

# French Considerations for Returning to Workplaces in the Wake of COVID-19

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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On April 28, 2020, the French government announced the outline of its plan to end the lockdown measures currently in force, scheduled for May 11, 2020. (This date may be postponed if the hospitalization and death rates related to the coronavirus epidemic have not sufficiently decreased as expected by May 11, 2020.) The outline included rules for employers and employees.

In addition, the Ministry of Labor published a protocol on May 3, 2020, establishing general rules for employers to ensure the health and safety of their employees upon returning to work. The ministry will produce approximately 60 guides consolidating and adapting by professional sector the conditions for returning to work. More than 30 of the guides have been published and define general health rules to be implemented in the workplace.

This protocol and guidance are not legally binding, but set general instructions and doctrine of employee protection. Failing to comply with them would make employers more likely to be found liable in a case of employee infection, and could justify employees using their right to refuse to work in order to avoid exposure to serious and imminent danger.

## Labor Law Matters Relating to the Conditions for Resuming Work

The government's plan for returning to the workplace in the wake of COVID-19 encourages telecommuting whenever possible as well as implementing measures to avoid overcrowding. As the government has emphasized throughout the crisis, employers who are able to do so are required to prioritize telecommuting for their employees.

In addition, the protocol provided by the Ministry of Labor provides that for workers unable to telecommute, the practice of staggered working hours should be implemented in order to distribute the flow of employees on public transportation and reduce the simultaneous presence of employees in the same work area. The ministry's guidelines state that each employee should be attributed an area of at least four square meters to ensure social distancing and minimized contact, meaning that an office with a surface area of 60 square meters can hold no more than 15 employees at the same time.

In addition to these rules, the sector-specific guidelines contain instructions tailored to different labor activities. For instance, the retail sector cannot comply with the four-square-meter rule mentioned above since certain employees must be in contact with clients, and therefore the guidelines require that employees are provided with higher-grade safety equipment.

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Lastly, as was recently highlighted in emergency court decisions involving an e-commerce platform, companies must work closely with employee representative bodies in the entire process of risk assessment and the implementation of preventive measures since that process impacts the employees' working conditions. In that case, an appellate judge ordered the e-commerce platform to limit its activity to essential goods pending an assessment of the risks linked to the coronavirus epidemic, subject to a penalty payment of €100,000 for every good that the company handled that did not fall under an essential category, in particular because the jurisdiction considered that the company had failed to involve its works council in the risk assessment procedure.

## Required Health and Safety Measures To Protect Employees

Firstly, employers must update the mandatory "health and safety risk assessment document" that lists the risks to which their employees might be exposed, and consult with the works council about such update.

Secondly, employers need to implement specific measures to address social distancing and the layout of work spaces. The wearing of masks will be mandatory when the rules of contact minimization cannot be guaranteed, and the type of protection will vary according to working conditions. Employers may consider some of the following measures:

- modifying seating and workspaces to create more distance between workers;

- implementing capacity limits for meeting rooms;
- installing physical barriers to separate workers from each other;
- providing resources that promote personal hygiene, such as hand sanitizer, hydroalcoholic gel, disinfecting wipes, tissues and no-touch trash cans.

Thirdly, employers are responsible for providing employees with required health and safety equipment, which includes masks when required. The type and grade of equipment necessary depend on the level of exposure for each employee.

In addition, employers whose employees come into close contact with clients or third parties must consider additional protective measures, such as planning a traffic flow within offices to avoid people crossing each other, or providing high-protection masks to concerned employees. Two recent decisions rendered by emergency courts involving a home assistance association and a supermarket considered that because employees in the cases were particularly exposed to the risks linked to the COVID-19 epidemic, additional regulation should apply, and the workers should be provided with higher-grade protective equipment.

Lastly, the French government was explicit in the fact that employers in France could not test their employees or require employees to be tested. Additionally, employers cannot check their employees' temperatures or make temperature checking mandatory for their employees. Employers can, however, propose that employees voluntarily measure their temperatures each morning and call in sick if the results are unusually high.