

Employment News No.

56

Care Leave to Care for Sick Relatives and for Children with a Serious Health Condition

As of next year, employees will be entitled to paid short leaves of up to three days to care for sick or injured relatives and to a long-term leave of up to 14 weeks to care for a child with a severe health condition. In this newsletter you will find out what needs to be considered in connection with this new regulation.

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Care Leave to Reconcile Employment with Care Duties



By **Philippe Nordmann**

Dr. iur., LL.M., Attorney at Law
Partner

Phone +41 58 658 14 50

philippe.nordmann@walderwyss.com



and **Christoph Burckhardt**

MLaw, Attorney at Law
Associate

Phone +41 58 658 14 34

christoph.burckhardt@walderwyss.com

As of 1 January 2021, employees will be entitled to a paid short leave to care for sick or injured family members or partners. The employee will be entitled to a leave of a maximum of three days per incident and to no more than ten days of leave per year. In addition, as of 1 July 2021, working parents are jointly entitled to a 14 weeks' leave to care for a child with a severe health condition. Find out in this newsletter what needs to be considered in connection with this new regulation.

Current Situation

Improving the reconciliation of employment with care duties towards relatives has been in the political spotlight for some time. According to current law, employees are entitled under certain circumstances to a short-term leave of up to three days to care for sick children (art. 36 para. 3 Employment Act, EmpA), to a temporary continued payment of salary to care for and nurse their own children, spouse, registered partner, but not of life partners, parents or siblings (cf. art. 324a para. 1 Code of Obligations, CO). However, employees are *not entitled to loss of earnings compensation* for longer absences due to care-related duties. This will change next year when the Federal Act for Better Reconciliation of Employment with Care Duties enters into force. There are two types of care leaves to be distinguished: a short-term leave to care for relatives and a long-term leave to care for children with a severe health condition, including entitlement to loss of earnings compensation.¹

Entitlement to Short-Term Leave and Continued Payment of Salary during Short-Term Leave

As of 1 January 2021, employees are entitled to *short-term leaves and continued payment of salary* for up to three days to take care of a family member or partner with a health impairment (art. 329h nCO, art. 36 para. 3 nEmpA).

The employee is entitled if a *family member or life partner* has a health impairment. The health impairment must be documented by a doctor's certificate and require care by the employee. The term family member includes relatives in the ascending and descending line (i.e. children, parents and grandparents) and siblings. The term life partner includes spouses, registered partners or life partners who have been living in the same household as the employee for at least five years. The scope of application of the new regulation is wider than under previous law in that employees are not only entitled to a leave in case their children, spouse or registered partner are sick but also in case their life partner, parents or siblings have a health impairment.

The *duration of the short-term leave* is limited to the time required for caring. The short-term leave shall not exceed three days per health incident. In addition, the short-term leaves may not exceed a maximum of ten days per year of service (art. 329h nCO, art. 36 para. 3 and 4 nEmpA). The annual limit does not apply to leaves required to take care of children but only to care duties towards other family members. The previous legal rules regarding continued payment of salary in case of the employee being prevented from working due to a health condition of one of his or her children apply (cf. art. 324a CO). The respective leave does not reduce the maximum entitlement to up to ten days of leave per year to

take care of relatives. This means that the employer has a duty to continue to pay three weeks' salary during the first year of service and thereafter the salary for appropriately longer periods depending on the duration of the employment relationship and the particular circumstances. In practice, the so-called Basel, Bern or Zurich scales (*Basler, Berner oder Zürcher Skalen*) are used to determine the length of the employer's duty to continued salary payment.²

It is unclear whether the annual maximum entitlement is reduced on a *pro rata* basis where an employee has *not yet completed one year's service*, e.g. whether or not the employee is only entitled to leaves of a maximum of five days if he or she is employed for a fixed term of six months. In our opinion, the annual maximum entitlement in an incomplete year of service is reduced *pro rata*.³

Entitlement to Care Allowance and Care Leave to Take Care of Children with a Severe Health Condition

As of 1 July 2021, working parents of a minor child whose health is seriously impaired due to illness or an accident are jointly entitled to a care leave (*Betreuungsurlaub*) of up to 14 (fourteen) weeks per incident and care allowance (*Betreuungsentschädigung*) during the care leave (art. 329i nCO, arts. 16n et seqq. new Earnings Compensation Act, nECA).

The *parents* of a child with a severe health impairment are eligible. The civil status (*Zivilstand*) of the parents is irrelevant. The parents are entitled to care allowance if at least one of them is an employee, self-employed or an employee with a cash salary in the wife's or husband's business and interrupts the employment due to care-related duties (art. 16n para. 1 nECA). Exceptionally and under certain conditions, parents who are not employed due to inability to work or unemployment are also entitled to care allowance (art. 16n para. 3 lit. b nECA). Foster parents are supposed to be entitled to a care leave and care

allowance, too. However, the respective provisions have not yet been published.

The parents are entitled to a care allowance in case a minor child has a *severe health impairment*. A child's health is severely impaired if

- his or her physical or mental condition has changed drastically;
- the course or outcome of this change is either hard to predict or a permanent or increasing impairment or death are to be expected;
- there is an increased need for parental care; and
- at least one parent is forced to interrupt employment to care for the child. (art. 16o nECA).

The parents are entitled to *one paid care leave per incident* relating to illness or an accident. If, for example, a child falls ill with another severe condition after an initial severe illness or accident, the parents are entitled to another paid care leave. An illness that is related to another illness, e.g. because it arises as a result of an impaired immune system, is not considered a new illness. However, a relapse of the illness after a long period without symptoms is considered a new illness. If more than one child has a severe health impairment due to the same accident, two claims arise.

If a child is born with a severe illness, there is no entitlement to care allowance. In this case, the mother is entitled to receive maternity allowances. An entitlement to care allowance may arise subsequent to the end of the entitlement to maternity allowance if the respective requirements are met.

Modalities for Claiming Care Leave and Care Allowance

The 14 weeks' care leave and the care allowance can be claimed *within a time-frame of 18 months* from the day for which the first daily allowance is paid.

The care leave can be taken all at once or be split into separate days. If both parents are employees they are each entitled to a care leave of seven weeks and half of the maximum care allowance, unless they mutually agree on a split. Employees shall inform their employer immediately about the division of the care leave, when and how they wish to take the leave and any subsequent changes. The entitlement stops at the end of the 18 months' timeframe or after the maximum care allowance has been claimed. It also stops in case the conditions for receiving care allowance are no longer met, e.g. because the child no longer has a severe health impairment. However, if the child reaches the age of majority during the 18 months' timeframe, the entitlement does not stop (see, regarding the whole paragraph, arts. 329i nCO and 16p et seq. nECA).

The parents are jointly entitled to a maximum of *98 daily care allowances*. They are also entitled to allowances on days off, e.g. Saturday and Sunday. Therefore, two additional daily allowances are paid out for every five working days. This means that the parents can claim 98 daily allowances but can only take 70 actual vacation days. The daily allowance amounts to 80 percent of the average income earned before the entitlement to care allowance started, up to a maximum of 196 Swiss francs per day amounting to a total of 19,208 Swiss francs (see arts. 16q and 16r nECA in conjunction with art. 16f ECA). In case of a part-time employment the level of the allowance is adjusted to the workload. The daily allowances are also paid for days on which the employee does not work. If, due to this limitation, the care allowance does not cover 80 percent of the salary, the employer must pay at least the difference between the daily allowance and 80 percent of the salary (art. 324b para. 2 CO). The employer may also voluntarily continue to pay the full salary but is not obliged to do so.

The employer and the employee can claim the care allowance by submitting the corresponding *form* indicating the days taken and the employee's salary to the competent compensation office (*Ausgleichskasse*). A doctor's certificate stating the severity of the health impairment and the need for care must be enclosed with the registration. After a certain period of time, the employer may request another doctor's certificate confirming that the child concerned still has a serious health impairment.

Protection of Employees during Care Leave

Employers may not terminate an employment contract as long as the employee is entitled to a care leave. The *protection* applies for six months from the day on which the 18 months' timeframe begins to run (art. 336c para. 1 lit. c^{bis} nCO). Any notice of termination which is given during the proscribed period mentioned above is null and void, i.e. it has no effect. If the employer gives notice of termination before the proscribed period starts to run but the notice period has not yet expired by the start of the 18 months' period for claiming care leave, the notice period is interrupted and only continues to run after the end of the proscribed period (art. 336c para. 2 CO).

Recommendations

There is *no need to adjust existing employment contracts*. The new rules apply to all employment relationships under the Swiss Code of Obligations irrespective of any express provision in the contract. The employer may not reduce the employee's entitlement to either short-term leaves to take care for relatives and continued payment of salary or to a 14 weeks' care leave (cf. art. 362 para. 1 nCO). The employer may grant longer care leaves on a voluntary basis or pay the full salary during the care leave.

We recommend **(i)** to require the employee to provide a doctor's certificate regarding the health impairment of the relative(s) concerned in each case, **(ii)** to check whether the certificate is credible and whether it certifies a severe health impairment and an increased need for care, and **(iii)** to make sure that the employee's absence does not exceed the annual limit of ten days for short-term leaves and 14 weeks for care leaves by taking record of the absences in the absence list.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Endnotes

1 See, with regard to the entire newsletter, Botschaft zum Bundesgesetz über die Verbesserung der Vereinbarkeit von Erwerbstätigkeit und Angehörigenbetreuung of 22 May 2019, BBl 2019 4103, 4115 et seqq. The new provisions of laws (AS 2020 4525 et seqq.) and regulations (AS 2020 4545 et seq.) are referred to with the abbreviation of the law or regulation and a prefix (e.g. art. 329h nCO).

2 Internet: www.arbeitsverhinderung.ch (downloaded on 2020-12-10) > Rechtsfolge > Lohnfortzahlungsskalen.

3 The wording of art. 329h nCO is not clear. It rather suggests that the maximum entitlement exists per complete year ("ten days per year"). The purpose of the provision (prevention of an excessive number of vacation cases) is met when the maximum entitlement is reduced *pro rata* in the case of an incomplete year of service.

Contact persons



Ueli Sommer

Partner, Zurich

Phone +41 58 658 55 16

ueli.sommer@walderwyss.com



Philippe Nordmann

Partner, Basel

Phone +41 58 658 14 50

philippe.nordmann@walderwyss.com



Daniel Staffelbach

Partner, Zurich

Phone +41 58 658 56 50

daniel.staffelbach@walderwyss.com



Davide Jermini

Partner, Lugano

Phone +41 58 658 44 02

davide.jermini@walderwyss.com



Olivier Sigg

Partner, Geneva

Phone +41 58 658 30 20

olivier.sigg@walderwyss.com



Irène Suter-Sieber

Partner, Zurich

Phone +41 58 658 56 60

irene.suter@walderwyss.com



Christoph Stutz

Counsel, Zurich

Phone +41 58 658 56 57

christoph.stutz@walderwyss.com



Fabian Looser

Managing Associate, Basel

Phone +41 58 658 14 61

fabian.looser@walderwyss.com



Simone Wetzstein

Managing Associate, Zurich

Phone +41 58 658 56 54

simone.wetzstein@walderwyss.com



Alex Domeniconi

Senior Associate, Lugano

Phone +41 58 658 44 06

alex.domeniconi@walderwyss.com



Nadine Mäder

Associate, Zurich

Phone +41 58 658 56 31

nadine.maeder@walderwyss.com



Laura Luongo

Senior Associate, Geneva

Phone +41 58 658 30 21

laura.luongo@walderwyss.com



Jonas Knechtli

Senior Associate, Basel

Phone +41 58 658 14 82

jonas.knechtli@walderwyss.com



Gaurav Bhagwanani

Associate, Zurich

Phone +41 58 658 52 80

gaurav.bhagwanani@walderwyss.com



Yannik A. Moser

Associate, Basel

Phone +41 58 658 14 85

yannik.moser@walderwyss.com



Nathalie Möri

Associate, Zurich

Phone +41 58 658 53 03

nathalie.moeri@walderwyss.com

Contact persons



Sarah Eichenberger

Associate, Zurich

Phone +41 58 658 58 69

sarah.eichenberger@walderwyss.com



Chiara Wirz

Associate, Zurich

Phone +41 58 658 52 46

chiara.wirz@walderwyss.com



Christoph Burckhardt

Associate, Basel

Phone +41 58 658 14 34

christoph.burckhardt@walderwyss.com