

Covid-19 - Criminal liability of employers: A real mitigation or a simple reminder of the principle of individualization of penalties?

On May 11, 2020, the state of health emergency was extended through the adoption of Law No. 2020-546⁽¹⁾ which supplemented existing provisions. One of the purposes of this legislation is to mitigate the employer's liability in the event of infection or exposure to infection by the Covid-19.

Indeed, many companies had to continue operating since the outbreak of the crisis, thereby exposing employees to the risk of infection. In the event of infection of one of them by the virus, the employer, i.e. both the natural person who is at the head of the company and the company itself as legal entity, may be held liable.

It is in this context that the French Government has undertaken to mitigate the criminal liability of employers. However, is this really a mitigation or simply a reminder of the principle of individualization of sentences?

Law No. 2020-546 has introduced in the French Public Health Code a new Article L. 3136-2 which reads as follows: *"Article L121-3 of the [French] Criminal Code is applicable taking into account the skills, power and means available to the perpetrator in the crisis situation that justified the state of health emergency, as well as the nature of his/her missions or functions, in particular as a local authority or employer"*.

This text does not purely and simply decriminalize infection by the Covid-19 or the fact of being exposed to

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Covid-19 for employees who continued to go to their workplace throughout the crisis, but simply invites judges to take into account the context of the offense before sentencing.

In principle, the individualization of sentences requires the judge to consider the circumstances surrounding the offence and the personality of the offender. It is to be hoped that this reminder will encourage judges to take a more practical interest in the background of the offences and, above all, in the perpetrators.

However, it should be pointed out that the new provision inserted in the French Public Health Code is intended to apply only to acts committed during the period of the state of health emergency, i.e. between March 24, 2020 and July 10, 2020. Furthermore, this provision applies to decision-makers responsible for implementing measures in a state of health emergency, as opposed to the politicians responsible for adopting such measures.

Some difficulties in the assessment of each situation and in the enforcement of this provision are nevertheless foreseeable. The French Labor Code provides that the employer must take the necessary measures to ensure and protect the physical and mental health of workers. If it does not take these measures whereas employees are exposed to the Covid-19, the infringement of the provisions of the French Labor Code may constitute an assault against the integrity of others or an endangerment of the lives of others. These offences will be established respectively when the employee has contracted the Covid-19 or is exposed to a risk of contracting it.

The extent of the employer's liability will then depend on the causal link (direct or indirect) and the nature of the fault (simple or qualified). The difficulty lies in assessing the wrongful conduct: does it constitute a simple breach or a deliberate violation?

Health recommendations have been evolving throughout the crisis, particularly with regard to the use of facial masks. Will an employer that did not make it compulsory for its employees to wear a mask from the beginning of the crisis be held liable? Will also the one that was unable to provide masks to its employees from the beginning of the crisis be held liable? To what behavior of a normally careful person will judges have to refer when assessing the situation?

As the text does not provide any details in this respect, judges will have to assess each situation on a case-by-case basis. They may, for example, rely on existing case law on asbestos, according to which the exposure of an employee to asbestos constitutes an endangerment of the life of others on the part of the employer, given the known dangerousness of asbestos. This reasoning could be quite the same with the Covid-19.

[1]<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041865244&categorieLien=id#:~:text=LOI%20n%C2%B0%202020%2D546,et%20compl%C3%A9tant%20ses%20dispositions%20%7C%20Legifrance>

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