

## Signature Litigation

### Anxiety: a complete change in case law that raises a lot of questions

On 5 April 2019, the French Supreme Court sat in plenary session and handed down a decision that has already given rise to many articles and comments. Below are some of our thoughts and concerns about the future of a type of litigation that has already cost companies in France a lot of money.

#### What is the Plenary Assembly?

The Plenary Assembly of the French Supreme Court is a bench composed of the First Presiding Judge of the French Supreme Court and the three representatives of the six chambers (Commercial, Criminal, Social and the three Civil Chambers). It is the most formal bench whose decisions are highly respected by the trial court Judges. Until now, the decisions pertaining to anxiety related to the exposure to asbestos were handed down by the Social Chamber.

#### What did the Plenary Assembly decide on 5 April 2019?

In this decision, the Plenary Assembly made a major change by creating the possibility to obtain compensation on the ground of anxiety for **all** employees who can prove exposure to asbestos. Before, the employee had to prove that he/she had worked on a site listed in the Ministerial Orders as triggering the right to the "asbestos workers' early retirement scheme". Only these employees were eligible. Now, all employees are eligible.

However, the Court seems to have decided to regulate this new possibility to obtain compensation, by erasing any trace of the special regime that had been implemented by the Social Chamber up until now:

- By subjecting the recognition of the employer's liability to the **rules of ordinary law**, including, in particular, the requirement to prove that the employer breached its safety obligation;
- By requiring that the employee justifies that his/her exposure to asbestos has generated a risk of developing a **serious disease**;
- By requiring that claimants establish their **anxiety that they have personally suffered**.

#### The questions that arise / Signature Litigation's analysis

The return to the application of ordinary civil liability law in asbestos-related litigation can be praised. It had indeed been strongly undermined for nearly 10 years. However, one cannot help but think that this decision will pave the way for a new wave of litigation that will raise many questions that will absolutely have to be studied by employers, for their defence.

I/ There is no indication concerning the **starting point of the limitation period** for claiming such compensation. However, under ordinary law, the starting point of the limitation period is the "*day on which the holder of a right knew or ought to have known the facts as a result of which his/her right can be exercised*" (Article 2224 of the French Civil Code). According to civil case law, the starting point will have to be adapted to each individual case. Will the Social Chamber accept such an approach that it has always refused to follow?



2/ The Court does not specify either how the concept of "**serious disease**" should be interpreted. The question arises, for example, for pleural plaques, the most common disease identified and medically deemed to be benign. Is there going to be a medical debate on what is serious or not and on the determination of the risk of developing a form of cancer?

3/ How will it be possible to organise the new requirement for the employee to prove his/her anxiety and the fact that the Social Chamber considered that anxiety is not an illness and that cases should be submitted to the jurisdiction of Labour Courts rather than Social Security Courts? What kind of proof will the employee be able to provide if not a medical certificate?

4/ Who will really be eligible? All the employees who have received a certificate of exposure to asbestos? Employees who worked after 1996 (date of the ban on asbestos) on a listed site? Employees exposed to environmental risks only?

### What about afterwards...?

Two main questions currently arise when reading this decision:

- Does this decision create a division between **the ordinary law regime** applied to asbestos exposure on **unlisted sites** and the **special regime** applied up until now concerning asbestos exposure on **listed sites**? In other words, can we expect an extension of ordinary law to cases related to listed sites? This is what we have been arguing for years with some trial courts accepting our analysis, considering automatic compensation *contra legem*.
- Is this decision likely to be the starting point for a compensation regime under ordinary law for anxiety that any employee who can prove **exposure to a controversial or dangerous substance other than asbestos** could benefit from?

The Signature team is available to discuss in more detail the impact that this decision could have on you. Feel free to contact any of us.



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