Key points to keep in mind for the end of the lockdown on May 11

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Over the past two months, the health crisis and the lockdown associated with the Covid-19 have profoundly changed the employment world (home office; production shutdown and site closures, introduction of safety rules to protect the health of employees and limit the spread of the epidemic, etc.).

Although the French government has announced a gradual end of the lockdown as of May 11, the continuation of the state of health emergency necessarily implies that companies must continue to adapt to this new situation in order to reconcile the recovery or continuity of activity and the health of employees.

However, in the context of the gradual end of lockdown, the balance between the derogatory measures linked to Covid-19 on the one hand, and general law on the other, is often difficult to seize. The following are the main questions asked by employers in order to prepare for May 11:

1) What is the scope of the employer's safety obligation during the state of health emergency?

In accordance with article L. 4121-1 of the Labor Code, the employer takes the necessary measures to ensure the safety and protect the physical and mental health of employees (implementation of an appropriate organization and appropriate material resources, professional risks prevention actions, which also include information and training actions for employees).

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While the employer must ensure that these measures are adapted to take account of changing circumstances, case law considers that the employer has a reinforced obligation of means.

Recent judgements during the Covid-19 crisis tend to show that the simple employee's information is insufficient: the employer must be proactive in order to guarantee the effectiveness of his actions and their respect in practice by his employees.

The respect of these obligations by the employer, which are assessed *in concreto* by the judge, is traditionally based on various criteria such as the size of the establishment, the nature of the activity, the nature of the risks observed and the employee's functions. To these criteria, we are tempted to add the following two criteria, which are specific to the Covid-19 crisis:

- the geographical area of the workplace, with the question of travel to the workplace, particularly via public transport;

- the vulnerability of certain employees presenting a risk of developing a serious form of infection, which will have to be assessed in the light of the 11 criteria resulting from decree no. 2020-521 of 5 May 2020.

At the very least, for the return to work on May 11, employers will have to review their work organization in order to follow the recommendations of the Ministry of Labor and the Government. These recommendations include the respect of health measures in the company's premises, business continuity plans and good practices issued by the professional organizations of the activity sector to which the company belongs.

For the most vulnerable employees, it will be essential that they remain in home office beyond May 11, or, if their functions do not allow it, they can be put in partial activity.

For the other employees, a reduced presence at the workplace (organized by alternating between an on-site presence and remaining in home office or partial activity) is recommended in order to respect sufficient social distancing and to show that the employer has reconciled the constraints of the company's operations with respect for the health and safety of employees.

2) Do companies have to update the single assessment document for professional risks (DUER) in order to include the risks associated with Covid-19?

The DUER is a mandatory document in all companies. Its purpose is to list all risks to which the employees can be exposed within the framework of the exercise of their functions.

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In accordance with article R.4121-1 of the French Labor Code, the employer is required to update this document whenever the employees face new risks. In the context of the current health crisis, the French Ministry of Labor has reminded the need to update the document to take into account the specific risks related to Covid-19, including:

- work reorganization on the company's premises (in particular with regard to the physical and psychosocial risks related to the transmission of the disease)

- work in home office (isolation of employees, right to disconnection, working time, etc.).

Once the risks have been identified, the employer will also have to describe in the DUER the measures taken to avoid all risks or, failing that, to reduce them through preventive action. The updated document must then be submitted to the CSE and made available to the employees.

What are the employer's sanctions if he does not update the DUER?

An employer who fails to update the DUER is in breach of his safety obligation and can be liable to criminal and civil sanctions. In particular, the employer can be subject to an inexcusable misconduct, which increases the damages that can be due to the employees.

What happens if an employee refuses to apply the preventive measures set out in the DUER?

The employer's safety obligation is a reinforced obligation of means and not a reinforced obligation of result. The employer's liability cannot be automatically engaged if the desired result is not achieved.

If the employees have been informed of the applicable health measures and the employer has provided them with sufficient measures to comply with them, the employer cannot be liable for non-compliance to these rules by a sole employee.

The employee is also required for himself and his colleagues to participate in the safety measures put in place by the employer.

In our opinion, failure to comply with the measures defined in the DUER could justify initiating disciplinary measures against the employee according to article L. 4122-1 of the Labor Code provided that compliance with the DUER's preventive measures are added in the internal rules.

3) Can employees ask to remain working in home office as of May 11?

In view of government announcements, pressure is being put on employers who feel "forced" to let employees work in home office beyond May 11.

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The implementation of the lockdown and the transition to stage 3 of the epidemic imposed the work in home office for employees when the workstation allowed it. Nevertheless, it is yet not sure if this obligation will remain as of May 11. According to the government, the work in home office as of May 11 is only "recommended" and should be applied as far as possible.

However, the employer is not obliged to maintain employees in home office except when the employee is part of "vulnerable" groups to Covid-19. In such cases, work in home office must be recommended by the labor doctor or, failing that, by a detailed medical opinion.

In addition, the employer's refusal for an employee to continue working in home office after May 11 must be motivated especially when work in home office is already regulated in the company by a charter or a collective agreement (article L. 1222-9 of the Labor Code).

In our opinion, the motivation of the refusal is also necessary in the absence of a home office framework within the company. Indeed, in accordance with his safety obligation, the employer is obliged to take all measures to safeguard health and safety of his employees.

Consequently, the employer will necessarily have to justify his refusal by demonstrating that work in home office causes an objective disorder to the company (e.g. remote work cannot be performed or not satisfactorily performed).

In the absence of a detailed refusal, the employer's behavior could be considered as faulty by the judges, for example for failure to take the necessary preventive measures for the employee's return in the company's premises.

4) Can I require my employees to take paid leaves or rest days ("JRTT") after the end of the lockdown?

Ordinance n° 2020-290 adopted on March 25, 2020 provides several temporary provisions which aim to offer more flexibility to companies. They allow them to impose paid leaves or rest days to employees and to modify their dates in order for the company to adapt to the more or less rapid recovery of the economic activity.

These derogations, which are implemented until December 31, 2020, do not dependent on the lockdown or the state of health emergency.

- concerning paid leave:

A company agreement negotiated with the trade unions or employee representatives (CSE) is necessary in order for the company to be able to impose to employees to take up to 6 days of paid leave (5 working days). Collective bargaining agreements have also been adapted to facilitate the conclusion of such an agreement within the company during the epidemic.

For smaller companies (less than 11 employees), a referendum with at least 2/3 of the majority of employees can be held. However, this majority obligation is a real obstacle to the implementation of exemptions for paid leaves.

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In the absence of a company agreement, measures relating to paid holidays can be negotiated within the professional branches. The procedures for the extension of the branch agreements concluded exclusively to face economic, financial and social consequences of the COVID-19 epidemic are accelerated in order to be applied to all companies within the branch.

- concerning rest days:

Rest days linked to the organization of working time (JRTT) may also be imposed unilaterally up to 10 days if justified by the company's interest regarding the economic difficulties resulting from the Covid-19 crisis.

As no company agreement is required in this case, the employer has more flexibility even if not all employees benefit from rest days. Managers or employees working more than 35 hours per week are particularly concerned.

5) If my employee continues to work in home office, do I have to pay him/her the home occupation allowance?

Case law traditionally considers that when the employer asks his employee to work in home office he has to compensate the hardship to use his home for professional purposes for intrusion in his private life. In addition, according to the Labor Code, work in home office is necessarily based on a mutual agreement between employee and employer.

However, since the beginning of the health crisis linked to the Covid-19, due to exceptional circumstances, namely the threat of an epidemic, home office no longer requires the agreement of the employee nor the employer (Article L. 1222-11 of the Labor Code).

Also, in the absence of any contractual or collective mention requiring paying this allowance, we consider that, due to the exceptional circumstances of work in home office during the Covid-19 crisis, the home occupation allowance should be paid to employees who exceptionally worked in home office during the Covid-19 crisis period.

The judges will certainly decide this issue in the coming months.

6) An employee claims the reimbursement of the expenses she/he considers she/he has incurred during her/his work in home office. Do I have to reimburse him?

We are expecting many disputes related to this issue, especially since no regulation on this matter has yet been specified by the Ministry of Labor or the URSSAF (French Social Security contribution collection office).

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Some companies, which were taken by surprise, had not equipped their employees with the necessary equipment for home office beforehand. The concerned employees therefore either used their personal equipment or incurred expenses to acquire it (hence the explosion in sales of computer equipment in the first weeks of the lockdown).

It is therefore highly likely that in the coming months the judges will rule not only on the legitimacy of these expenses for the continuation of the activity, but also on the possible excessive nature of certain purchases made unilaterally by the employees.

Although since 2017, the obligation to cover the costs related to home office is no longer enshrined in the Labor Code, case law requires the employer to cover the professional expenses incurred by the employee. A charter or a collective agreement in force in the company may determine specific conditions to cover these expenses.

Our recommendation on whether or not to cover the costs related to home office is based on the criteria established by case law on the coverage of professional expenses.

- firstly, the work in home office must have caused additional costs for the employee - thus excluding the employee's fixed costs, such as the bill for an internet box,

- secondly, these additional costs must be necessary for the continuation of the employee's professional activity (e.g. imperative need to print certain documents, purchase of business software, etc.).

If these two criteria are not met, we advise employers not to cover the expenses, especially as they may not be considered by the administration as a reimbursement of professional expenses and thus present a risk of URSSAF reassessment in the event of an audit.

Finally, we would like to remind you that there are two ways of covering home office expenses, and that proof of payment is required in both cases:

- Reimbursement of professional expenses on the basis of actual expenses;

- Allocation of a "home office" allowance on a flat-rate basis.

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