criminal liability of elected officials, civil servants and business leaders for decisions taken during a state of health emergency. Admittedly, the

National Assembly did not adopt it and merely pointed it out, by referring to the need to assess the responsibility of each person "*in the crisis situation which justified the state of health emergency*", that any analysis of the criminal risk must be carried out *in concreto*, i.e taking into account the fact that the employer merely applies measures and recommendations decided by others (government and parliament). However, the lively debates surrounding the Senate amendment reflect the need to review precisely the risks incurred in respect of unintentional offences under the Criminal Code and breaches of the health and safety rules laid down in the Labour Code in connection with the resumption of activity.

In this context, the purpose of this article is to specify the conditions under which the criminal liability of companies and directors could be engaged and to provide practical advice on the measures to be implemented to enable employees to resume their activity with serenity. A Question/Answer punctuates the analysis with concrete examples.

Under what conditions directors can be held criminally liable?

While the protection of employees and their safety at work is a major issue for employers in this period of resumption of activity, the law provides a fairly strict framework of the mechanisms that make it possible for an employer, whether the company or its directors, to be held criminally liable.

The Criminal Code provides for two types of offences that may be concerned, the

characterization of which may depend on the provisions of the Labour Code. The Labour Code also includes criminal sanctions in the event of non-compliance with certain provisions related to health and safety of employees.

Endangering the lives of others

Article 223-1 of the Criminal Code defines the offence of endangering the life of another person as "*directly exposing another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the evident deliberate violation of a specific obligation of prudence or safety imposed by any statute or regulation*".

This offence has the particularity of being committed in the absence of damage.

In order to be characterised, first it presupposes that is identified a specific obligation of prudence or safety imposed by law or regulation.

According to the Criminal Division of the Court of Cassation's case law, a special obligation of prudence is "*a model of detailed conduct specifying very precisely the conduct to be followed in a given situation*".

In fact, it is conceivable that certain existing obligations could be considered as specific, in particular:

- Certain specific provisions of the Labour Code regarding health and safety matters that are likely to engage the responsibility of the head of the company in the event of failure to comply (see below);
- Certain provisions of the 23 March 2020's decree prescribing the general measures to tackle the Covid-19 pandemic in the context of the state of health emergency, which provide for specific obligations incumbent on persons restrictively listed, such as public roads, guided, railways passenger transport operators who are required to clean each public transport vehicle or rolling stock with disinfectant at least once a day (Article 6 of the decree of 23 March 2020).

In contrast, a number of provisions such as compliance with the obligations of hygiene and social distancing, known as "barriers" as set out in Article 2 of the Decree of 23 March 2020, perhaps seem too general to constitute a specific obligation within the meaning of Article 223-1 of the Criminal Code. This article referring to "*rules defined at national level*" could thus be considered insufficiently precise.

The characterisation of the offence also presupposes the demonstration of direct exposure of the employee to an immediate risk of death or injury likely to result in mutilation or permanent disability.

Although such a condition is not without debate (does Covid-19 expose persons to an immediate risk of death or permanent disability? Is the risk proven in the absence of evidence of the existence of the virus within the company?), it cannot be ruled out, in the context of a pandemic, that it could be established if a company does not comply with the specific safety requirements.

Finally, the infringement supposes the demonstration of the deliberate nature of the violation, which in practice means the demonstration of a manifestly negligent conduct, or the demonstration of an almost conscious illicit conduct.

In this respect, the risk seems to be seriously limited as long as the employer has, at the very least, tried to implement the recommendations in force within the company.

In any event, it should be noted that endangering the lives of others is sanctioned for directors by one year's imprisonment and a fine of €15,000.

Companies risk up to five times the fines attributed to natural person, i.e. a fine of up to €75,000

Unintentional injury / manslaughter offences

In the event of the occurrence of damage, it is necessary to consider the possible criminal liability of the employer and directors on the basis of unintentional injury or even involuntary manslaughter, the provisions of which are set out

respectively in articles 221-6, 222-19, 222-20, R.625-2, R.625-3 and R.622-1 of the Criminal Code, which should be read in the light of the provisions of article 121-3 of the Criminal Code.

These offences relate to "*causing [damage leading to injury or death] by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statutes or regulations*".

Before going into further detail on the conditions laid down in this text, it should be noted that any liability naturally presupposes proof of the causal link between the fault and the damage, proof in this case that the place of contamination is indeed the workplace. This could, in practice, be very difficult to prove.

Subject to this reservation, it should be recalled that Article 121-3 of the Criminal Code leads to a distinction between the criminal liability of legal persons and that of natural persons.

Indeed, the liability of legal persons may be engaged by the characterisation of a simple breach of a particular duty of care or safety imposed by law or regulation, and even by the determination of a simple imprudent or negligent fault.

The liability of the legal person is therefore assessed fairly broadly, since it is not necessary for the breach to relate to an obligation of legal or regulatory value (the breach of recommendations may suffice) and the degree of fault required is not very high.

It should be nevertheless pointed out, that the liability of the legal person can only arise in the event of a fault on the part of an organ or representative, i.e. a director or delegate of authority within the company. It is therefore a body or this representative who must have committed the reprehensible breach and not an employee who does not fall into this category.

Regarding the personal liability of natural persons (directors and delegates of authority), Article 121-3 of the Criminal Code specifies that in the event of an only indirect causality between the fault and the damage (the most probable

hypothesis in the case of contamination with Covid-19), a qualified fault must be demonstrated, i.e. either a deliberate fault (the manifestly deliberate violation of a particular obligation provided for by law or regulation), or a "characterized fault" (the fault of a degree greater than recklessness or negligence having exposed others to a risk of a particular gravity).

The conditions under which natural persons may be held responsible are therefore stricter in this case. It should be noted, however, that a "characterized fault" does not require the demonstration of a breach of a particular duty of care or safety. Mere failure to comply with generally applicable recommendations, such as the establishment of conditions of social distancing or barrier gestures, could therefore be sufficient to engage the criminal liability of a natural person as long as the breach of these rules would be considered serious, since simple negligence cannot be retained.

The various penalties provided for in the Criminal Code (aggravated in the case of a manifestly deliberate violation) are as follows:

- In case of manslaughter: up to three years' imprisonment and a fine of €45,000 (possible aggravation: five years' imprisonment and a fine of €75,000);
- In the event of total incapacity to work for more than three months: up to two years' imprisonment and a fine of €30,000 (possible aggravation: three years' imprisonment and a fine of €45,000);
- In the event of total incapacity to work for a period of less than or equal to three months: 5th class contraventions fine (possible aggravation: one year's imprisonment and a fine of €15,000);
- In case of absence of total incapacity to work: 2nd class fine (possible aggravation: up to a 5th class fine);
- Legal entities incur up to five times the fines provided for natural persons (i.e. a maximum fine of € 375,000).

Failure to comply with the health and safety rules provided by the Labour Code

The Labour Code also provides for criminal sanctions in case of infringement of certain rules related to workers' health and safety. In the context of Covid-19, particular attention should be paid to compliance with these obligations, for which "*personal misconduct*" of the employer or his delegate is required, among which:

- Information and training of employees on the risks to their health and safety arising from their activity and the measures taken to address them;
- The layout of establishments and work premises to guarantee the safety of employees, the verification of ventilation systems to maintain "*a state of purity of the atmosphere*";
- The provision of work equipment and means of protection safeguarding the safety and health of employees, including individual protections where necessary.

While some of these obligations clearly set out the measures to be taken in practice by the employer, such as the obligation to train employees, this is not the case for all of the above-mentioned requirements.

By way of illustration, with regard to work equipment, certain regulatory provisions indicate that the employer must adapt his choice to the particular characteristics of the work and the establishment concerned. The legislator's expectations in this respect are then detailed for certain manual or radioactive activities. Apart from these assumptions, the scope of the obligation leaves room for the employer's interpretation. The Code simply states that if these measures are not sufficient to preserve the workers' health and safety, the employer must act "*in particular on the installation of work equipment, the organization and method of work*".

The Labour Code also provides for additional obligations applicable in establishments in which the nature of the activity may lead to the

exposure of workers to biological agents carrying a risk of infection (assessment of exposure risks, specific means of prevention, information and training of employees, enhanced medical monitoring for employees exposed to the most dangerous pathogenic biological agents).

There is some doubt as to the scope of application of this scheme, which is usually applied within laboratories, pharmaceutical industries or health care institutions. This system must apply to companies whose employees are systematically exposed to a risk of infection, as well as to those who are exposed to a 'specific' risk, even though their activity does not deliberately expose them to it in normal circumstances. The site of the Ministry of Labour cites as an example for this second category, the case of employees in the home-help sector, where the performance of their tasks does not allow them to practice social distancing. Certain civil jurisdictions have retained the application of this system for companies whose business is not healthcare; several rulings handed down in summary proceedings in Lille have applied this system to supermarkets that had indicated Covid-19 as a specific risk in their Unique Risk Assessment Document (*DUER*). Nevertheless, it is possible to believe that the criminal courts could have a stricter view of the scope of the obligation.

These uncertainties are all the more concerning as any infringement of the above rules is sanctioned by a fine of €10,000 per employee concerned to be paid by the company's legal representative, and a fine of €50,000 per employee concerned to be paid by the company itself. These sanctions may be accompanied by an obligation to display the judgment at the company's entrance as well as publication in the press at the employer's expense.

The labour inspector has the power to monitor compliance with all applicable health and safety provisions and is empowered to establish infringements by means of reports sent to the Public Prosecutor, who then decides whether or not to prosecute. The labour inspector may also refer the matter to the judicial judge in summary

proceedings in order to put an end to any serious risk to an employee's health caused by the employer's failure to comply with the provisions referred to above.

Where the labour inspector issues measures as a result of his inspection audit, they must be strictly adhered to, otherwise the following criminal and/or administrative sanctions will be applicable:

- In the event of failure to comply with the formal notice issued by the DIRECCTE after an inspection has revealed a dangerous situation: criminal fine of €3,750 for the legal representative and €18,750 for the company;
- In case of non-compliance with the measures enacted by the labour inspector to remove an employee from a situation of serious and imminent danger to his life or health: administrative fine of € 10,000 per employee concerned for the legal representative, and € 50,000 per employee concerned for the company ;
- In the event of non-compliance with the verification measures or risk exposure assessment ordered by the labour inspector: administrative fine of €10,000 for the legal representative, and €50,000 for the company.

Finally, in the absence of an update of the Unique Risk Assessment Document (*DUER*) taking into account the risks related to the current pandemic, the legal representative of the company is liable to a fine of €1,500, and the company to a fine of €7,500.

What are the steps for an employer to take?

In order to limit as far as possible the risk of being held liable, in particular under criminal law, the employer must ensure the effective implementation of delegations of authority and compliance with a certain number of health and safety standards in the workplace.

Ensuring the effectiveness of delegations of authority

It is essential, at this time of health crisis, that the company ensures the effectiveness of delegations of authority in the area of health and safety, which are a valuable tool for implementing employee and, where appropriate, public safety.

Indeed, their purpose is to ensure that the powers naturally exercised by the head of the company (to whom a presumption of liability for unintentional criminal misconduct applies) are indeed delegated to persons who, in the field and most often in a defined geographical area, are best able to exercise these powers and to ensure the effective implementation of health and safety rules. This is certainly a guarantee of efficiency in this area and therefore a source of legal protection.

In this respect, it seems important to:

- ensure that delegations of authority are formalized in writing, although this is not compulsory;
- check the chain of delegations and sub-delegations (particularly in the case of the recent departure of a member of staff in this chain) in order to avoid "holes in the racket";
- check that the conditions for the validity of delegations of authority are respected, i.e. the guarantee for any delegate to have the required authority, means (material, technical, financial) and competence (in particular through additional training if necessary, both practical and legal). In times of crisis, verification of compliance with these conditions can lead to a virtuous dialogue between delegators and delegates, which can be reassuring, while improving the effectiveness of the arrangements implemented.

Practical advice to limit the criminal risk

In order to best meet their obligations, it is strongly recommended for companies and their directors to:

- Comply with the general instructions of the National Deconfinement Protocol communicated on May 3, 2020 by the Ministry of Labour. The main advice given by this Protocol is as follows:
 - Implement work from home whenever possible;
 - Remind employees of the barrier measures;
 - Respect a distance of 1m around each person, i.e. 4m² per person;
 - Implement a traffic plan to manage the flow of people (employees and other stakeholders, customers or suppliers for example), while giving priority to work from home, arrangement of schedules and tasks, and installation of physical separation barriers;
 - Where collective protection is insufficient, introduce individual protection (mask and gloves), subject to the training of employees regarding their use;
 - Prohibition of screening campaigns in companies ;
 - It is authorised to take temperature at the entrance of the premises, but not recommended;
 - Daily cleaning of floors and regular cleaning of frequently touched surfaces and objects with the products indicated by the Protocol.
 - Refer to the Ministry's professions guides that complete the instructions of the National Deconfinement Protocol. At this stage, the 48 guides published mainly concern sectors of activity where employees have contact with the public or animals;
 - Refer to the instructions given by the social partners in the collective bargaining agreement applicable to the company. As an example, the UIMM and the Syntec Federation published, respectively on 24 March 2020 and 24 April 2020, guides on best health practices during and after the confinement period;
- Establish the rules for the resumption of activity with the CSE. In any event, the CSE must be informed and consulted prior to any measure significantly modifying the organization of work and concerning the health and safety of employees;
- Seek the assistance of the occupational doctor in order to draw up an appropriate protocol for resuming work;
- Update the Unique Risk Assessment Document, involving staff representatives (a good practice in this respect could be to integrate this update into the consultation process on the recommended measures), in order to integrate the risks related to Covid-19 as well as the preventive measures taken.

Questions & Answers

Q/ Is it enough to follow the recommendations of the deconfinement protocol published by the Ministry of Labour to avoid criminal risk?

A/ Careful obedience to the recommendations of the protocol drastically limits criminal risk. Attention should also be paid to certain provisions of the Labour Code applicable to health and safety, which are subject to criminal sanctions.

Q/ Does a resumption of activity on the 11th May, when home from work is possible, constitute a criminal risk for the company and its directors?

A/ It cannot be excluded for companies whose activity is perfectly compatible with work from home, since this organisational mode "*should be the rule whenever it can be implemented*", according to the deconfinement protocol. It could then be considered that these companies would put at risk their employees in their workplace, and by forcing them to commute.

Q/ What risk does the employer face in the absence of instructions to staff on preventive measures?

A/ A fine of €10,000 per employee concerned to be paid by the legal representative of the company or his delegate, and a fine of €50,000 per employee concerned to be paid by the company. Posting or publication measures can also be pronounced.

More generally, such an absence of instructions would undoubtedly be likely to fall within the

scope of recklessness or negligence (a condition for invoking the criminal liability of legal persons for unintentional injuries and manslaughter), or even of "characterized fault" (which could bring into play the criminal liability of natural persons in the event of damage).

Q/ Under what conditions can an entrepreneur be held criminally liable for offences related to Covid-19?

A/ In these fields, there is a well-established case law which lays down a presumption of liability of the company's director, since it is considered that it is up to him to organise the conditions for the safety of employees. Insofar as, in practice, the director will very often not be able to ensure the proper implementation of measures throughout the company, attention must be paid to the chain of delegations of authority, which will enable the effective spreading of safety instructions.

Q/ Under what conditions can a delegation of authority result in the criminal liability of the delegate?

A/ The delegate must have accepted the delegation and also have the authority, the means (material, technical, financial) and the competence (in particular through additional training if necessary, both practical and legal) necessary to apply the regulations in the sphere of delegation.

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