

Employment News No.

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From the home office back to the office On 26 May 2021, the Federal Council decided on various easings of Covid-19 measures. Among other things, the Federal Council has adapted the legal basis for the existing home office obligation in such a way that it is moderated to a simple recommendation under certain circumstances. However, various questions related to a (possible) return of workers to their company workplaces were not answered.

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Conditional easing of the previously applicable home office obligation



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The decision of the Federal Council allows companies that introduce a concept for targeted and repetitive testing within the meaning of the "Covid-19 Regulation Special Situation" (hereinafter: Regulation) to call their employees from the home office back to their company offices as of 31 May 2021. The specifications for the test concept required for this are derived from various legal regulations. Details regarding the test concept and, for example, the questions of how and whether the employer can take action against test refusers or employees who wish to remain in the home office, on the other hand, remain open.

Conversion of the home office obligation into a home office recommendation

Until now, a home office obligation applied in all areas in which it is possible to work at home without disproportionate effort. The Federal Council Regulation now provides, with effect from 31 May 2021, that the home office obligation will be abolished for companies that test regularly and are involved in a cantonal testing program.

Conditions for resuming work in the office

For the home office obligation to be abolished, it is sufficient for the employer to set up a testing regime that makes it possible for employees to be tested once a week in a simple way. These tests should primarily be carried out via pooled PCR saliva samples or, alternatively, with rapid antigen tests to be carried out by healthcare professionals in the locality. Simply providing test kits and self-tests from the pharmacy are not sufficient. In addition, workers must be regularly informed about the benefits of testing, e.g. through circular e-mails (see for an exemplary text module the fact sheet of the BAG of 26 May 2021 on how to deal with the adapted home office rules).

In addition to the test concept, measures concerning hygiene and distance must be fulfilled. This includes, first of all, the obligation to wear masks indoors. If several people are working in the same room, they must all wear a mask. This rule also

applies when there is a large distance, e.g. in an open-plan office. On the other hand, there is no obligation to wear a mask when working in a single office or in a separate room. The same applies to dispensed persons. In addition, employers are obliged to take further measures according to the STOP principle, (Substitution, technical and organisational measures, personal protective equipment), namely physical separation, separate teams or wearing face masks in outdoor areas.

Bringing workers back to the office

Under this new regime, the employer can bring its employees back from the home office in application of its right to give instructions (Art. 321d CO) - except for contrary agreements in the employment contract - if there is a test setting in conformity with the regulation. However, the employer's duty of care may require that employees be granted a transitional period, for example, to allow them to arrange childcare.

This does not apply to particularly vulnerable workers, who can still only be deployed within the company under the special regulation pursuant to Art. 27a Covid-19 Regulation 3. These are no longer considered to be at special risk as soon as they have either received two vaccination doses and 14 days have passed since the second vaccination or they have already had a confirmed coronavirus infection (PCR or rapid antigen test)

and have then received a vaccination dose since which 14 days have passed. For the time being, this applies for 6 months after a Covid-19 vaccination or after abolishment of the isolation.

Employees who are not particularly vulnerable and who refuse to return to the office in violation of an employer's instruction are in breach of their employment contract obligations as long as a testing concept has been in place and the other measures have been consistently implemented. In this case, according to the opinion represented here, the employer basically has the instruments of a warning and, if necessary, termination of the employment contract at its disposal. In this context, however, the concrete individual case must always be taken into account, i.e. the motives of the employee and the extent of the employer's interest in the physical presence of the employee. Finally, according to the principle of "no work, no pay", it may also be possible to stop paying wages, especially if the employee is not (or no longer) able to perform the work satisfactorily from home.

Is there an obligation to test and to get tested?

There is no obligation on the part of the employer to carry out the tests - just as there is no obligation in principle to tolerate them on the part of the employees (Art. 3d para. 3 lit. b in conjunction with Art. 10 para. 3bis of the Regulation and the associated explanations). The simple provision of a test setting is therefore sufficient to abolish the home office obligation. Accordingly, the reference in the BAG fact sheet of 26 May 2021, according to which persons who have already been vaccinated do not have to participate in repetitive tests (this is contrary to the BAG's own statement on its website that it is maintaining its current testing strategy because even vaccination does not offer 100% protection), is redundant in our view.

This is subject to special constellations in which an obligation to test may exceptionally be justified and enforceable for reasons of health protection, taking into account all the interests involved and in the sense of the principle of proportionality. This is maybe the case, for example, for workers with symptoms or those who have had contact with a person who was tested positive, an outbreak (multiple infections) in the company or for workers who have contact with persons from the risk group during work and no more moderate, equally suitable measures are possible.

Information about test results

Workers infected with Covid-19 are obliged, according to the SECO factsheet "Health protection at the workplace - New coronavirus (Covid-19)" of 2 June 2021, to inform the employer immediately in order to avoid endangering other workers at the workplace. In order for the employer to be able to ensure that information is provided in time and that the necessary measures are taken, he must, according to the present opinion, be allowed to demand or ask to see the test results on the basis of his duty of care and Art. 6 of the Labour Code. Although this is personal data that requires special protection, this data is needed for the implementation of the employment relationship and should in principle represent a less weighty interest compared to the health protection of the other employees. However, a case-by-case consideration of the interests involved remains unavoidable. Accordingly, and because there is no established practice in this regard, we recommend obtaining written agreements from employees regarding testing and disclosure of test results to the employer prior to the respective tests.

Measures against test refusers

Due to the voluntary nature of testing in principle, the employer has only limited options for dealing with test refusers.

Outside of an exceptionally enforceable testing obligation (see above), testing cannot be enforced and in principle there is also no possibility to take disciplinary measures. In order to avoid undermining the purpose of the test regime (prevention of a spread and protection of the employees), the employer should, according to the opinion expressed here, be allowed or possibly even obliged to leave such employees in the home office in application of his right to give instructions and in the sense of a milder approach, even against their wishes, provided that the existing conditions in the employee's offices (continue to) allow working in the home office. This is the only way to reduce the risk of a major outbreak. Such action can be based on the one hand on his duty of care towards the other employees as well as Art. 6 of the Labour Code and on the other hand, in view of the special situation, on the employee's duty of loyalty. However, due to the prohibition of discrimination, a consideration of interests must be carried out in each individual case. In addition, the employer must ensure that he protects the personal rights of the refusing employees by keeping their refusal secret.

Proof of vaccination

It has not yet been clarified whether the employer may or even must demand proof of the vaccination of its employees as part of the testing regime. In principle, this question should be answered in the negative, since the testing - which vaccinated persons do not have to undergo according to the BAG and SECO (but are probably allowed to) - is basically carried out on a voluntary basis anyway. However, a consideration of interests in individual cases may show that the question about existing vaccination protection and the demand for proof are admissible. This is to be affirmed in particular if the employer may exceptionally already demand the vaccination from the employee. In the remaining cases, the arguments in favour of the admissibility of a duty to provide

information should be taken into account in the context of the consideration of interests, i.e. the relief in operational and work organisation that a (known) vaccination brings, and the exceptions from the quarantine obligation for vaccinated persons.

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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No obligation to introduce a test concept

There is no obligation for employers to draw up a test concept in the sense described above. If they refrain from implementing such a concept, the home office obligation simply remains.

For companies with a corresponding test regime, the home office recommendation nevertheless remains in place, so that employers can alternatively let their employees continue to work from home and should also do so in the sense of a gradual and orderly return to presence work.

Prospects

With the conditional and restrictive relief of the home office obligation from 31 May 2021, the Federal Council has taken a further step towards normality as part of the stabilisation phase. But, according to the BAG, the home office obligation will not be converted into an unconditional recommendation until all persons willing to be vaccinated have been fully vaccinated.

However, in order to ensure a quick return to a normal working life and with regard to social security legal problems in connection with cross-border commuters working from home, companies are advised to implement a test concept and to call the employees back to the office as soon as possible (step by step) – taking into account the above recommendations. This is also due to the fact that employees are excluded from a contact quarantine during the exercise of their professional activity and on their way to work when the testing concept is in place (Art 3d para. 3 Regulation).

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