



The Amazon affair: an important lesson in the strict control of prevention and protection measures in the light of a potential end to lockdown announced for 11th May.

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As mentioned in our **previous social alert of 9 March 2020**, companies are more than ever confronted with the dilemma between the gradual resumption of activity and their obligation to ensure the safety of their employees returning to that activity.

Some companies and associations have continued to operate while others have implemented the measures prescribed by the government: telework, imposed paid holiday and rest days, partial activity or furlough. Nevertheless, with a potential end to the lockdown announced for 11 May, companies must now consider all the necessary measures to take in order to resume their activity whilst respecting their safety obligations as employers.

Recent developments in legal case concerning companies that have continued to operate during the lockdown are instructive and suggest that judges will exercise a particularly strict control in the matter of employer liability.

In the cases of *ADAR*, *La Poste*, *Carrefour Market* and *Amazon*, these companies were condemned by the judges for both **an absence of adequate risk assessments in the context of a pandemic**, an insufficient consultation with employees after consultation with the CSE, and equally, **the inadequacy of the measures taken** in direct contravention of the provisions of Articles L.4121-1 et seq. of the Labour Code.

The Court of Appeal of Versailles has just confirmed the decision of the first instance by further ordering the companies concerned to "perform with the involvement of staff representatives, a full assessment of the occupational risks inherent in the Covid-19 epidemic" within 24 hours, whilst loosening the ruling by both adding a precise list of items qualified as essential products, and reducing the penalty payment initially set at 1 million euros to that of 100,000 euros per day and per infraction observed.

La Poste was also condemned for not taking into consideration the risks directly related to the return of its support functions for **the future reopening of its activity** and branches.

In the present context and conditions how can a plan for the end of lockdown be prepared? What can be learnt from these first court rulings in the context of the Covid-19 pandemic?

A capital obligation concerning the Single Risk Assessment Document "DUER" (Document Unique d'Evaluation des Risques)

Employers have the obligation to carry out a **proper and comprehensive assessment** in the context of a pandemic and take **substantial, specific, varied and appropriate measures** for the sector and the positions concerned of the company.

The preparation of a plan for the end of lockdown as part of a Business Continuity Plan (BCP) as well as the updating of the DUER are both essential in order to assure compliance with security obligations and to allow a gradual resumption of the company's activity.

These decisions clarify certain points concerning the risks to be included in the document.

These risks must be **assessed according to the different sites, work areas, positions**, and go beyond the simple provision of hydroalcoholic gel or masks. They include:

- **Taking strict measures when posts prevent a compliance with the recommended distance of security** or when the common areas of a company (turnstiles, changing rooms, canteens and cafeterias) make it impossible to guarantee a respect of everyday barrier gestures;

- **Taking into account the psycho-social risks** resulting from Covid-19 such as the changes in work organisation and working conditions, the risks inherent in telework (isolation, hyperconnectivity, and the difficulties of transitioning between private and professional lives);
- **Planning for the measures to take in the event of a confirmed case in the company, support for sick employees, procedures for cleaning the premises, etc;**
- **Providing procedures for tracing people who have been in contact with infected individuals,** security procedures for external service providers;
- **Providing for all measures possible to limit both the contact between employees** and the access to the company's establishments by putting alternatives in place: the using of paid leave balance (before 31 May), rest days, training, teleworking or work arrangements (change in working times to avoid peak hours, rota work, multi-functioning and adaptability, etc.);
- **Anticipating equally for potential indirect risks** such as reduced security on certain posts due to less employees being on site.

This list is of course not exhaustive and is not applicable to all companies as **the different risks must be assessed on the basis of a company's establishments.**

The decisions made show that the prevention document "DUER" must go beyond the few measures provided and communicated by the government; barrier gestures, stocks of hydroalcoholic gel, provision of masks are no longer sufficient on their own.

An absolute necessity to involve staff representative institutions (CSE, trade unions) and to be able to provide proof of this

The courts have highlighted the need to **include the staff representative bodies in any measures taken by the company to deal with Covid-19** and not just those which focus on employee safety. Indeed, although the consultation of these bodies is not mandatory for all the measures taken by an employer, the nature of the present health crisis implies that for all the effective measures to combat the spread of Covid-19 and to ensure the safety of employees these should be taken in consultation with the CSE.

The question of proof is all the more important as the ruling against Amazon insists on the need to provide documentary evidence: consultations with staff representative bodies, any agreements or disagreement, minutes of meetings, written communication of measures to employees, proof of posting. Actually dating such written evidence in order to strengthen proof is also essential in anticipation of any possible litigation resulting from the resumption of the company's activity.

The employee's role in any risk prevention is not to be forgotten.

The employer is required to **raise awareness and train employees** where necessary in instructions of hygiene and the use of protective methods, and more notably through practical exercises.

The employer must also **inform and raise the awareness** of all employees concerning prevention, and in particular with regard to **the individual reporting** of any risks of contagion which must then be strictly controlled. In order to anticipate any potential issues of liability, companies must keep as supporting documentation any written instructions and provide proof of the training courses that are organised.

Do not hesitate to involve the occupational doctor and the company's health services who will be key players in assessing the risks and in planning the most appropriate measures to be taken.

Contacts



Caroline Luche-Rocchia

Partner, Attorney-at-Law
E: CLuche-Rocchia@avocats-gt.com
T: +33 1 41 16 27 37

Grant Thornton Société d'Avocats

29, rue du Pont
92200 – Neuilly-sur-Seine, France
www.avocats-gt.com



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