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## **ANTICIPATION OF THE CONSEQUENCES OF THE EMPLOYER'S GROSS NEGLIGENCE**

In France, when an employee is victim of an accident at work leading or not to the recognition of an occupational disease, he may attempt to seek the liability of his employer as a legal person (on a civil level) and as a natural person (on a civil or on a criminal level).

In recent years, this kind of action has grown significantly, exposing firms established in France to a real risk of condemnation that is not fully transposable in other countries.

It is therefore imperative, in order not to endanger the solvency of the French establishment, to provide adequate guarantees via an adapted French local policy granting the insurance guarantee named "Faute Inexcusable de l'Employeur".

### **1- A procedure now widespread in France**

Any person, who is victim of a work accident, if he determines that his employer has not complied with his safety obligation, may seek the responsibility of his employer on basis of "Faute Inexcusable de l'Employeur".

This action has undergone many legislative and case law developments in recent years.

Since the amendment of the definition by the Court of Cassation in 2002, the simple fault committed in safety measures taken by the employer with respect to its employees is sufficient to determine an inexcusable fault.

Thus, even a minimal breach can result in a conviction on this ground.

If we take an example:

An employee driving a forklift breaks down and intervenes under his truck, engine turned on, while he had a clear procedure from his employer requiring him not to intervene and call maintenance.

The judges noted that the truck had not made its last inspection visit. Thus, if the visit had been carried out on time, the engine might not have broken down.

The judges therefore held the inexcusable fault of the employer in this area despite the employee's failure to comply with the safety procedure.

Currently it is a gross negligence ("Faute Inexcusable") for an employer to fail to fulfil its obligation to ensure the safety of its employee, in particular with regard to occupational diseases contracted as a result of products manufactured or used by the firm, where the employer was, or should have been, aware of the danger, and failed to take the necessary measures to protect its employee.

To discharge its responsibility, the employer will therefore have to prove that it has put in place all the necessary measures to protect its employees to avoid the accident.

Thus, since 2002, the number of procedures in this area has increased sharply.

This trend has been reinforced by the publication of the so-called "Macron" orders, which capped the compensation to be collected by employees in the event of dismissal recognized as being without real and serious cause.

Employees are therefore now increasingly systematically trying to seek the firm's responsibility on this ground, once the dismissal has its origin in an accident, in order to increase their compensation.

It's so since it is extremely easy to operate this procedure in France: a simple phone call to the CPAM (Caisse Primaire d'Assurance Maladie / Social Security in France) is enough to initiate its implementation.

No "gravity" of the accident in its bodily consequences is required to trigger this action.

Even a small personal injury can therefore be compensated, including with a partial permanent incapacity for work of 0%.

## 2- Compensation in case of a recognition of « Faute Inexcusable »

From the moment when the social pole of the Judicial Court has been able to recognize the inexcusable nature of the employer's fault, this will open the right to compensation for a number of positions of damage.

First, as soon as the PPI (partial permanent disability) is greater than 10%, this action will allow an increase in the rate of the pension paid by the "Sécurité Sociale".

This increase will be paid in the first line by the "Sécurité Sociale" and then recovered from the employer directly. It is calculated in capital payable at one time.

Regardless of the severity of the accident suffered by the employee, the "Faute Inexcusable" will be entitled to compensation posts under ordinary law, namely:

- Health care expenses and travel expenses
- Loss of earnings during the period of incapacity
- Temporary occupational injury
- Loss of future professional earnings
- Third party assistance after consolidation
- Endured suffering
- Aesthetic harm
- Damage to approval
- Sexual harm
- Temporary functional deficit

- Housing development
- Purchase of a suitable vehicle

These positions of prejudice will be evaluated by a medical expert and transcribed in monetary compensation by the judges.

Here too, the funds will first be advanced by Social Security and then recovered from the employer directly.

If the victim died in the accident or after it, the rights holders will be able to claim compensation for these positions of damage instead of the victim.

### 3- Risk of recourse against the employer (natural person)

Lawyers for victims very regularly advise, in parallel with a civil action against the legal entity, to conduct a criminal action against the employer as natural person (this may be a director or an officer of the legal entity).

Indeed, the personal responsibility of the firm manager can be retained in the event that he personally committed a fault, reaching the safety of employees. This may be in case of violation of hygiene and safety rules, lack of adequate training, etc.

This type of action is characterized by a complaint, a police investigation and can result in convictions such as fines or prison sentences.

On the criminal side, we also advise to take out a guarantee " D & O " either locally in France or through a Master contract covering an international group and all its subsidiaries including France.

For this type of proceedings, these contracts allow the manager (natural person) to be able to benefit from the reimbursement of defence costs related to the proceedings as well as any damages that would be borne by him, for example in the case of a personal conviction in this regard for breach of a hygiene or safety rule.

However, fines or prison sentences will not be covered.

### 4- Effectively cover inherent risks of "Faute Inexcusable"

On a civil level, we advise to take out a French local "Public Liability" insurance in order to provide a guarantee " Faute Inexcusable de l'Employeur " generally between 1.500.000,- and 3.000.000,- € per year depending on the type of activity of the underwriting firm.

These guarantees make it possible to cover:

- Defense costs related to the action taken by the employee ; in this regard, the insurer holds the direction of the trial, he has the choice of the law firm he wishes to mandate
- The pension increase ;
- The items of damages under ordinary law.

Will never be covered

- Fines or prison sentences
- The increase in the rate AT / MP (Accidents at work / occupational diseases) ;
- Intentional misconduct.

To put it in a nutshell, we advise all our international clients to have a local cover in France to be cover in case of actin on the basis of this “faute inexcusable de l’employeur”.  
If you have any question, our international team is here to assist you.