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# Health in the workplace: new provisions effective on July 1, 2012 and reminder of related risks faced by companies

## The latest reform of the rules governing occupational health was introduced by the Law n° 2011-867 of July 20, 2011. The publication of two Implementation Decrees (Decree n°2012-135 and Decree n°2012-137) on January 30, 2012 provides a good opportunity to go over the main changes that will enter into force on July 1, 2012 and to recall some of the risks associated with the employer’s obligation to monitor the health of its employees.

It should firstly be recalled that under French law and in respect of health in the workplace, the employer is bound by a so-called *obligation de résultat*[1] and must therefore protect the mental and physical heath of its employees.

This issue has become today a centerpiece of social relationships. Disputes based on employer’s non-compliance with its obligations in terms of health in the workplace no longer fall within the exclusive jurisdiction of the Social Security Tribunal (inexcusable fault, indemnification of the victim and his/her assignees) and are increasingly brought before the Labor Court.

Given the surge in this type of litigation, it should be a high priority for companies to get more and more vigilant about due compliance with their obligations in matters concerning the health of their employees.

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## Changes concerning medical examinations

### a) The pre-hiring medical examination:

Effective on July 1, 2012, the purpose of the pre-hiring medical examination will no longer be limited to verifying that the to-be-hired person is fit for the relevant employment position but will extend to informing such person of the exposure risks associated with the relevant employment position and of the necessary medical follow-up (Article R 4624-1of the French Labor Code).

The possibilities to benefit from an exemption from the obligation to undergo a pre-hiring medical examination have been extended (Article R. 4624-12 of the French Labor Code): if the person holds a similar job **presenting the same exposure risks** and has undergone a medical examination in the past 12 months – if he/she works for another employer – or over the past 24 months – if he/she works for the same employer – he/she can be exempt from this obligation.

We would, however, recommend companies to act very cautiously, notably because of this new reference to a job "*presenting the same exposure risks*". In addition, it must be recalled that exemption from the pre-hiring medical examination only applies if the *médecin du travail* (occupational health physician) deems that such examination is not necessary and only if such occupational health physician is provided with the certificate of fitness for work issued further to the employee's latest medical examination.

### b) Periodic medical examinations:

The purpose of periodic medical examinations is also to inform the employee of the exposure risks associated with his/her employment position and of the necessary medical follow-up. Periodic medical examinations still must take place every 24 months. In certain circumstances, medical services may request that such examinations take place at longer intervals.

In respect of occupational medical examinations, collective bargaining agreements that include provisions that depart from legal provisions will automatically cease to apply on January 24, 2013. This will for instance be the case for collective bargaining agreements stipulating that occupational medical examinations must take place on a yearly basis.

For employees subject to a close medical monitoring, the periodic medical examination must take place at least every year. Effective in July 2012, periodic medical examinations will no longer take place at fixed intervals. The maximum period of time between two periodic medical examinations will simply be 24 months. Despite this change in the frequency of periodic medical examinations, it should be recalled that pregnant women benefit from a close medical monitoring. Companies must therefore be vigilant about the transmission of information to the occupational health physician. They have in particular the obligation to inform the occupational health physician of any leave for less than 30 days resulting from an occupational accident (Article R.4624-24 of the French Labor Code).

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### c) Medical examination prior to work resumption:

The medical examination prior to work resumption is today only a possibility offered to employee, the employee's family doctor or the *médecin conseil* (medical officer) of the French Social Security. As from July 1, 2012, this medical examination prior to work resumption will be **systematic for all persons who have been granted a leave exceeding 3 months** (Article R.4624-20 of the French Labor Code).

The initiative to conduct such a medical examination prior to work resumption still falls on the employee, the employee's family doctor or the *médecin conseil* (medical officer) of the French Social Security. Yet, we invite companies to remain vigilant to avoid any potential liability in this respect. Specifically, we recommend systematically informing the occupational health physician of any leave exceeding 3 months.

The purpose of this medical examination prior to work resumption is to allow the occupational health physician to suggest some adaptations of the workplace environment, to make recommendations in relation to the redeployment of the employee to another position and to his/her professional training in order to facilitate the redeployment or career reorientation of the employee.

### d) Medical examination upon work resumption:

There are fewer obligations in this respect.

Medical examinations upon work resumption remain mandatory after maternity leaves and leaves due to an occupational disease.

For all **other types of leaves** (i.e. leaves due to an occupational accident, non-occupational accident or sickness), a medical examination upon work resumption will be mandatory **only if such leaves exceed 30 days.**

The current obligation to undergo a medical examination upon work resumption "*in case of repeated absences from work due to health reasons*" set forth in Article R.4624-21 of the French Labor Code, is removed.

The removal of this obligation is positive because the notion of "*repeated absences from work*" had never been defined and was, therefore, a source of litigation. Yet, this can appear in contradiction with the employer's obligation to preserve the mental and physical health of the employees that is increasingly burdensome and more and more relied upon before French courts. As such, we believe that companies with employees regularly absent from work for sickness reasons or presenting physical or mental health problems, should continue to officially report these situations to the occupational health physician and to request the organization of a medical examination upon work resumption.

In this respect, it should be noted that Article L.4624-3 of the French Labor Code fixes the terms and conditions of a written correspondence between the employer and the occupational health physician, both when the occupational health physician himself/herself identifies a risk and when it is the employer that reports a matter to this physician.

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The purpose of the medical examination upon work resumption has been clarified. Effective on July 1, 2012, companies must ensure that the occupational health physician duly provides them with all required information. Indeed, at the end of the day, it is still the company that will be required to compensate for any loss/damage if any of the relevant applicable obligations is not complied with.

Following the medical examination upon work resumption, the occupational health physician will deliver a certificate of fitness for work, recommend the adaptations of the work environment or the redeployment of the employee to another employment position, and review the adaptation or redeployment proposals made by the employer in response to the issued recommendations.

Article R.4624-23 of the French Labor Code, in its new formulation, imposes on the employer the obligation to inform the occupational health services "***as soon as it knows the end date of the leave***" in order to make sure that the medical examination will be duly held within 8 days from the work resumption date.

Companies must carefully comply with their obligations to set aside any risk associated with medical examinations of employees. Examining a request for damages lodged by an employee who had not been required to undergo a pre-hiring medical examination, the *Cour de Cassation* (French Supreme Court) ruled that "*the employer, bound by an obligation de résultat in matters of safety at work, must ensure the effectiveness of the medical examination"* and that *"non-fulfillment of it obligations necessarily causes a damage to the employee"* (Labor Chamber of the *Cour de Cassation*, October 5, 2010, n° 09-40913).

Consequently, non-compliance with safety and health related obligations is likely to entitle the employee to compensation, without the employee having to prove a specific loss/damage as a result of said non-compliance.

## Changes concerning unfitness for work

### a) Establishing unfitness for work:

On the whole, the conditions in which unfitness for work must be established remain unchanged but the systematic organization of a medical examination prior to work resumption has been taken into account. As from July 1, 2012, the certificate of unfitness for work can be issued after one medical examination insofar as a medical examination prior work resumption has taken place in the preceding 30 days.

### b) Challenging the medical certificate of fitness / unfitness for work:

The timeline within which the certificate of fitness / unfitness for work can be appealed against is henceforth strictly regulated: the objection claim must be sent by registered letter, return receipt requested, to the competent labor inspector within two months as from the date of issuance of the certificate. An objection claim can also be lodged against the decision of the labor inspector within 2 months as from the date of issuance of the decision.

We can only deplore the fact that the legislator did not include in the newly applicable set of rules the

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obligation to inform the company (or the employee if an objection is lodged by the company) of the existence and status of the objection proceedings. Companies are indeed exposed to significant risks when they dismiss an employee due to the latter's unfitness for work and when such unfitness is subsequently cancelled following the appeal of the employee.

### c) No more notice period in case of unfitness for work due to a non-occupational cause:

The Law for the Simplification and Improvement of the Quality of French Law, promulgated on March 23, 2012, expressly stipulates that in case of a dismissal decided upon because it is impossible to redeploy the employee to another position or because the employee has refused a proposed redeployment following the recognition of his/her unfitness for work due to a non-occupational cause, the employment agreement shall be terminated upon notification of the dismissal. The employment termination date is thus aligned on the termination date applicable in case of dismissal for unfitness for work due to an occupational cause. The new provisions thereby finally remove the unworked and unpaid notice period that was necessarily detrimental to the dismissed employee.

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