

How can the employer respond to the COVID-19 outbreak?

March 11, 2020

1. Employer protection responsibilities

Employers have a safety obligation towards their employees; Article L 4121-1 of the Labour Code provides that they must take the necessary measures to protect the physical health of workers, including risk prevention measures, information and training for employees and the establishment of an appropriate organisation.

In the event of a proven risk, the employer is liable, unless he demonstrates that he has taken the necessary and sufficient preventive measures to avoid contamination of his staff.

In this context, the first recommendation is to be informed daily of the instructions published on the official website gouvernement.fr/info-coronavirus, to communicate them to employees by any means - e-mail, posting, meeting - and to ensure their effectiveness.

As of March 9, 2020, the following precautionary measures are recommended:

- inform employees and train them in hygiene measures;
- avoid travel and non-imperative travel in high-risk areas;
- arrange workstations for employees who have been in contact with an infected person for 14 days: set up teleworking; if teleworking is not possible, adapt the workstation so that the employee avoids places where fragile people are located/avoid any non-essential outings or meetings/avoid close contacts .

The employer must inform its employees of the presence of a "contact case" (i.e. someone in direct contact with an infected person) within the company and of the measures taken to enable fragile persons to avoid exposure (pregnant women, employees chronically ill, elderly persons).

The employer may request the occupational doctor to implement government recommendations.

In addition, the employer must update the Single Risk Assessment Document in order to incorporate government recommendations. To do so, the employer will have to consult the employees' representatives (SEC).

2. Employee compensation in quarantine/if unable to perform functions

Employees who are subject to a measure of isolation, eviction or home care and are unable to work because of being in contact with a person suffering from coronavirus can be prescribed a work stoppage by a doctor from the ARS

(regional health agency) for a maximum of 20 days and is then entitled to receive daily allowances without other conditions (such as length of service) and without application of any waiting period. This exceptional regime has been in force since 2 February 2020 for a period of 2 months.

The employment contract is then suspended and the employee benefits from legal or contractual guarantees of salary maintenance (supported by the employer) in addition to daily allowances served by State.

If the employee does not benefit from a work stoppage prescribed by the ARS, the employer at the origin of the eviction measure cannot suspend the employee's remuneration and the period of absence is assimilated to a period normally worked.

3. Employee diagnosed with COVID-19

Same answer than above knowing that in such a case the ARS will prescribe a medical sickleave.

4. Employment term adjustments in the event of operational difficulties

Partial activity

If the COVID 19 obliges the company to adapt its activity to the downturn, this exceptional circumstance allows the company to resort to partial activity (article R. 5122-1 of the Labour Code). Employees who, while remaining bound to their employer by an employment contract, suffer a loss of salary attributable to the reduction in working hours usually practised in the establishment below the legal working hours, benefit under conditions set by decree, from a specific allowance which is paid by the State. When employees are placed in a position of partial activity, the employment contract is suspended but not terminated. Thus, during the hours or periods not worked, employees must not be at their place of work, at the disposal of their employer and comply with his instructions. As the employment contract is suspended, employees receive a compensatory allowance paid by their employer. This compensation must be at least 70% of the gross previous remuneration and may be increased by the employer. This corresponds to approximately 84% of the net hourly wage.

The partial activity could concern all employees of a service/department/team/, in charge of a specific project. It cannot concern only one employee or several employees within a service. In the latter case, it could be considered only if there is a rotation in the employees concerned by the partial activity.

It seems that, in the current state of the pandemic, it cannot be considered as force majeure for the execution of an employment contract.

To accompany the payment of the allowance for hours not worked by employees, the employer receives a lump-sum allowance co-financed by the State and Unedic (Unemployment regime) for an hourly amount of EUR. 7.74 euros for companies with less than 250 employees;

For this, the employer must apply for the partial activity on this website: <https://activitepartielle.emploi.gouv.fr/aparts/>. The employer may receive the partial activity allowance within the limit of 1,000 hours per year and per employee.

The procedure of partial activity entails the prior information-consultation of the CSE.

If the State accepts the partial activity, employees could not claim any modification of their employment contract.

Work from home

If the situation so requires, the employer may impose working from home, the epidemic risk allowing the employer to do so without collecting the express employee's agreement.

Leave

If necessary, the employer may modify the dates of leave already set by the employee to cover the 14-day vigilance period. Conversely, if the employee has not set any leave, the employer cannot impose it.

For example, Air France proposed to its employees, on a voluntary basis, to take their vacation days or take unpaid leaves.

5. Employee claims (e.g., exposure to Coronavirus in the course of business, inability to perform function)

Right of withdrawal

The government specifies that if the employer complies with the updated government recommendations available at <https://www.gouvernement.fr/info-coronavirus>, the right of withdrawal should be very limited.

In particular, it is specified that, subject to the sovereign discretion of the jurisdictions, on the sole ground that a member of the company returns from a risk area or has been in contact with an infected person, the conditions for exercising the right to withdraw are not met if the employer implements the government's recommendations.

The Ministry of Labor specifies that "if these recommendations are properly followed, the risk to other employees is limited since, according to the epidemiological data available to date, only close and prolonged contact with persons presenting symptoms could contaminate them." These recommendations are updated daily on the website (<https://www.gouvernement.fr/info-coronavirus>).

The Ministry of Labor's press release also specifies that it has already given its opinion on the exercise of the right of withdrawal in a crisis situation within the framework of DGT Circular No. 2007/18 of 18 December 2007 relating to the continuity of private sector activity in the event of an influenza pandemic, as well as DGT Circular No. 2009/16 of 3 July 2009 relating to the influenza pandemic. The solution was then the same. The employer will therefore have to respect the government's recommendations in order to limit the valid recourse to the right to withdrawal.

Occupational risk

There is no answer in the government's press release. However, COVID-19 is not the first pandemic that France has experienced and during the H1N1 pandemic several circulars were issued. Thus, it seems that it is necessary to rely on these circulars. Circular DGT 2007-18 of 18 December 2007 provides that the risk associated with a pandemic cannot legally be qualified as an occupational risk, insofar as the potential contamination is not directly related to the company's activity but is generated by the intensity of inter-human transmission to which the entire population is exposed.

6. Employee data privacy / employer data

collection and sharing

No special provisions have been put in place regarding personal data and COVID-19. The general provisions continue to apply. On the other hand, it is conceivable that the employer may ask such workers to notify him/her in the event of a stay in a risk area.

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