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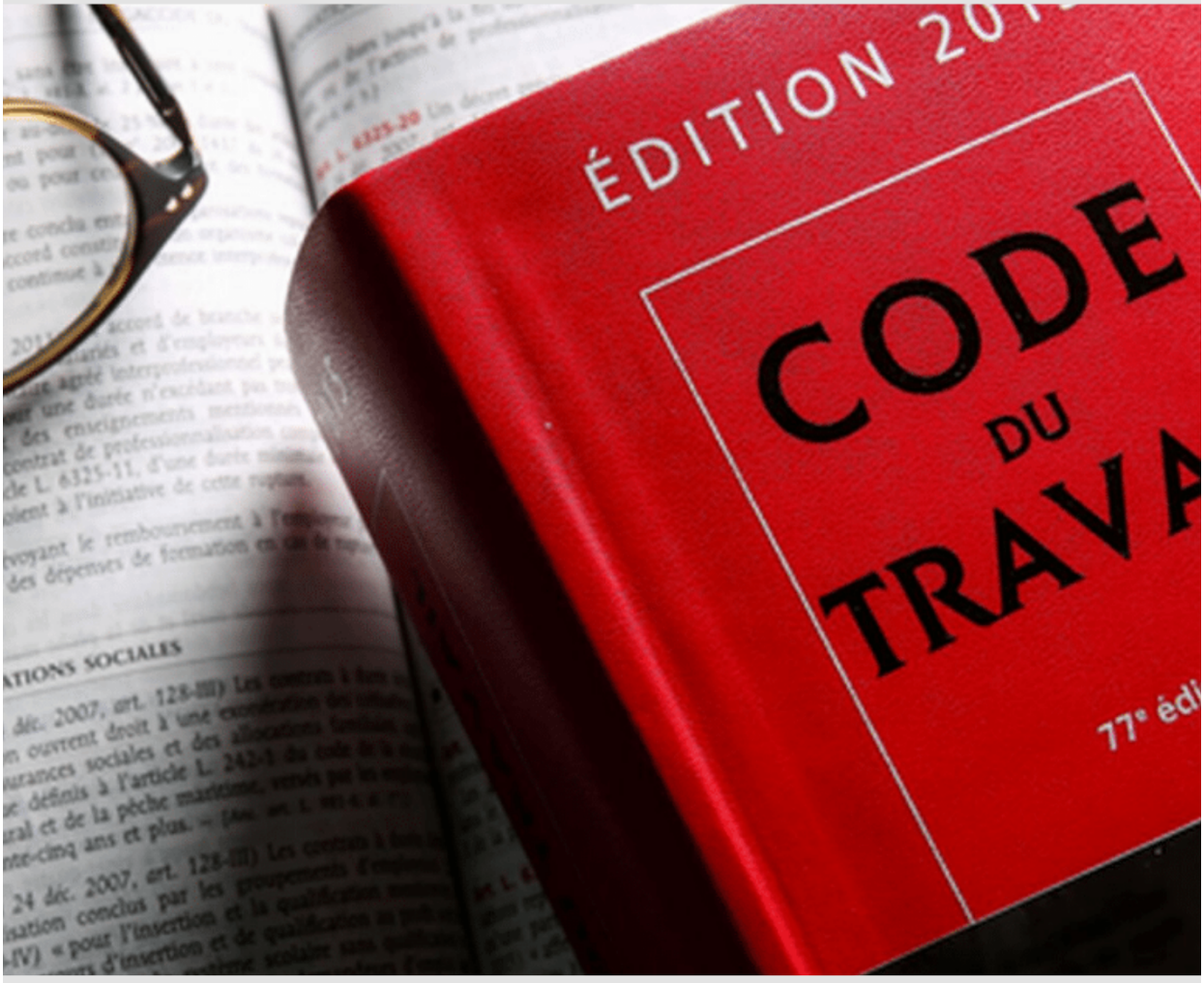
COVID-19: A PRESSURE TEST FOR OCCUPATIONAL HEALTH AND SAFETY



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Since the Covid-19 pandemic, the occupational health and safety issues have increased. It is more than ever a current topic that not only concerns employers, even if he is the main actor of this issue. Indeed, employees now feel very aware and interested about it.

To better understand this notion of occupational health and safety, we will go through different steps to see how those issues are tackled in France.

I. The legislative framework for the employers' obligations to ensure OHS with a reference also to working time

A. The sources of the employer's safety obligation

1. The Labor Code

In France, the employer is required to ensure the health and safety of his employees, in particular by preventing all occupational risks. This obligation is provided by the French Labor Code. Occupational health occupies an important place in the Labor Code, indeed an entire part (Part IV) is devoted to occupational health and safety.

The Labor Code sets out the employer's obligations to reduce or even eradicate risks. He must be able to analyze the existing risks to health and safety at work in order to reduce them.

Health and safety is the responsibility of several actors:

- The employer has an obligation of safety of result imposed by case law. In other words, the prevention organization will only be considered effective in the eyes of the law if it has effectively reduced (or limited) the occupational risks. This is a no-fault liability: he cannot be exonerated by showing that he has not committed a fault.

- The staff representatives of the Economic and Social Committee also have a preventive role. In companies with more than 300 employees, health and safety at work is the responsibility of the members of the Health, Safety and Working Conditions Commission. It can carry out investigations, use its right to alert and must remain vigilant with regard to the company's prevention policy. *This point will be developed in question 3.*

- The labor inspectorate and occupational medicine are also actors in the prevention of health and safety at work.

- The employees also have a role to protect their health and safety. *This point will be developed in question 2.*

2. The European law

French legislation has been influenced by European law. The framework directive N° 89/391/EEC of 12 June 1989 defines the fundamental principles of worker protection. It placed the assessment of occupational risks at the top of the hierarchy of general prevention principles, when the risks could not be avoided at source. The Act N° 91-1414 of 31 December 1991, applicable since 31 December 1992, transposed the provisions of the framework directive into French law, and the provisions of the framework directive into French law, and in particular Article L. 4121-1 and L. 4121-2, which set out the general principles of prevention.

3. The internal sources: Case law and social dialogue

French legislation is also influenced by internal sources, particularly those resulting from Case law or social dialogue.

The 2 August 2021 Act aiming to strengthen occupational health prevention transposes the national interprofessional agreement concluded on 10 December 2020 by the social partners to reform occupational health. Trade unions and employers reach an agreement which includes a first part that provides for the creation of a "prevention passport", as well as a focus on the prevention of professional deintegration. There is also a section on quality of life at work and a "modernization" of inter-company occupational health services.

The social chamber of the Court of Cassation recalls, in a decision of 5 March 2008 “SNECMA”, that the employer is bound, with regard to his staff, by an obligation of safety of result which requires him to take the necessary measures to ensure the safety and protect the health of the workers and that he is prohibited, in the exercise of his power of direction, from

taking measures which would have the object or effect of compromising the health and safety of the employees.

A legal and regulatory obligation, inspired by Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, the employer's safety obligation has become, over the years, sprawling.

In the famous "asbestos" rulings of 28 February 2002, the Court had already considered that the employer is liable for a safety and result obligation and that failure to fulfil this obligation constitutes inexcusable fault when the employer "was or should have been aware of the danger to which the employee was exposed and did not take the necessary measures to protect him or her".

These rulings were the beginning of a long evolution and have notably allowed the appearance of this obligation in matters of work accidents (Cass. soc, 31 October 2002 n°00-18.359, 24 June 2005 n°03-30.038), moral harassment (Cass. soc, 21 June 2006 n°05-43.914 ; Cass. civ 2eme, 22 February 2007), protection of workers against smoking in the company (Cass. soc, 29 June 2005, n° 03-44.412; 8 November 2007 n°06-15.873) or even in terms of company medical visits (Cass. soc, 9 January 2008, n°06-46.043) and now in terms of reorganization.

The decision handed down on 5 March thus confirms the will of the Court of Cassation to impose on the employer a real obligation of safety and result.

In a decision of the Court of Cassation in November 2015, the obligation to protect the health of employees, which since 2002 has been considered an obligation of result, seems to be shifting with the "Air France" case towards an obligation of "reinforced means". There is a relaxation of the employer's safety obligation: in fact, with this Air France decision, the Court of Cassation no longer subjects the employer to an obligation of safety of result, but to a reinforced obligation of means. This means that the employer can be exonerated from his responsibility by proving that he has taken all the necessary measures to preserve the health and safety of his employees. Such a solution is favorable for employers since they will be able to defend themselves.

From now on, the employer can be exonerated as soon as he has implemented all the measures provided for by the articles of the Labor Code. The relaxation of the case law is limited: with the expression "all the measures", only the employer who scrupulously implements these measures provided for by the Labor Code is exonerated from liability

B. The application of the employer's safety obligation

According to article L. 4121-1 of the French Labor Code, the employer is required to take all necessary measures to ensure the safety and protect the physical and mental health of his employees.

In this context, the employer must not only reduce the risk, but must prevent it. The measures that must be taken are organized around three axes:

- Actions to prevent occupational risks relating to the risks of falling from a height, the risks of coming into contact with a working part of a machine, psychosocial risks (e.g. work overload, etc.), chemical risks and provisions relating to exposure to certain occupational risk factors (arduousness at work);

- Information and training for new recruits, employees changing workstations, temporary workers and employees returning to work after being seen by the occupational physician;

- The implementation of an organization and adapted means:
  - Modify work schedules in the context of atmospheric conditions (heat wave) with the aim of reducing the risk of accidents at the workstation
  - installation of adapted machines, withdrawal of dangerous products, putting in place personal protective equipment and making it compulsory to wear a helmet, gloves and non-slip safety shoes on a building site

The employer must ensure that these measures are adapted to take account of changing circumstances and aim to improve existing situations.

1. The safety obligation and risk prevention

The safety obligation has a specific application in the area of risk prevention.

The framework European directive of June 12, 1989 has gathered the general principles in the field of safety and health at work. It provides that the employer must take the necessary practical measures to ensure the safety of workers and protect their health.

The directive 89/654 of November 30, 1989 sets the minimum safety and health requirements for workplaces. It is based on 9 general principles of prevention included in the French Labor Code, in the fourth part dedicated to health and safety at work, Book 1, Title II on the general principles of prevention (Articles L. 4121-1 to L.4122-2).

According to article L. 4121-2 of the French Labor Code, the employer must take all useful measures based on the general principles of prevention in order to:

- Avoid risks;
- Evaluate the risks that cannot be avoided;
- Combat risks at their source;
- Adapt work to the individual, in particular with regard to the design of workstations and the choice of work equipment and work and production methods, with a view to limiting monotonous work and work at a fixed pace and reducing their effects on health;
- To take into account the state of evolution of the technique;
- To replace what is dangerous by what is not dangerous or by what is less dangerous;
- To plan prevention by integrating, in a coherent whole, the technique, the organization of work, the working conditions, the social relations and the influence of the ambient factors, in particular the risks related to moral harassment and sexual harassment, such as they are defined in articles L. 1152-1 and L. 1153-1, as well as those related to the sexist acts defined in article L. 1142-2-1;
- Take collective protection measures, giving them priority over individual protection measures;
- Give appropriate instructions to workers.

With regard to these different elements, the employer will formalize the assessment of risks in his company in the Single Risk Assessment Document (DUERP = “document unique d'évaluation des risques professionnels”), which must be updated regularly:

- At least every year in companies with at least 11 employees;
- At the time of any decision to make major changes to health and safety conditions or working conditions;
- When additional information relevant to the assessment of a risk in a work unit is collected (e.g.: appearance of occupational diseases, pandemic due to Covid-19...).

The DUERP has been reinforced by the recent 2 August 2021 Act. It is a regulatory requirement which makes it possible to define a preventive action plan resulting from the safety studies and assessments carried out beforehand. Its main objective is to reduce or completely eliminate occupational accidents and diseases.

It must include the following elements:

- Inventory of hazards and results of the risk assessment identified in the company
- List of risk prevention and employee protection actions

The results of the risk assessment must be transcribed into the DUERP in order to meet 3 requirements:

- Consistency: by grouping together on a single medium the data resulting from the analysis of the risks to which workers are exposed
- Convenience: to bring together in a single document the results of the various risk analyses carried out, thus facilitating the monitoring of the risk prevention process in the company
- Traceability: the results of the risk assessment must be systematically reported so that all the elements analyzed appear on a paper or computer medium

There is no model imposed by the Labor Code. The employer can choose the medium that seems best suited to his needs (paper or digital document).

The DUERP, in its successive versions, is kept by the employer for a period of 40 years from the date of its preparation.

2. Physical and mental health prevention

French law is concerned with physical and mental health, especially with the social modernization Act of 17 January 2002 which introduces the concept of mental health into the Labor Code.

This law defines moral harassment as "*a set of repeated acts whose purpose or effect is to degrade working conditions likely to infringe on the employee's rights and dignity, to alter his or her physical or mental health or to compromise his or her professional future*". The very broad and not very restrictive definition of psychological harassment thus leaves the judge with an extremely important power of interpretation and assessment.

European Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin already provided for harassment as a form of discrimination where there is "unwanted conduct related to racial or ethnic origin, the purpose or effect of which is to undermine the dignity of a person and to create an intimidating, hostile, degrading, humiliating or offensive environment.

The new act was inspired by these principles and those already known in French law, both legal and jurisprudential.

The legislator has taken over the principles laid down by the Civil Code insofar as the new Article L. 120-4 of the Labor Code provides that "the employment contract shall be performed in good faith". The employer is therefore obliged to do everything possible to ensure that the contract is performed in good faith and must therefore prevent or put a stop to acts of psychological harassment. If he fails to do so, he may be held liable. However, the act gives no indication of the nature of these preventive actions.

Finally, the 17 January 2002 Act requires the employer to amend the internal regulations in order to include a provision on the prohibition of any form of moral harassment, in addition to the provisions on employees' rights of defense and abuse of authority in sexual matters.

Since the 17 January 2002 Act, the procedure for alerting staff delegates in the event of infringement of personal rights or individual freedoms has been extended to cases of infringement of employees' "physical and mental health". The staff delegate can therefore use his or her right to alert in the presence of a situation of moral harassment.

The law also considerably strengthened the power of the occupational physician. From now on, the latter can propose individual measures such as transfers or job changes justified by the employees' "physical and mental" health.

In practice, this obligation to ensure the health and safety of employees must lead the employer to:

- ensure that the premises are well ventilated (article R. 4222-4 of the French Labor Code);
- equip the premises with first aid equipment (article R. 4224-14 of the Labor Code);
- allow employees to take meals in premises other than those where they work (article R. 4228-19 of the Labor Code);
- regularly measure noise levels and, above 85 decibels, provide for medical surveillance of employees and provide them with individual protection (Article R. 4434-7 of the Labor Code);
- provide outdoor workstations with protection against falling objects or nuisances (article R. 4225-1 of the Labor Code).
- ensure medical check-ups (periodic check-ups and follow-up check-ups - article R4121-1 of the Labor Code).
- enforce the ban on smoking in enclosed areas (Article R3511-1 Public Health Code).
- not to take measures that would have the purpose or effect of compromising the health and safety of employees (Court of Cassation, Social Division, March 5, 2008 n°06-45.888).

3. Employer's safety obligation and Covid-19 pandemic

During the Covid-19 pandemic, there was a huge amount of guidance, including administrative texts, whose legal status is uncertain. The government published "health protocols" and "questions and answers" to assist the employer in managing the crisis. The employer was obviously encouraged to respect these guidelines, but there was no legal obligation to do so.

The role of the employee representatives was also debated, notably on the question of information-consultation.

In the context of the Covid-19 pandemic, the Single Risk Assessment Document must be regularly updated with the help of staff representatives to take into account public instructions and to support the return to work linked to the decontamination.
It should be noted that the national protocol to ensure the health and safety of employees in companies faced with the Covid-19 pandemic is a reference document to ensure the health and safety of employees and the continuation of economic activity.

Thus, it is not the employer's responsibility to guarantee the absence of any exposure of employees to risks, but to avoid them as much as possible and, if they cannot be avoided, to evaluate them regularly, in particular according to the government's recommendations, in order to then take all the necessary measures to protect the exposed workers.

Therefore, in the current situation, it is the employer's responsibility to:
- Carry out an assessment of the risks incurred in the workplace which cannot be avoided according to the nature of the work to be performed;
- Determine, according to this assessment, the most relevant prevention measures (e.g.: safety training);
- Involve the staff representatives in this work;
- When possible, ask the occupational health service, whose mission is to advise employers, workers and their representatives and, as such, to recommend any useful information on effective protective measures and the implementation of "barrier gestures";
- To respect and make respect the barrier measures recommended by the sanitary authorities.

This extremely dense framework delimits both the conditions for exercising the right of withdrawal of employees (article L. 4526-1 of the Labor Code), which cannot be legitimate when the employer meets his obligation; and the scope of the employer's civil and criminal liability. *This point is further developed in question 5.*

In the face of a pandemic, the employer's liability is assessed on a case-by-case basis, according to several criteria: the nature of the employee's activities and level of exposure to risk, the employee's skills, experience, and the extent of the measures taken by the employer, in particular in terms of training and information, work organization, and instructions issued to the hierarchy.

These measures must be updated if necessary in relation to the evolution of the situation in the company and to the instructions of the public authorities. In the event of infection with the virus, if it is covered as an occupational accident by the social security system, the employer's inexcusable fault can only be accepted if it is demonstrated that the employer was aware of the danger to which the employee was exposed and did not take the necessary measures (barrier gestures, rules of distancing, etc.) to protect him/her. *This point is further developed in question 5.*

4. Employer's safety obligation and working time

- **The beginning of regulations on the duration of working time**

The first laws to reduce working hours concerned children. For the first time in France, on 22 March 1841, an Act was passed on the work of children employed in factories, plants or workshops: the minimum age for work was set at 8 years in companies with more than 20 employees, and the working day was limited to 8 hours for 8-12 year olds and 12 hours for 12-16 year olds. Unfortunately, this first law limiting child labor was not followed by the effects hoped for by the legislator.

The question of the duration of working time became central, together with the wage. For the first time in 1848, a normative provision was to govern the duration of working time. The decree of 2 March 1848, which reduced working hours by one hour, introduced a major breakthrough by establishing for the first time a national standard setting a maximum duration for adult work.

The question of the duration of working time has become more and more important with time. Nowadays, regardless of the size or sector of activity of the company, every employer is obliged to control the working hours of employees.

- **The current regulations**

In addition to complying with Labor law, this obligation to monitor working hours enables the employer to ensure the health and safety of employees and to provide proof of the hours worked for overtime claims, which generate a great deal of litigation.

The Court of Cassation follows the interpretation of the Court of Justice and interprets the texts on paid leave or rest time as texts protecting health at work. It therefore exercises strict control over collective agreements. Collective agreements can only adjust employees' working hours if they guarantee employees' rest periods, or they risk being annulled.

The maximum working hours are as follows:
The actual daily working time may not exceed 10 hours. The daily working time (hours between the beginning and the end of the day, including breaks) cannot exceed 13 hours.
The weekly working time may not exceed 48 hours and 44 hours on average over a period of 12 consecutive weeks.
In addition, breaks and rest periods are also mandatory. Unless otherwise provided for in the agreement, the employee benefits from:

- a break of at least 20 minutes, as soon as the daily working time reaches 6 hours;
- a daily rest period of at least 11 consecutive hours.

A weekly rest period of at least 24 consecutive hours, plus the consecutive hours of daily rest (11 hours), i.e. a minimum total weekly rest period of 35 consecutive hours.

In addition to compliance with these maximum working hours and compulsory rest periods, the monitoring of working hours is also one of the indicators used to measure employees' workload.

However, the employer's obligation to ensure the health and safety of employees also implies "the establishment of an organization and appropriate means" pursuant to Article L4121-1 of the Labor Code.

At a time when the prevention of work overload, psychosocial risks and suffering at work is a priority, the monitoring of hours actually worked by employees is a first step in this preventive approach.

Furthermore, to ensure the effectiveness of his safety obligation, the employer must take into consideration the proposals for individual measures made by the occupational physician, who may propose, in writing and after discussion with the employee and the employer, individual measures for the adaptation or transformation of the workstation or measures for the reorganization of working hours justified by considerations relating in particular to the age or the state of physical and mental health of the worker (C. trav., art. L. 4624-3). In the event of refusal, the employee is required to justify this (C. trav., art. L. 4624-6; Cass. soc., Dec. 19, 2007, no 06-43.918; Cass. soc., Dec. 19, 2007, no 06-46.134).

- **The particular case of fixed price day agreements**

The fixed price day agreement is a document drawn up in writing, which formalizes the conditions allowing the employee to work under a fixed number of days.
The employee's working time is not counted in hours. The employee on a fixed-term contract is obliged to work a certain number of days in the year. This number of working days in the year is fixed at a maximum of 218 days. However, a company or establishment collective agreement (or, failing that, a branch agreement) may set a number of working days lower than 218.

The employee is therefore not subject to the maximum daily and weekly working hours.
On the other hand, he continues to benefit from the legal guarantees provided for daily and weekly rest periods, paid holidays and public holidays not worked in the company. To ensure that these guarantees are respected, the employer must regularly check that:

- that the employee's workload is reasonable and allows for a good distribution of work over time
- that the employee's work and personal life are well coordinated.

A decision of the Court of Cassation of 29 June 2011 indicated that an employer who does not respect the provisions having constitutional value, which aim to ensure the protection of the safety and health of the employee and his right to rest, the fixed day agreement of an employee is null and void and the employee can claim the payment of overtime.

This decision of the Court of Cassation is based on:

- paragraph 11 of the Preamble to the Constitution of 27 October 1946 on the protection of health
- Article 151 of the Treaty on the Functioning of the European Union on the promotion of employment and the improvement of living and working conditions of employees
- Article L3121-45 of the Labor Code on fixed-term agreements in days of an employee over the year
- Article 17 of Council Directive 1993-104 EC of 28 November 1993 on the general principles for the protection of the safety and health of workers
- Article 31 of the Charter of Fundamental Rights of the European Union on the right of employees to limitation of maximum working hours and daily and weekly rest periods,

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Thus, an employee's daily work package must not derogate from the respect of health, the right to rest and the increased remuneration for overtime. Articles L3121-43 to 48 of the Labor Code determine the agreements on fixed-term working days for employees.

In the event of recourse to a fixed number of days, the law requires the employer to regularly ensure that the employee's workload is reasonable and allows for a good distribution of his work over time.

The Court of Cassation has long held that any agreement on a fixed number of days must be provided for by a collective agreement whose stipulations guarantee compliance with maximum working hours and daily and weekly rest periods and ensure that the amplitude and workload remain reasonable.

The employer's failure to comply with its obligations to regularly monitor the workload is sanctioned by the nullity of the fixed-term contract.

Recently, in a decision of 2 March 2022, the Court of Cassation has established the possibility for the employee to also seek the employer's liability on the basis of his safety obligation.
"Failure to comply with the legal or contractual provisions, compliance with which is likely to ensure the protection of the safety and health of the employee subject to the fixed-term work week system, constitutes a breach of the employer's safety obligation" (Cass.soc. 2 March 2022 No. 20-16.683).

It recalls that the employer, bound by a safety obligation towards employees, must take the necessary measures to ensure the safety and protect the physical and mental health of workers. He does not breach this legal obligation if he can prove that he has taken all the necessary measures provided for by the Labor Code.
It is therefore up to the employer, on whom the burden of proof rests, to justify the concrete workload monitoring measures taken to guarantee the right to health and rest.

Now that we have a general approach of the OHS in France, and the employer’s safety obligation, we need to question the individual role of the worker.
Indeed, the employer is not the only one to have obligations, the employee has some too.

II. The specific requirements on the Individual worker's cooperation to the fulfillment of OHS in the pandemic (e.g., quarantine, obligation to remote work, vaccination requirements, specific safety requirements for essential workers).

While the employer has a duty to ensure health and safety in the workplace, French labor law has also established obligations for employees.

The pandemic has revealed the need for everyone to get involved in order to preserve everyone's health.

Thus, within the framework of labor law, it was necessary to set up rules imposing constraints on employees in order to limit the health and safety risks induced by the covid-19 pandemic.

A. Working from home generalization

The first rule that emerged concerned working from home. If the implementation of working from home required, outside of the pandemic, the signature of an agreement, the Covid-19 pandemic changed this rule of implementation.

According to the French labor code, working from home is implemented within the framework of a collective agreement defined by a negotiation between the employer and the trade unions or the employees' representatives. In the absence of an agreement, it can be decided by the employer through a charter, but only after the opinion of the social and economic committee (CSE).

However, the Labor Code also provides that, in case of exceptional circumstances, and in particular the threat of a pandemic or in case of "force majeure", then the implementation of work from home may be necessary to allow the continuity of the company's activity and to guarantee the protection of employees.

Thus, during the pandemic, the employer may require employees to work from home, and may even be required to implement it if the employee's activity is eligible for working from home.

Thus, employees whose activity allowed it, were sometimes required to work from home during the pandemic.

In France, during the pandemic, the sanitary protocol also required the mandatory use of work from home. Sometimes it was totally compulsory, especially during the first lockdown, except for employees whose activity did not allow it, such as cashiers or nurses.

It was also sometimes mandatory on a certain number of days during the week. For example, in the health protocol of December 29, 2021, employees who were able to do so, were required to work at least three days a week from home.

B. Others safety measures

The health protocol also required employees to wear masks in the workplace and to respect the physical distance made possible by the employer.

It should be noted that employees were sometimes subject to isolation if they were declared a contact case, that is to say, if they had been in contact with and were likely to be contaminated by a sick person.
These employees were generally required to isolate themselves for 7 days. They had to work from home when it was possible, or they could be off work but paid by the health insurance.

If they were tested negative at the end of their isolation period, they could then return to work. Moreover, when the vaccine and the health pass were generalized in France, vaccinated employees were no longer obliged to isolate themselves if they were vaccinated, and sometimes on condition of a negative Covid test.

In the event of Covid-19 contamination, employees were not allowed to go to their workplace. In addition, according to the French Labor Code, each worker must take care of his or her own health and safety as well as that of others affected by his or her actions or omissions at work.
Indeed, this obligation is explained in the article L. 4122-1 in the French Labor Code. This article states that "*In accordance with the instructions given by the employer (...), it is the responsibility of each worker to take care, in accordance with his or her training and abilities,*

of his or her own health and safety and that of other persons affected by his or her acts or omissions at work (...)".

Thus, an employee who knows he is positive but goes to work represents a significant risk to other workers, and this could potentially be a reason for a dismissal for misconduct.
This ground for dismissal had been validated by the Court of Cassation in 2017 regarding an employee who had continued to work, knowing that he was unable to do so, putting his colleagues at risk. However, in practice, this reason for dismissal has not been widely used by employers.

C. "No jab no job": mandatory vaccination for specific jobs

According to August 5, 2021 Act, the principle is that vaccination is not mandatory for employees in general. However, there are exceptions, and therefore professions for which vaccination is required. Those employees have to be vaccinated to be able to continue working, unless they have medical contraindications. This is particularly the case for health personnel, professionals and volunteers working in premises, people working in health transport, employees in the medico-social sector or firefighters.

It was also made compulsory for employees working in contact with vulnerable people. If at the beginning, it was accepted that the employees concerned present a certificate of recovery or a test of non-contamination, it was then compulsory for them to have received at least one dose of the vaccine.

Then, if they did not receive the full vaccination, employees could be suspended, and without pay. However, dismissal or early termination of contract was hardly possible.
Thus, health care workers were given priority to receive their vaccine dose.

Moreover, in places where the health pass was required for users, meaning their vaccination certificate, employees also had to be able to present it. This concerns, for example, cashiers, sales or reception staff, etc.

In conclusion, employees were very largely and quite strictly involved in the fight against the pandemic. However, not all employees had the same level of intensity in terms of obligations. Nonetheless, all had to comply with the wearing of masks and physical distancing.

Workers were not alone to deal with all this set of rules. Indeed, they were helped by worker's representation, and they had a huge impact in the collective bargaining area to ensure the fulfillment of OHS rights and duties during the pandemic.

III. The role of workers' representation within the undertaking and collective bargaining in the view of ensuring the OHS rights and duties during the pandemic.

As already mentioned, French labor law is divided into 2 types of sources:

- The legal source, which is the Labor Code
- The conventional source, which is the set of collective agreements negotiated in the company between the employer and the worker's representation.

In the field of occupational health, agreements have little room for flexibility since they must respect legal obligations when they are of public order (it is then impossible to derogate from them). In fact, negotiations in companies tend to focus on the prevention of harassment and psycho-social risks, as well as the quality of life at work, like for example work environment.

To understand how the French employee's representative institutions work, it is necessary to take an overview of its evolution.

A. The former employee representative institutions

The worker's representation has evolved since the creation of the first committee in charge of the safety and the health of the workers in France.

Before 2020, employee representation in French labor law was ensured by several employee representative institutions. These were the works Council and the health, safety and working conditions Committee: it was composed by an employee delegation (members of the worker's representation) and the employer's representative. The health, safety and working conditions committee contributed to the prevention of professional risks and the improvement of working conditions within the company.

The health, safety and working conditions committee then became the exclusive body representing the personnel in the prevention and health at work in all companies with at least 50 employees. The creation of a right of alert has given it an additional power.

The employer must set up the health, safety and working conditions committee as soon as the company reaches the threshold of at least 50 employees, and in all establishments with at least 50 employees. This number of employees is defined as having been reached for at least 12 months, consecutive or not, during the previous 3 years.

The prevention of occupational risks is therefore becoming an issue for the company. The employer is now obliged to implement a global policy for the prevention of health, safety and working conditions, as well as an assessment of occupational risks. This obligation is enshrined in the French Labor Code.

The health, safety and working conditions Committee had three missions, mentioned in the French Labor Code:

- it must contribute to prevent and protect the physical and mental health but also the safety of the workers
- It must contribute to improve working conditions, particularly with a view to facilitate women's access to all jobs and to address maternity-related issues.
- Finally, it must contribute to the adaptation of workstations in order to facilitate the access of people with disabilities to all jobs and to encourage them to remain in employment throughout their working lives.

Consequently, this committee had a role of prevention, and was in charge to ensure the safety, the health and the improvement of working conditions of the workers. In order to carry out this role, it had four essential missions within the company:

- Analyze risks with the power to observe, inspect, investigate, alert and trigger expert opinions;
- To carry out investigations relating to accidents;
- Carrying out studies on accommodation;
- Prevent moral harassment.

The control role of the CHSCT was also exercised through regular inspections, investigations and studies concerning working conditions, occupational risks, or monitoring compliance with

health and hygiene regulations. It noted shortcomings, but it did not have the power to take the place of the employer. Nevertheless, the CHSCT had prerogatives that allowed it to improve its decisions. For example, if it identified a risk or a danger, the employer was (and still is) fully liable if it did not take adequate measures.

B. The Social and Economic Committee and the Health, Safety and Working Conditions Commission

Nowadays and since 2017, the worker's representation has evolved in France. Indeed, the structures have been completely modified. Nowadays, there is only one employee representative institution, the Social and Economic Committee, which delegates some of its powers to commissions. The Social and Economic Committee has responsibilities in economic, social and cultural matters... and it can delegate its powers to commissions, as it is the case for the Health, Safety and Working Conditions Commission (CSSCT).

The health, safety and working conditions commission (CSSCT) is part, with other thematic committees (professional equality committee...), of the committees that may be created, or that must be created, within the social and economic committee (CSE) of companies with at least 50 employees. Since it is directly related to the health protection of the employee, this committee has an important role, especially during the pandemic.

This commission must be created within the CSE in :

- companies with at least 300 employees
- separate establishments with at least 300 employees;
- establishments with at least one basic nuclear facility, for example, with no headcount requirement.

The health, safety and working conditions committee (CSSCT) is entrusted, by delegation of the CSE, with all or part of the committee's powers relating to health, safety and working conditions, with the exception of the use of an expert and the committee's consultative powers (the CSSCT cannot issue an opinion in place of the CSE).

To summarize:

	CHSCT (before 2017)	CSE & CSSCT (since 2017)
Definition	Representative body of the employees. It is responsible for issues related to the protection of health, safety and quality of life at work.	● CSE: it is the only worker's representative body. ● CSSCT: It is part, with other thematic committees (professional equality committee...), of the committees that may be created, or that must be created, within the CSE
Missions	● Analysis working conditions and occupational risks to which workers, and in particular pregnant women, may be exposed ● Verification, through inspections and surveys, of compliance with legislative and regulatory requirements and of the implementation of prevention measures ● The development of prevention through awareness and information actions. For example, it can propose preventive actions in the field of harassment in the workplace ● Analysis of the circumstances and causes of occupational accidents or illnesses or those of an occupational nature.	● CSSCT: They depend entirely on the decision of the CSE. The CSSCT is entrusted, by delegation of the CSE, all or part of the attributions of the committee relating to safety, health and working conditions. ● The only limit to this delegation, however, is that since the commission is only an emanation of the CSE, the latter can never give it the power to appoint an expert. Nor can it delegate its consultative powers to the commission.

1. Information and consultation of employee representative bodies (CSE, CSSCT) in the pandemic context Covid-19

The employer is obliged to inform employees by all means when risks arise. The Social and Economic Committee (CSE) and its possible Commission for Health, Safety and Working Conditions (CSSCT) therefore have an important role in crisis situations.

In companies with more than 50 employees, the CSE must be informed and consulted by the employer, in particular in case of important modifications of the organization of work related to the Covid-19.

It is the case in particular for:

- The important modifications of the organization of the work
- The use of partial activity (used by the service of public policy to prevent economic layoffs, which allows employers in difficulty to have all or part of the cost of paying their employees covered).
- Derogations to the rules relating to working hours and rest periods.

Usually, the employer's decisions must be preceded by the collection of the opinion of the CSE, which must be informed of the meeting during which it will be consulted at least 3 days in advance. However, if the urgency requires it, the employer may take precautionary measures to organize the work before having carried out the consultation.

The CSE can also be convened at the motivated request of two of its members, on subjects related to health, safety or working conditions.

2. Evaluation of the risks during the pandemic and the role of employee representatives

Any health crisis involving the health of employees and the continuity of economic activity must be prepared. In connection with the CSE and/or the CSSCT, it may be interesting to update the Single Risk Assessment Document (DUERP) aimed at defining the necessary measures to allow the company to continue its activity in case of a major crisis, such as a pandemic like the one experienced with the Covid-19.

According to the terms of the articles of the French Labor Code, the employer must transcribe and update in a single document the results of the assessment of the risks for the health and

safety of workers within the company. The employer must therefore ensure that the prevention measures he has adopted are adapted to take account of changing circumstances.

A sanitary crisis like the Covid-19 is a change of circumstances which must lead the employer to verify that the prevention measures which he usually implements are adapted to protect the employees against the risk of contamination.

This step of evaluation of the risks is crucial because it helps to determine the work situations in which the conditions of transmission of the Covid-19 are met and, according to the work stations, to adopt the measures of prevention to avoid these situations.

For greater effectiveness, the employer must rely on the representatives of the workforce, in particular the social economic committee (CSE), who are well placed to identify the situations at risk and to give their opinion on the relevance of the measures proposed by the employer.

The employer must thus update the single document of prevention of the risks by integrating the risk related to the Covid-19.

3. A practical example: the assessment of risks within the Amazon company in France during the pandemic

In its decision of April 24, 2020, the Court of Appeal of Versailles ordered Amazon to proceed (with the involvement of employee representatives) to the assessment of occupational risks inherent to the Covid-19 pandemic in all of its warehouses as well as to the implementation of prevention measures. The Court of Appeal specified all the obligations and requirements that had to be respected concerning the risk assessment. Thus:

- The employer is required to adapt the single document of assessment of occupational risks (DUERP) in order to integrate the specific measures related to the pandemic.
- The employer is bound to involve the staff representatives in this risk assessment. It must also formalize in detail all the steps involved in the implementation of preventive measures (e.g choice of measures, information of employees,

verification of the effectiveness of the measures). This will provide a body of evidence in the case of a conflict in this area.

- The employer is required to take into account the psycho-social risks related to the anxiety-inducing climate created by the epidemic risk and the work reorganizations linked to it.
- Finally, risk assessment must be done on a case-by-case basis, by workstation, in order to be as effective as possible.

The Court of Appeal has specified the procedure to be applied concerning the assessment of risks during the pandemic:

- Obligation of prior consultation of the Social and Economic Committee on the grounds that the specific contagiousness of Covid-19 leads to a significant modification of the work organization in Amazon's warehouses.
- Obligation of active participation of all the Social and Economic Committees in the risk assessment. This is justified by the fact that the concrete knowledge and experience of the work situations are essential for the risk assessment.

Therefore, the Court of Appeal reinforces the requirement of employee involvement in the elaboration of protective measures and lightens the activity restriction imposed on Amazon until these measures are implemented.

In fact, this decision has had a significant effect. Indeed, it was the only decision at the time that settled the issue of occupational risk assessment and the implementation of prevention measures during the pandemic. It therefore served as a reference for many companies afterwards.

However, the Court of Cassation, the highest court in the French legal system, ruled much later on the issue. In a decision of May 12, 2021, it held that "there is no legal or regulatory obligation for the employer to consult" the institutions representing the personnel concerning the elaboration of the DUER. (Cass. soc., 12 May 2021, n°20-17.288).

After seeing the practical effects of the worker’s representative on the OHS obligation, we are going to study which are the OHS authorities in France and how they work.

IV. OHS authorities, grievances procedures, practitioners.

Every employer has the duty to ensure the fulfillment of occupational health and safety in his company, according to his or her employees.
This is usually materialized by intern or extern authorities.

We will see right below the role of each authority:

A. Intern authorities in the process of OHS

1. Employer

The employer must take measures to ensure the safety and protect the mental and physical health of all workers at their workplaces.

This is illustrated in various fields, as we already saw before:

- Actions to prevent occupational risks

The employer must act to prevent occupational risks in several areas such as : risks of falling from a height; or risks of coming into contact with a working part of a machine; and even psychosocial risks such as overwork, aggression and internal and/or external violence etc.

- Information and training measures

The employer must set up information and training measures for the following employees : new recruits, employees who change their workstation, temporary workers and employees returning to work after being seen by the occupational physician

- Risk assessment in the company

The employer must avoid risks. If this is not possible, he must assess the risks and implement preventive measures.

To make it clear, he can refer to the definition of risk assessment which is composed by: the hazard is the capacity of a material, substance or work method to cause a harmful event and the risk that is considers as the association of a hazard with a worker

- Single occupational risk assessment document

The results of this assessment are included in a document called the single risk assessment document. This document is mandatory in all companies.

2. Employee

The employee must take care of his or her own health and safety and that of other people in the workplace. They must follow the instructions and guidelines set by their employer. If these rules are not respected, the employee may be sanctioned and held liable.
Depending on his or her training and level of responsibility, the employee follows and benefits from the following actions:

- Knowing and applying safety instructions
- Use the appropriate collective and individual protection means
- Follow training courses and obtain information

Finally, when the work situation presents a serious and imminent danger to his or her life or health, the employee may leave his or her workstation or refuse to move to it without the employer's agreement.
They can then exercise their right to withdraw and stop their activities until the employer has put in place the appropriate preventive measures.

3. Safety service referent

His role is to assist the employer in the management of health & safety at work. The employer MUST appoint a department manager and/or an officer in charge of safety and working conditions; he must call on an external party, this is conferred by the article L4644-1 of the French Labor Code.

A referent appointed primarily internally: the employer appoints one or more competent employees to deal with the company's occupational risk protection and prevention activities.

The employer first looks for an employee of his company. Most often: either people already in the company or people recruited to carry out this task. The employer ensures the competence of the person recruited or appointed, no diploma requirement.

Can also be an employee with delegated authority in the field of health and safety.

Use of an outside agent: a professional risk prevention agent belonging to the inter-company occupational health service to which it belongs; or professional risk prevention organizations, as it is mentioned in the article L4644-1 of the same code.

In this case, the employer informs his occupational health service.

In any event, the safety adviser's appointment is subject to the prior opinion of the economic and social committee of the company (as it is referred at the article R4644-1 Labor Code); the employer must give details of his or her competence in the field of occupational risk prevention, indicating in particular his or her qualifications and professional experience, and of the tasks that will be entrusted to him or her.

His main role is to deal with the company's protection & prevention of occupational risks.

Risk assessment process, diagnosis, development of the employer's prevention actions and monitoring of the implementation of these actions. In concrete terms: prevention leadership, development and updating of the Professional Risk Evaluation and action plan, welcoming and informing new recruits, carrying out and analyzing risks: link with the economic and social committee, etc.

4. Economic and social committee (CSE) followed by health safety and working conditions commission (CSSCT)

Since September 2017 each CSE must have a CSSCT. This is mandatory. Before this reform, there were two separate organization: the CSE on one hand, and the CHSCT on the other. Today, they are embodied in one larger entity: the CSE.

Its task is to deal with occupational health and safety issues. This new commission is subject to public order provisions which cannot be derogated from but its establishment and powers are

subject to agreement as article L2315-36 of the French Labor Code regulated it. Despite public order, many of its settings can be implemented by agreement between the employer and the employee's representatives.

Generally, this committee can have a few organizations in charge of several issues such as: economical questions, training, health and safety at work etc.

Regarding article L2315-36 of French Labor Code, this obligation to implement CSSCR is a public order one if you fulfill the following requirements:

- Companies with at least 300 employees
- Separate establishment of at least 300 employees
- Establishments mentioned in L4521-1

Since 2017, lawmakers have really focused on the CSSCT because this body is the one that has received the main attention.

The labor inspectorate can also enforce its creation in the first two situations mentioned above, depending on the nature of the activities, the layout or the equipment of the premises: Article L2315-37 of Labor Code.

It is the ESC which delegates to the CSSCR the attributions relating to health, safety and working conditions except:

- Recourse to an expert of the CSE provided for in articles L2315-78 of the same Code
- Consultative powers of the committee

Thus, the CSSCT cannot be consulted instead of the ESC, even if it can prepare the opinions of the CSE. It cannot appoint an expert either, but it can give some recommendation to the ESC.

The CSSCT is composed by:

- The employer or his representative. The employer can be assisted by employees from the company chosen from outside the committee. Together they cannot be more than the number of full staff representatives;
- Minimum of 3 staff representative members

Its members are appointed by the CSE from among its members, by a resolution adopted by a majority of the members present, for a period ending with the term of office of the elected members of the ESC.

The appointment of the members of a CSSCT, whether its establishment is compulsory or conventional, is the result of a vote by the members of the CSE by a majority of the votes of the members present at the time of the vote.

This appointment does not therefore require a prior resolution of the CSE setting out the terms of the election; regarding the case law: Cass. soc., 27 Nov. 2019, n° 19-14.224.

In concrete terms, the missions of the CSSCT are conferred by article L2314-3 of the Labor Code:

- Advisory voice during the CSSCT meeting

The occupational physician may delegate to one of the members of the occupational health service's disciplinary team with competence in occupational health or working conditions

The internal head of the occupational health and safety service, or failing that, the officer in charge of occupational health and safety

- Conditions must be invited to CSSCT meetings: article L2315-39 French Labor Code

The control agent of the labor inspection: L8112-1

The prevention service agents of the health and safety organizations

Training of CSSCT members: minimum duration of 5 days in companies with up to 300 employees & 3 days for those with less than 300 employees: this is regulated by article L2315-40 French Labor Code.

The members of the HSC can benefit from a specific training corresponding to the particular risks or risk factors, in relation to the activity of the company. The terms and conditions of this training are defined by a majority company agreement within the meaning of the first paragraph of article L. 2232-12 of the french code.

Methods of setting up the CSSCT: company agreement and otherwise agreement with the CSE in some specific cases.

5. Occupational health physician

Occupational health physician's mission is to prevent and avoid any deterioration in the health of workers as a result of their work. He manages their hygiene conditions at work; the risks of contagion and their state of health.

He also advises the head of the company or his representative in accordance with article L4622-3 of the French labor code.

Mainly, he works on the improvement of the working conditions, adaptation of workstations, techniques and work rhythms to physical and mental health, particularly in order to maintain employees in employment; and establishment hygiene.

He can decide on the individual monitoring of the state of health of workers, which is exclusively preventive in nature.

But that is not it, the health physician has a major role in the prevention of occupational risks (= set of situations and working conditions likely to have a direct impact on the health of employees who are exposed to them and reduce their life expectancy in good health); which requires individual monitoring of the employee.

This doctor is bound by an employment contract, in accordance with the article R4623-4 French Labor Code.

He is responsible for various tasks including the medical surveillance of staff, via medical examinations; consultation by staff representatives on the health and safety committee of the company or the employer on issues within his remit or action on the working environment.

He also drafts various documents and reports.

Moreover, in order to strengthen occupational health prevention, the 2 august 2021 act created a new role: employee prevention.

In reality, this Act stipulates that the employer, mandatorily chooses between autonomous health service or inter-company health service (common to several companies).

In one way or another, the main actor still remains the occupational doctor.

Furthermore, a last character exists in the field of the occupational health doctor. It's the occupational risk prevention worker (ORPW).

This actor was introduced by the 17 January 2002 Act. The Labor Code introduces a distinction between the ORPW:

- Employed by the occupational health service

This is regulated from article R. 4623-37 to R. 4623-39 of the Labor Code.

The occupational risk prevention worker has technical or organizational skills in occupational health and safety (ergonomics, toxicology, industrial hygiene, work organization).

He/she participates, with the exclusive objective of prevention, in the preservation of the health and safety of workers and the improvement of working conditions. They are an integral part of the multidisciplinary team of inter-company occupational health services. In this context, the IPRP carries out diagnostic, advisory, guidance and support tasks, and communicates the results of its studies to the occupational physician.

He has the necessary time and resources to carry out his tasks. He may not be discriminated against because of his preventive activities. He shall carry out his tasks under conditions which guarantee his independence.

- The occupational health officer shall be an external person called upon by the employer and the occupational health service for a specific task.

When the employer does not have competent employees to deal with protection and prevention of occupational risks, or when the occupational health service does not have the technical skills necessary for its intervention, both may call upon, where appropriate, an ORPW duly registered with the office in charge of it.

As we saw the internal authorities, we still need to focus on the external ones.

B. External authorities regarding the OHS

1. CARSAT: Pension and occupational health Insurance Fund

The CARSAT (« Caisse d'assurance retraite et de santé au travail ») is a Pension and occupational health Insurance Fund which has several tasks such as:

- Preventing occupational risks and involving companies in prevention

CARSAT is the reference organization for occupational risk prevention. If accidents at work and occupational diseases have a cost, their prevention is an investment. Through its advisory and inspection activities in companies, CARSAT fully plays its role as an insurer of occupational risks.

Through this mission, the aim is to reduce the number and severity of accidents at work and occupational diseases, and to participate in the improvement of working conditions in companies.

This is achieved through direct intervention in the workplace, collective action with professional branches, the design of assessment and prevention systems, training, but also through the dissemination of good practices.

CARSAT also offers financial incentives for prevention. The distribution of technical documentation and the regular organization of regular conferences or information meetings contribute to this prevention.

it’s also relevant to mention that CARSAT and the labor inspectorate are both invited to the meeting of the economic and social committee which relates to health and safety, as mere bodies in charge of this topic.

- Targeting major risks

Prevention also means being close to employees' concerns and watching out for the emergence of new risks. So, CARSAT is working in particular on the prevention of musculoskeletal disorders, occupational cancers and falls in the construction industry.

And to target their actions in the best possible way, the engineers and inspectors concentrate their efforts on statistical analyses of claims. This is done in partnership with many regional players.

- Setting the contribution rate for accidents at work and occupational diseases

CARSAT’s assignment is also to calculate and notify, each year, the contribution rate for accidents at work and occupational diseases. The calculation of the rate is based on the expenses to compensate for these accidents and diseases and to cover the risks incurred according to the sectors of activity.

These contributions paid by the company insure it against the risks of accidents at work, commuting accidents and occupational diseases.

2. INRS: reference organization for occupational risk prevention in France

The National Institute for Research and Safety (INRS) is a reference organization for occupational risk prevention in France. Its aim is to develop and promote a culture of prevention of occupational diseases. There are three major axes: identify / analyze / disseminate and promote.

The actions are mainly aimed at prevention specialists and companies and employees of the general social security system. Its main tasks are to:

- Identify the occupational risks and highlight the dangers
- Analyze their consequences for the health and safety of employees
- Disseminate and promote the means to control these risks within companies

It also has four complementary assignments:

-Studies and research in various fields covering the major part of occupational risk, from toxic risk to physical risk or psycho-engineers, doctors, chemists, ergonomists

-Technical, legal, medical and documentary assistance; responses to requests from the company or occupational health services

- Direct training of prevention actors, implementation of initial training schemes, design of continuous training materials

-Information via brochures, posters, information and awareness-raising materials for company managers/employees/safety officers and other stakeholders/occupational physicians.

As we studied the main occupational health and safety authorities and their operation, we must analyze right now the sanctions and the responsibilities of those who violate the safety obligation.

V. Sanctions and responsibilities for the violation of the safety obligation. (rights of employees who have been injured due to violation of safety obligations; right to refuse unsafe work; reasonable accommodations for workers whose disability has been caused by the violation of the safety obligation).

Historically, the first regulation concerning health and safety was in 1842 to forbid children under 8 years old to work in factories; as we saw in the first question. Even if this law is very old, we can find a principle that still applies: the fine is multiplied by the number of people concerned.

In France, the employee who is the victim of a work-related accident can take legal action and claim damages. The employer may be held criminally responsible for the employee's accident, since the French criminal law is also in charge of protecting and ensuring the safety of the employees.

A. Civil responsibility and inexcusable fault

First, civil responsibility rules have historically played a minor role in enforcing the employer's safety obligation. Thus, the April 9, 1998 Act establishes a special liability regime. An employee who is the victim of a work-related accident can claim compensation without having to prove the fault of his employer. However, the compensation is fixed and it is complex for the employee to take legal action against his employer. Indeed, in order to be able to take legal action, it is necessary to establish the presence of an "inexcusable fault" of the employer, which is very complicated to characterize. The "inexcusable fault" can be defined as a fault of exceptional gravity deriving from a voluntary act or omission, from the awareness of the danger that its author must have had, from the absence of any justifying cause. It is notable for the lack of an intentional element.

In the 2000's, the link between the inexcusable fault and the employer's obligation of safety has evolved. The Court of Cassation considered that the employer must take the necessary measures to ensure the safety of its employees. If he fails to do so, the breach of his safety

obligation is constitutive of an inexcusable fault. Thanks to this decision, it has become easier for the employee to take legal action and claim damages. However, inexcusable fault remains secondary in French law.

B. Focus on French criminal law and the employer's responsibility

On the other hand, the employer may be held criminally responsible in case of a work-related accident. The role of French criminal law is traditionally more important since it is composed of many acts to ensure the safety of the workers and to sanction misconducts by employers. In some cases, such as involuntary homicide, the employer may be subject to a prison sentence.

The work inspection services are responsible for ensuring that employers are complying with their general safety obligations. To this end, they have administrative powers (observations, formal notices) and judicial powers (official reports, summary proceedings). Violation of the obligations of the Labor Code in the field of health and safety is covered by criminal sanctions specific to labor law, implemented by the labor inspection and judicial police officers (police, gendarmerie).

C. The right of withdrawal

The purpose of the right of withdrawal is to enable employees and the employer to deal effectively with any dangerous situation that suddenly appears and threatens the life or health of employees. This right calls for urgent decisions when the company is effectively confronted with a situation known as serious and imminent danger.

Indeed, the exercise of the right of withdrawal obliges the employer to take measures to put an end to the dangerous situation. And this is explained by the obligation of safety of the result to which he is bound.

As a matter of fact, the worker shall immediately alert the employer of any work situation which he has reasonable cause to believe presents a serious and imminent danger to his life or health, as well as of any defect he observes in the protective systems.

He can withdraw from such a situation; the employee thus has a right to alert and withdraw. Indeed, the worker immediately alerts the employer of a situation presenting a serious and

imminent danger is not only a right of the employee but a real duty conferred by article L4131-1 French Labor Code. Moreover, withdrawing from a situation presenting a serious and imminent danger is a right for the employee and not an obligation. The exercise of the right of withdrawal is therefore optional, as the Court of Cassation said: Cass. soc., 9 Dec. 2003, n° 02-47.579.

Conditions for exercising the right of withdrawal are:

- A prior or simultaneous denunciation
- Alert the employer
- Absence of formalism
- The existence of a serious and imminent danger

To focus on this last point, to be able to legally withdraw from a work situation, the employee must have reasonable grounds to believe that he/she is in serious and imminent danger to his/her health (article L 4131-1 French Labor Code).

This subjective assessment is the basis for exercising the right to withdrawal, regardless of the actual existence of a situation of serious and imminent danger. The merits of the assessment of the "reasonable grounds for believing" are a matter for the sovereign assessment of the trial judges and not for the employer

D. The medical unfitness caused by a work-related accident or illness

French law provides for measures concerning employees who have suffered a work-related accident or illness, particularly when the safety obligation has not been respected. Specifically, the medical unfitness for work can be pronounced by the occupational physician when the employee's state of health (physical or mental) has become incompatible with the position he/she occupies.

Before making this decision, the occupational physician must conduct at least one medical examination of the employee concerned and carry out a study of the employee's workstation. It is only when the occupational physician finds that it is not possible to adapt or change the employee's workstation and that the employee's state of health justifies a change of workstation that the physician can declare the employee unfit for his/her workstation.

- **The notice of unfitness obliges the employer to seek a new position for the employee**

The employer is then required to offer the employee another position appropriate to his or her abilities, after consulting the social and economic committee. This is an obligation to redeploy the employee, which is framed by the French Labor Code, and is the subject of considerable case law.

This obligation is defined by several general principles, since the employer must look for a position adapted to the employee's abilities. Nevertheless, this position must also be adapted to the indications of the occupational physician. Furthermore, French law emphasizes that this obligation must be implemented in a fair manner by the employer: he cannot simply offer a position to the employee without clarifying the type of work entrusted to him, for example.

During the reclassification period, the employee has a special status. Indeed, the employee is not paid for one month from the date of the notice of unfitness. However, the employee receives a temporary incapacity allowance during this period.

- **Nevertheless, the employer may proceed with the dismissal of the employee if he is able to justify:**
  - The employer is unable to offer the employee a job compatible with his or her state of health,
  - or that the employee refused the proposed job.
  - The employer may also dismiss the employee if the notice of unfitness expressly mentions that any continuation in a job would be seriously prejudicial to his health or that his state of health is an obstacle to any reclassification in a job.

An employee who has become unfit for work as a result of an accident at work or an occupational disease (i.e., the cause of which is related to his or her work) and who is dismissed because he or she is unable to find another position or refuses the position offered, benefits from a specific compensation scheme:

- An indemnity equivalent to the indemnity in lieu of notice
- A special dismissal indemnity equal to twice the legal indemnity.