REBER

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FAQ regarding the labour law implications of the coronavirus pandemic

In the course of the coronavirus pandemic measures (COVID 19 Ordinance 2) enacted by the Federal Council on 16 March 2020, various legal questions arise, particularly in the area of labour law. We have compiled the most important current issues.

1. What general measures must employers take to protect their employees?

In accordance with the duty of care set out in Art. 328 of the Swiss Code of Obligations (CO), the employer must take due account of the employee's health. In connection with the coronavirus, this means that the employer must take concrete measures to keep the risk of infection in the company as low as possible. As far as possible, home office work is to be ordered for employees whose work activities permit this.

2. How are employees at particular risk protected?

Particularly at risk are persons over 65 years of age and persons suffering from high blood pressure, diabetes, cardiovascular diseases, chronic respiratory diseases or cancer, as well as persons whose immune system is weakened due to diseases or therapies. The new COVID 19 Ordinance 2 (Art. 10c) of the Federal Council stipulates that employers must enable particularly vulnerable employees to carry out their work from home. If this is not possible due to the nature of the work, the employer must ensure that the federal recommendations on hygiene and social distance are observed. If this is also not possible, particularly vulnerable employees must be granted leave of absence, whereby their wages remain due. However, since such cases do not constitute an illness in the legal sense, there is probably no cover for any daily sickness benefit insurance.

3. May an employee stay away from work for fear of infection?

No. Absenteeism for fear of infection is an unfounded refusal to work which means that the employee is not entitled to a salary. However, if the employee refuses to work because the employer does not take sufficient protective measures and thus violates his duty of care, the wage claim remains valid.

4. What is the legal situation if contagion or suspected contagion occurs in the company or its environment?

If an employee has tested positive for the coronavirus or shows its typical symptoms, he or she must stay away from work and inform the employer immediately. In this case, the employee is entitled to sick pay in accordance with Art. 324a OR.

In accordance with its duty of care, the employer must temporarily exempt from work those employees who were in direct contact with the (presumably) infected person. Even in such cases, the obligation to pay wages to the released employees remains in force.

If there are infections or suspected cases of infection among persons living in the same household as an employee, the employee must also be temporarily released from work. However, the wage remains due even if the employee is prevented from performing his work through no fault of his own.

5. What is the legal situation if the employee can no longer reach the workplace as a result of a curfew?

If the employee's place of residence is affected by a curfew or if public transport is restricted to such an extent that the employee cannot reach the place of work, the employee is prevented from performing his work through no fault of his own. In this case, the employee does not have to perform his work, but he is probably not entitled to a wage either, because the prevention of work does not fall within the employer's sphere of risk. If possible according to the type of work, home office work should be ordered in such cases.

6. Is a wage due if an employee is stuck abroad?

If employees cannot return from their holidays on time due to flight restrictions or other measures imposed by foreign authorities (e.g. ordered quarantine in hotels or cruise ships), there is no entitlement to continued payment of wages, as the trip falls within the employee's sphere of risk. The situation must be assessed differently if the reason for the stay abroad is of a business nature; in this case the salary is still owed.

7. Must employers affected by a business closure continue to pay wages to employees?

Since the Federal Council has decided to close public facilities in principle (with the exception of grocery stores, petrol stations, take-aways, etc.), many companies are confronted with the question of whether they must continue to pay the wages of their employees despite the lack of employment opportunities. According to SECO's pandemic plan, the company bears the operational and economic risk, which is why it must continue to pay wages in such cases. However, due to their duty of loyalty, employees may have to make up for missed working hours. In any case, affected companies should declare short-time working (see below).

8. Can the employer order that overtime and overtime hours should now be compensated with holidays?

According to Art. 321c para. 2 CO, the employer may, with the employee's consent, compensate overtime work within a reasonable period of time by taking time off of at least the same duration. According to Art. 13 para. 2 of the Federal Employment Act (ArG), the same applies to overtime. The consent of the employee is therefore required in any case. This is partly given in advance in employment contracts and regulations. If this is not the case, the consent of the employee must always be obtained; otherwise there is a risk that the employee will contest the order and subsequently demand payment including a supplement. Depending on the constellation, however, an employee may be obliged to give his or her consent due to his or her duty of loyalty, especially in crisis situations such as the current one. In this case, a discussion with the employee should be sought.

9. Can the employer order the holiday pay?

According to Art. 329a para. 2 OR, the employer basically determines the time at which the employee is entitled to take his/her holidays. In doing so, he must take the employee's wishes into account to the extent that this is compatible with the interests of the company. In practice, this means that the employer must give at least three months' notice of the holiday. It is important that the purpose of the holiday is guaranteed, which is questionable but not impossible in the current situation with travel bans and exit restrictions. Here too, it is advisable to seek dialogue with the workforce and find a joint solution. If the only alternative is to order short-time work, the holiday pay is more attractive for the employees, as in this case 100% of the salary is owed, while the short-time work compensation is only 80% of the salary. It is also conceivable to order company holidays, which is generally only permissible if the company would

otherwise get into serious difficulties.

The situation in which employees still benefit from holidays from 2019 should be assessed in the same way. According to Art. 329a para. 1 CO, vacation must generally be taken during the respective year of service. In some cases, there are provisions in employment contracts or regulations according to which holiday entitlements lapse if they are not taken by a certain date. However, the admissibility of such regulations is controversial, as according to the CO, non-payable holiday entitlements cannot be forfeited, but only expire after five years. In principle, the employer can therefore also order the withdrawal of holiday entitlements from 2019 under the conditions described above.

If an employee has already entered vacation for a time when the restrictions due to the coronavirus will probably still exist, these must in principle still be taken. This only applies if the purpose of the holiday would be completely impossible, for example if the employee himself is ill. This also applies if the business is temporarily closed at the time the holiday is taken.

10. May the employer now order a large number of overtime hours?

The coronavirus pandemic has led to a massive increase in work for some sectors of the economy, for example in the health sector, but also for cleaning and food processing companies. According to Art. 321c para. 1 CO, the employee is obliged to perform necessary overtime work as far as it is reasonable. In view of the extraordinary situation, an increase in necessary overtime work can certainly be expected for the industries mentioned. Employees must perform this work within the scope of what is reasonable. However, if the overtime exceeds what is reasonable, the employer must ensure that the workload is distributed, for example by hiring additional employees on a temporary basis. Personnel resources are particularly scarce in hospitals and clinics and it is currently not possible to deploy personnel in such a way that all legal requirements are met. The Federal Council has therefore considered the validity of the provision of the Labour Act

11. May the employer order the vaccination of workers or require them to undergo tests for coronavirus?

This question will become topical as soon as vaccines become available on the market and the general public also has access to coronavirus tests. An obligation to vaccinate workers against their will, however, constitutes a clear violation of personality and would therefore be inadmissible. The ordering of tests is also probably inadmissible, as this would also interfere with the physical integrity of the workers. At most, it is conceivable that in companies with contact to persons at risk (old people's homes, hospitals, etc.) employees are obliged to carry out appropriate tests because of their duty of loyalty.

12. May the employer give notice in connection with the coronavirus?

Notice of termination at an inopportune moment in accordance with Art. 336c CO is null and void. This includes in particular cases in which an employee is dismissed due to illness during the vesting period. This naturally applies to employees who themselves have contracted the coronavirus. The same probably also applies to employees who are obliged to self-quarantine due to a personal suspicion of illness or a suspected case in the immediate vicinity.

Abusive dismissals according to Art. 336 ff. CO lead to a termination of the employment relationship, but under certain circumstances they may result in compensation obligations. If an employee from the risk group is dismissed because he or she is justifiably unable to appear for work (see 2. below), this is certainly abusive. It would also be abusive to dismiss an employee who is looking after his minor children because neither a public care service is available nor a private solution is reasonable. Similarly, a dismissal which is pronounced because the employee requires the employer to comply with the hygiene regulations is equally abusive.

On the other hand, it is not abusive if the dismissal is for economic reasons (e.g. because an employee

refuses short-time work or because an older employee who is not entitled to short-time work compensation is dismissed). If the employee is dismissed because he/she is absent from work without a legitimate reason, this is also not considered abusive. Similarly, the employer may dismiss an employee who does not comply with the official and company regulations on hygiene. If the protection of other employees can only be guaranteed by terminating such an employee, the employer may even be obliged to do so.

According to Art. 337 CO, both the employee and the employer may only terminate the contract without notice for good cause. Termination without notice based on purely economic reasons is not permissible, even if the company is hard hit by the coronavirus pandemic. An important reason for termination without notice by the employee is given, for example, if the employer does not comply with the federal hygiene regulations despite being requested to do so by the employee. Conversely, the employer can also dismiss the employee without notice after a warning if the employee does not comply with the hygiene regulations.

The employer may suspend working and rest periods in hospital wards (Art. 10a para. 5 COVID-19 Regulation 2).

13. What is short-time work?

Short-time work is the temporary reduction or complete cessation of work in a company in economically difficult times. In connection with the coronavirus pandemic, applications for short-time work were initially made primarily by companies whose customers did not show up for fear of contagion or who were experiencing a decline in orders. As a result of the closure of entire plants ordered by the Federal Council, the number of applications from affected companies also increased. Short-time work can probably also be applied for by companies affected by a closure by the cantonal government in violation of federal law, as is currently the case for the entire construction industry in the canton of Ticino.
Short-time work can be registered for an entire company or just for a part of it. To ensure that existing employment contracts are maintained and no redundancies have to be made, the legislator has provided for the instrument of short-time work compensation (KAE). Under this scheme, 80% of the wages of those entitled to compensation are paid out. During short-time work, the full statutory and contractually agreed social security contributions (AHV/IV/EO/ALV, accident insurance, family compensation fund, occupational benefits, etc.) must be paid in accordance with normal working hours. The employer is entitled to deduct the full contributions from the wage. The employer's shares of AHV, IV, EO and ALV for the lost working hours are reimbursed by the unemployment insurance fund. Short-time work compensation is paid for a maximum of twelve months over a period of two years. A monthly work loss of more than 85% can be credited for a maximum of four payroll periods.

14. Who is entitled to short-time work and what are the requirements?

The payment of KAE is subject to the existence of a creditable loss of working hours. This is the case in the following constellations:

- The loss of working hours is due to economic reasons and is unavoidable. Economic reasons include both cyclical and structural reasons which result in a decline in demand or sales (in connection with the coronavirus pandemic, for example, the absence of guests, patients or customers);

- Loss of working hours is due to an official measure (e.g. closure of a plant) or other circumstances for which the employer is not responsible;

- The loss of working hours is only temporary and it is to be expected that jobs can be saved with the order of KAE

- Employees affected by short-time working must be subject to a company working time check,

which must provide daily information on the hours worked, including any overtime, the hours lost for economic reasons and all other absences.

- There must be at least 10% loss of working hours per accounting period.

In principle, employers are entitled to short-time work compensation for all employees who are in a non-terminated employment relationship and who are liable to pay contributions to the employment insurance. When employer h registers for short-time work, the employee's consent is required in all cases. According to the Federal Council's new package of measures to extend short-time work, apprentices and employer-like employees as well as persons who work in the spouse's company are now also entitled to compensation. Employer-like employees are, for example, shareholders in a limited liability company who work as salaried employees in the company for remuneration. A lump sum of CHF 3320 is provided for them as short-time work compensation. However, employees who are over 65 years of age are still not entitled to this compensation due to the fact that they are not required to pay employment insurance contributions.

The entitlement has also been extended to employees on fixed-term contracts and to persons working for an organisation for temporary work. However, employees on call whose level of employment fluctuates considerably (more than 20%) are currently not entitled to short-time work compensation if their level of employment is reduced. However, the Confederation is currently working out a solution for those affected.

15. What must be done to receive compensation for short-time work?

The employer must submit an **application for short-time work compensation** to the cantonal office responsible before the planned introduction of short-time work. In most cantons, the responsible office is a department of the Directorate of Economic Affairs. The necessary **form** "Advance notification of short-time work due to official measures following the Covid 19 pandemic" can be found on the websites of the cantonal offices and SECO[11].

SECO has introduced a number of administrative simplifications in the context of coronavirus pre-notification, which are linked to the legal force of the Regulation: For example, there is **no longer a waiting period/registration period** for filing the application and the right to short-time working exists from the date of registration. Questions no. 1-8 of the form contain questions about the company and the planned short-time work; these must be completed in full directly on the form. Questions no. 9-12, which must be submitted on a separate sheet, are subject to simplifications: currently only questions 9a (company's field of activity), 10b (monthly turnover and fee amounts in the last two years), 11a (reasons for short-time work) and 11c (postponed order dates) must be answered. Furthermore, neither the form "Approval for short-time work" nor a copy of the current excerpt from the commercial register must be enclosed. In any case, it is advisable to document the employee's consent in writing. A written consent of the employee in the home office can also be sent by e-mail if a signed written declaration cannot be delivered.

In the **statement**, it must be credibly explained why the work absences to be expected in the company are due to the occurrence of the corona virus. A general reference to the coronavirus is insufficient and the application will only be approved if the loss of working hours is adequately causally related to the coronavirus. In particular, this applies to cases in which companies have to be closed down by order of the authorities, to production stoppages due to supply bottlenecks or import/export bans, or to a lack of customers due to fear of infection and/or because of the prescribed exit restrictions. In the case of plant closures by order of the authorities, the enclosure of the corresponding order is sufficient. In other cases, the connection with the coronavirus must be proven, for example by notifications from suppliers and customers or by evidence of an extraordinary slump in sales or drop in the number of articles.

[1] https://www.arbeit.swiss/secoalv/de/home/service/formulare/fuer-arbeitgeber/kurzarbeitsentschaedigung.html

Furthermore, the duration of the intended short-time work and the estimated percentage of lost work must be stated in the advance notification. The maximum duration of short-time work is six months.

16. What measures exist for self-employed persons?

In its package of measures, the Confederation has also provided for compensation for self-employed persons who suffer loss of earnings as a result of the coronavirus pandemic, provided that no corresponding insurance benefits exist. The regulation also applies to freelance artists who suffer a loss of earnings due to the coronavirus (especially in the event of cancellation of engagements). Compensation is initially provided for the following cases:

- Loss of third-party care for children;
- medically prescribed quarantine;
- Closure of an independently managed, publicly accessible business on the basis of a measure in accordance with Art. 6 para. 1 and 2 of COVID-19 Regulation 2.

Self-employed persons are entitled to a daily allowance amounting to 80% of the average gross income from gainful employment achieved before entitlement to the allowance commenced, up to a maximum of CHF 196 per day. The corresponding applications must be submitted to the competent AHV compensation offices. Updated information is published on the website of the Federal Social Insurance Office. [1]

17. Are there any other assistance measures for employees?

The same compensation as for self-employed persons is also provided for dependent parents with children under 12 years who have to interrupt their employment because third-party care is no longer guaranteed. The need for care must be due to measures to combat coronavirus (especially the closure of schools or kindergartens). Other employed persons who have to interrupt their employment because of a quarantine measure are also entitled to the same compensation.

Please do not hesitate to contact us if you have any further questions.

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[1] https://www.bsv.admin.ch/bsv/de/home/sozialversicherungen/eo-msv/grundlagen-und-gesetze/eo-corona.html