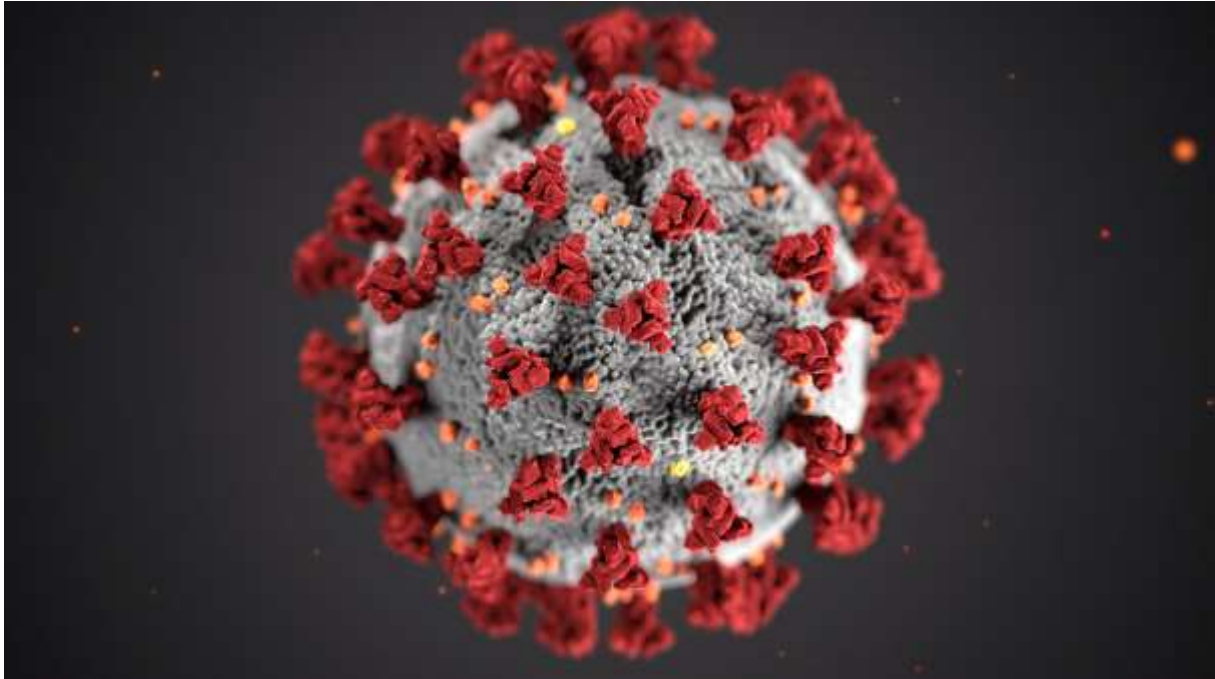


EMPLOYERS: HOW TO ANTICIPATE STAGE 3 OF THE CORONAVIRUS?



In this context of crisis, most French employers have already mobilized to inform their employees about the precautionary measures to adopt both in terms of behaviour and hygiene, in order to avoid risks of contagion in the workplace. Some have also already implemented a series of measures aimed at work organisation by favouring teleworking or videoconferencing or even by restricting certain journeys. Should the employer already anticipate phase 3 and how?

Whether through memos, circulars, e-mails, updates via an intranet, or the use of crisis units, most employers regularly issue health instructions based on information provided by the health authorities, which are themselves constantly evolving.

At the time of writing this article, we are still at "stage 2" of the National Plan for the Prevention and Control of "Pandemic Influenza" (*National Pandemic Influenza Prevention and Control Plan in its latest version of October 2011*) and we could move on to stage 3 very soon, some people already speak of "reinforced stage 2".

At stage 3, the so-called epidemic phase, where the virus will circulate throughout the country, it will no longer be a question of preventing or at least delaying its circulation but of dealing with an epidemic. Should the employer already anticipate and take new measures at the dawn of this stage 3?

It should be remembered that the employer is responsible for the health of employees in the workplace and, as such, must implement measures to preserve it. In accordance with Article L.4121-1 of the French Labour Code, the employer has a safety obligation towards its employees which obliges

him to put in place an organisation and means adapted to the risks of endangering employees. So, what does the passage to stage 3 imply for the employer's safety obligation?

How is the health risk assessed?

The hierarchy of stages 1, 2 and 3 of the Plan - which has no legal value - is an assessment of the health risk by the authorities for the population; these stages reflect the progression of the epidemic in the territory, correspond to the objectives of crisis management and serve as an aid to preparedness and decision-making.

In stage 2, the objective of the public authorities is to limit the spread of the virus, the reasoning being "cluster".

Stage 3 - the epidemic phase (depending on the Plan it can last 8 to 12 weeks) - is characterized by the circulation of the virus throughout the territory (the epidemic is declared). The purpose of stage 3 is therefore to manage the consequences of the epidemic under the best possible conditions.

Thus, some of the measures taken in stage 2 will no longer be necessary. For example, as the virus circulates on the territory, there will no longer be any reason to confine people returning from areas exposed to active virus circulation.

Locally, Prefects and Directors of the Regional Health Agencies (ARS) have geographical responsibility. Local authorities and rectors implement these decisions and take the resulting measures in schools and educational establishments for the latter. They will adapt these operations according to the evolution of the situation or to the characteristics of certain territories.

However, since 6 March, in view of the spread of the virus, a measure to close all schools has been ordered in the Oise and Haut Rhin.

What are the consequences for the employer?

Employers will therefore also have to adapt their security policy to the changing situation, the characteristics of the jobs and the territories concerned.

In the event of a risk of pandemic and a proven pandemic, it remains essential for the employer with a safety obligation to have identified upstream the risks to which the various categories of employees are exposed and to assess the needs to preserve the continuity of the company's activity.

The employer must first continue to inform his employees regularly about the risks of contagion.

The employer must also issue and communicate safety instructions and may therefore relay regularly updated government communications (<https://www.gouvernement.fr/info-coronavirus>).

Preventing the risks of epidemic contagion cannot be limited to information alone, it is also necessary to constantly adapt existing systems, involve the Social and Economic Committee, develop measures to prevent contagion, check the suitability of personnel to wear equipment, and develop safety instructions specific to the risk of an influenza pandemic (*Circ. DGT 2009/16, 3 July 2009, on the influenza pandemic*).

In this respect, employers are strongly advised to provide their employees with so-called personal protective equipment, disinfectant wipes and hydroalcoholic gels or sprays and to involve the Social

and Economic Committee in the measures even if the employer is free to choose the equipment he intends to provide.

The employer will also be able to impose the use of this equipment when he considers that the risks are significant.

Wearing an FFP2 mask, which protects the wearer, is particularly recommended for employees in close and regular contact with the public (*Circ. DGT 2009/16, 3 July 2009, on the influenza pandemic*). The primary function of "surgical" masks is to protect the people they are facing. This mask does not protect the wearer from the risks of contamination. Gloves and goggles may also be required.

What preventive and corrective measures can the employer implement in terms of work organisation?

The employer will have to consider measures aimed at "the establishment of an organisation and appropriate means" (Art. L 4121-1 of the Labour Code).

The coronavirus is an exceptional circumstance.

In these circumstances, the employer may impose, where the activity lends itself to it, the adaptation of the employment contract to allow for the continuity of the activity and ensure the protection of employees; this adaptation may take the form of a change in working hours, shift arrangements or even workplaces and the use of teleworking.

The DGT circular 2009/16 of 3 July 2009 on the influenza pandemic envisages this possibility: "*modifications or adjustments in the performance of work will probably be unavoidable. They will have to be temporary (duration of the crisis), proportionate (attention to the essential elements of the contract) and directly related to the 4 constraints suffered (degraded functioning) and to the desired goal (maintenance of essential activities)*".

In the case where telework is not suitable due to the activity of the company and the characteristics of the workplace, the question arose as to whether the employer can force employees to stay at home, obviously the employer will be able to resort to the quota of "RTT" days (*Reduction of Working Time days*) (provided for in the collective agreement) as part of its search for the most economical solution.

What are the other possibilities?

The principle is clear, the employer cannot take note of the illness of his employees. The only person authorised to draw conclusions from the contamination of an employee by the coronavirus is to date a doctor authorised by the Regional Health Agency; at stage 3, in view of the wave of requests, it is highly likely that a new system will be established for contaminated employees - as is already the case with the <https://declare.ameli.fr/> system allowing simplified work stoppage declarations for employees who are parents and whose schools remain closed - it remains to be seen who will be able to prescribe work stoppages. Occupational physicians continue to regularly inform employees on all matters relating to their health.

However, in the event of contamination, the employer must immediately take measures to isolate or even temporarily close and decontaminate the premises concerned.

The employer who notices a galloping contagion in his company or who would face the consequences impacting at the level of his activity (absence of the customers, drastic reduction of the orders) can resort to the device of partial activation which makes it possible to benefit from partial unemployment.

To date in France, 400 companies have activated this system: the employer must make a request on a dedicated website (<https://activitepartielle.emploi.gouv.fr/>).

This procedure has already recently been implemented by a restaurant owner whose establishment is located in a so-called cluster area.

It should not be forgotten that despite the measures that the employer must/may take, the employee is the first to be concerned by his or her health at work and is therefore entitled to exercise certain rights.

Will the right of withdrawal be more easily invoked at stage 3?

If the employee believes that the risk of coronavirus propagation has the characteristics of a "serious and imminent danger", the employee must alert his or her superiors in writing, preferably.

Under the condition that he has exercised his right to alert, the employee "may withdraw from a situation" in which he has "reasonable grounds to believe that it presents a serious and imminent danger to his life or health" by exercising his right to withdraw (*Art. L. 4131-1 of the Labour Code*).

It is therefore required at this stage to be in good faith and not to prove a real cause of danger. Hence the importance, for the employer, of setting up and adapting these measures.

It will therefore be a question of assessing for the judge of urgency (*référé prud'homal*) on a case-by-case basis the sincerity and legitimacy of the feeling of endangerment in a work situation; for example, it would not be legitimate today for an employee's request to be based on a risk when travelling on public transport.

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