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Physical Strain in the workplace

A CONCEPT TO BE TAKEN INTO ACCOUNT BY COMPANIES IN THEIR PREVENTION POLICY AND A SPECIFIC OBLIGATION TO BE COMPLIED WITH BY CERTAIN COMPANIES BEFORE JANUARY 1, 2012

The concept of physical strain at work (or physical strain in the workplace) became an important issue in the French labor and employment landscape during the debates on the retirement reform as trade-unions urged not to apply the increased legal retirement age to employees who had been working in particularly difficult conditions.

While Chapter II "Compensation of physical strain at work" of the Law of November 9, 2010 (the "Law") does provide for some exceptions to the legal retirement age because of the exposure to physical strain factors but such exceptions are limited to employees suffering from a minimum disability rate set forth by law. Yet, the Law introduced new provisions on the prevention of physical strain at work both in the French Labor Code ("FLC") and in the French Social Security Code ("FSSC"). These provisions were completed by two Decrees published in July 2011 (Decree n°2011-823 and Decree n°2011-824 of July 7, 2011) and by Circular DGT n°08 of October 28, 2011.

The publication of this Circular on company-wide collective bargaining agreements and action plans to favor the prevention of physical strain at work gives us the opportunity to review the new obligations imposed on companies in terms of physical strain at work.

1. Definition of physical strain at work

No strict definition

The French Labor Code does not, strictly speaking, include a definition of physical strain at work.

Yet, a definition seems to stem from the provisions set forth in Article L.4121-3-1 of the FLC that refers to an exposure to ***"one or several occupational risk factor(s) determined by Decree and related to significant physical constraints, an aggressive physical environment or certain work rates likely to have irreversible and identifiable lasting consequences"*** on the employee's health.

The occupational risks referred to above are listed in Article D.4121-5 of the FLC:

1° In relation to significant physical constraints:

a) The manual handling of loads defined in Article R. 4541-2 of the FLC;
b) Strenuous positions/postures defined as forced positions of body joints;
c) Mechanical vibrations mentioned in Article R. 4441-1 of the FLC.

2° In relation to aggressive physical environment:

a) Hazardous chemicals enumerated in Articles R. 4412-3 and R. 4412-60 of the FLC, including dusts and smokes;
b) Activities performed in an hyperbaric environment, as defined in Article R. 4461-1 of the FLC;
c) Extreme temperatures;
d) Noise mentioned in Article R. 4431-1 of the FLC.

3° In relation to certain work rates:

a) Night work in the conditions set forth in Articles L. 3122-29 to L. 3122-31 of the FLC;
b) Work in rotating shifts;
c) Repetitive work characterized by the repetition of the same action, at a determined rate, imposed or not by the automatic move of a piece or by piece-work remuneration, within a defined cycle time.

Distinction between occupational risks and physical strain:

It is very important for companies to distinguish between these two notions that, even though superposable, must not be confused.

The modification made to Article L. 412-1 of the FLC that defines employers' obligation under "General Prevention Principles" in terms of health and safety in the workplace is a proof that the two aforementioned concepts must be distinguished. Establishing the principle according to which the employer "*takes the measures necessary to protect the physical and mental health of the employees*", the Law imposed, in addition to the already prescribed "*actions for the prevention of occupational risks*", actions for the prevention of physical strain at work.

Similarly, the Law expressly vested a new competence to the Health, Hygiene and Safety Committee by completing Article L.4612-2 of the FLC as follows: "*It [the Health, Hygiene and Safety Committee] carries out the analysis of the employees' exposure to physical strain factors*".

2. New obligations imposed on companies:

General Obligation:

The prevention of physical strain is now part of the general obligations imposed on companies with respect to heath in the workplace, just like the prevention of occupational risks.

The question is whether companies have in this respect an ***obligation de résultat*** or an ***obligation de moyens***. With an ***obligation de résultat***, a party must fulfill a specific obligation or arrive at a specific result. With an ***obligation de moyens***, the party must simply implement or use, to his/her/its best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result.

With respect to the prevention of occupational risks, companies have an *obligation de résultat*. With respect to the prevention of physical strain at work, only time will tell… but one thing is certain: companies, whatever their size, have at the very least an *obligation de moyens*.

Specific obligation: the individual exposure sheet:

The aforementioned Article L.4121-3-1 of the FLC imposes on companies the obligation to keep an individual exposure sheet for all employees exposed to physical strain at work.

This sheet shall become mandatory on January 1, 2012 and must record all prior exposures. A forthcoming Decree will set the terms and conditions for the establishment and update of this sheet.

The individual exposure sheet shall record information on:

- The physical strain conditions to which the employee is exposed,
- The exposure period,
- The preventive measures taken by the employer during the exposure period to remove or reduce physical strain factors.

The individual exposure sheet shall be communicated to the occupational physician.

In the event the employee is granted a medical leave exceeding a duration to be fixed by Decree or contracts an occupational disease, **a copy of the individual exposure sheet must be delivered to the employee** when the latter leaves the company.

3. The mandatory company-wide collective bargaining agreement or action plan on the prevention of physical strain at work :

Companies subject to this new legislation have the obligation either to negotiate a company-wide collective bargaining agreement (“CBA”) or to set up an action plan on the prevention of physical strain at work before January 1, 2012, failing which they will be liable for a financial penalty. The CBA or action plan must have a maximum duration of three years.

The companies that are subject to this obligation:

This obligation applies to companies:

- **with at least 50 employees** or belonging to a group with at least 50 employees,

AND

- having **at least 50% of their employees exposed to physical strain factors**.

The first step is, therefore, to identify exposed employees. This identification is made by the company that must record the proportion of exposed employees in the so-called occupational risk assessment document (*Document Unique d'évaluation des risques professionnels*).

Shall be exempted from this obligation to negotiate a CBA or to implement an action plan companies with 50 to 299 employees or belonging to a group with 50 to 299 employees that have already concluded an industry-wide agreement on the prevention of physical strain at work.

The nature of the obligation:

Companies have the option to either negotiate a CBA or to unilaterally implement an action plan. The provisions set forth in Article L.138-29 of the French Social Security Code that define the rules applicable in case of non-compliance with this obligation does not specifically recommend one option or the other.

The content of the CBA or action plan:

Pursuant to Article D.138-28 of the French Social Security: "the CBA or action plan ***is based on a preliminary diagnosis of physical strain situations and defines the associated preventive measures as well as the procedures to follow-up their effective implementation***.

Each focus areas addressed in the CBA or action plan must ***include quantifiable targets, the implementation of which is assessed pursuant to follow-up indicators****. Such indicators must be communicated, at least once a year, to the members of the Health, Safety and Hygiene Committee, or if there is no such Committee, to the staff representatives".*

The preliminary diagnosis phase requires a more thorough analysis than the mere identification of exposed employees. The diagnosis must indeed enable the company to define the specific exposure factors in order to (i) remove – or at the very least – reduce them and (ii) to set up the exposure indicators and the follow-up procedures.

The CBA or action plan must address at least one of the following focus areas:

a) The reduction of multiple exposures to physical strain factors

OR

b) The adaption or layout of the work station.

The CBA or action plan must also address at least two of the following issues:

a) The improvement of working conditions, notably in terms of organization,
b) The development of competences and qualifications,
c) The end of career planning,
d) The retention of employees exposed to physical strain factors.

Registration formalities:

Two copies (hard copy plus electronic copy) of the CBA or action must be registered with the *Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi* (Regional Directorate for Companies, Competition, Consumption, Labor and Employment or "DIRECCTE")

Control by the labor inspector :

The administrative authorities do not control or review the CBA or action plan at the time it is registered.

When performing an investigation, the labor inspector (or controller) will check that

- The CBA or action plan addresses the mandatory focus areas and issues,
- The CBA or action plan includes quantifiable targets,
- The CBA or action plan contains indicators for each addressed focus area and issue,
- The preliminary diagnosis has been performed, a prevention program established and follow-up procedures defined.

If any of the aforementioned requirements is not met, the CBA or action plan will be considered as insufficient.

If the CBA or action plan is considered insufficient (or if the company has neither negotiated a CBA nor implemented an action plan), the labor inspector (or controller) will formally request the company to remedy the situation. The company shall then have 6 months to establish, negotiate or complete the CBA or action plan on the prevention of physical strain at work.

If the company has difficulties remedying the situation, it will be entitled to ask the Labor inspector (or controller) to take into account the grounds for its non-compliance.

Grounds for non-compliance include, but are not limited to: the occurrence of economic difficulties affecting the company, pending reorganizations or mergers, pending insolvency or bankruptcy proceedings, crossing of the staff thresholds set forth by law in the preceding 12 months or any other reason outside the employer's control. Yet, the company must have fulfilled at least part of its obligations in terms of prevention of physical strain at work. In other words, full non-compliance will not be tolerated.

The financial penalty:

The decision to apply a penalty falls within the sole responsibility of the DIRECCTE.

At the end of the six-month period granted to the company to remedy non-compliance, the Director of the DIRECCTE will decide whether the company must pay a financial penalty and, if yes, fix the applicable penalty rate by taking into account the actions taken by the company and the measures it has implemented.

The financial penalty can amount **up to 1 % of the wages paid to the exposed employees** during the period where the company is not covered by a CBA or action plan. **The penalty has no retroactive effect** and, therefore, only applies from the notification of the penalty rate to the company. The financial penalty is reportedly due for each day during which the company fails to comply with its obligations. It is collected by the URSSAF (French agency responsible for collecting social security contributions) and the company must mention it in its contribution returns.