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## Update: Vacation and public holidays during furlough

The Swiss Federal Supreme Court clarifies the controversial question of whether vacation and public holidays should be taken into account when calculating furlough compensation for employees on monthly wages during the Corona pandemic.

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## Update: According to the Swiss Federal Supreme Court, vacation and public holidays must be taken into account when calculating furlough compensation in the summary procedure.

The Federal Supreme Court confirms the ruling of the Cantonal Court of Lucerne of 26 February 2021 and judges the previous practice of the State Secretariat for Economic Affairs SECO to be unlawful, according to which vacation and public holidays are not taken into account for employees on monthly wages when calculating furlough compensation in the summary procedure during the Corona pandemic.

### Initial situation

Due to the Corona pandemic, a large number of Swiss companies were (and in some cases still are) dependent on furlough and the payment of furlough compensation. The unemployment insurance funds, which in the normal procedure calculate the entitlement to furlough compensation for each employee individually, were not in a position to process the large flood of applications. The Federal Council therefore changed the normal procedure to a summary settlement procedure by means of an emergency decree (currently still in force until 31 December 2021). The summary settlement procedure enables a quick and simple calculation of averages, in which the entitlement to furlough compensation is determined on a flat-rate basis for all employees of a company.

With regard to vacation and public holidays, the calculation of furlough compensation in the normal procedure is designed in such a way that companies can also claim furlough compensation for vacation and public holidays of their employees. However, the form issued by the State Secretariat for Economic Affairs SECO that must be used for the summary procedure during the current Corona pandemic excludes this possibility of claiming vacation and public holidays for monthly wage earners.

In its ruling of 26 February 2021, the Cantonal Court of Lucerne decided that the failure to take into account vacation and public holidays for employees on monthly wages when calculating furlough compensation in the summary procedure was unlawful for lack of a sufficient legal basis and referred the matter back to the unemployment insurance fund. The competent unemployment insurance fund of the Canton of Lucerne appealed against this decision before the Federal Supreme Court.

The authors of this newsletter reported on the ruling of the Cantonal Court of Lucerne in [Employment News of April 2021](#).

### Judgement of Federal Supreme Court of 17 November 2021

In its judgement 8C\_272/2021 of 17 November 2021, the Federal Supreme Court has now dismissed the appeal of the unemployment insurance fund and confirmed the decision of the Cantonal Court of Lucerne.

According to the Federal Supreme Court, the aim of introducing a summary procedure for the settlement of furlough compensation was to ensure a quick and unbureaucratic payment of furlough compensation by reducing the administrative burden for employers and the

administration in the extraordinary situation caused by the Covid-19 pandemic.

The Federal Supreme Court held that with the summary overall settlement per company on the basis of the total wages of all employees or the sum of their lost hours (instead of individually per employee as in the normal procedure), certain differences in the resulting entitlement to furlough compensation compared to the normal procedure were deliberately accepted. However, the Federal Supreme Court agreed with the opinion of the lower court that the different method of calculating furlough compensation in the summary and normal procedure (in addition to the above-mentioned system-related, acceptable differences) by not taking into account vacation and public holiday compensation in monthly wages entailed an unjustified disadvantage for employees on monthly wages compared to those on hourly wages, which had no sufficient legal basis.

#### **Press release of the State Secretariat for Economic Affairs SECO**

In a press release dated 10 December 2021, the State Secretariat for Economic Affairs SECO stated that it had taken note of the Federal Supreme Court's judgement and would now examine its effects on the implementation of furlough compensation in detail.

According to SECO, the consequences for a settlement procedure that conforms to the Federal Supreme Court judgement should be determined as quickly as possible. SECO will respond to the demands of the Federal Supreme Court with the aim of submitting corresponding proposals to the Federal Council for a decision at the beginning of the new year.

#### **Consequences of the Federal Supreme Court judgement for practice**

The Federal Supreme Court judgement has far-reaching significance for numerous companies throughout Switzerland that settled and received fur-

lough compensation in the summary procedure during the Corona pandemic. It means that all companies that received furlough compensation for monthly wage earners were wrongly paid amounts that were too low. Depending on the canton and the contractual vacation entitlement, the furlough compensation could be around 10% higher than was actually granted.

As a result of the judgement, the question arises in particular as to whether the companies that never claimed vacation and public holiday compensation due to the incorrect SECO form can also retroactively claim furlough compensation. The statutory forfeiture deadline of three months for claiming furlough compensation has probably already expired for a large part of the claims.

However, shortly after the ruling of the Cantonal Court of Lucerne, SECO expressly asked companies on its website *"not to submit any applications for payment of vacation and public holiday compensation"* until the Federal Supreme Court issued its judgement. In the authors' opinion, the companies concerned cannot be blamed for having complied with this request.

#### **Recommendations for further action**

In [Employment News of April 2021](#) we recommended to the companies concerned to claim vacation and public holiday compensation from the competent unemployment insurance fund with the future monthly furlough compensation settlement. For past furlough compensation settlements, we advised companies to request a contestable decision on the settlement of vacation and public holiday compensation and to contest this decision – together with a request for suspension – or to apply for reconsideration of the decision.

Insofar as companies have not taken precautions as described above and the forfeiture deadline of three months for a settlement period of furlough compensa-

tion has expired, it is recommended to file a request for restoration of the deadline for rectification of the missed legal act as soon as possible, since in our opinion – as described above – there is no fault on the part of the companies concerned for their previous non-settlement of furlough compensation for vacation and public holidays. The companies concerned must request the restoration of the deadline within 30 days "after the obstacle has ceased to exist" and make up for the missed legal act.

It is currently unclear whether and, if so, under what conditions SECO will grant the possibility of retroactively claiming furlough compensation for vacation and public holidays for completed furlough compensation periods. It is also unclear exactly how the 30-day period is calculated, in particular when the period begins to run. For these reasons and to be on the safe side, prompt action by the companies concerned is recommended.

It is also still open how exactly vacation and public holiday compensation is to be calculated. The Federal Supreme Court did not object to the considerations of the Cantonal Court of Lucerne that vacation and public holiday entitlements can be granted by means of a lump sum, whereby this lump sum can be taken into account either in the calculation of the percentage of economically induced lost hours or in the wage total for lost hours. It is recommended for the companies concerned to make comparative calculations if necessary and, as a first step, to enter a maximum demand as a precautionary measure until the basis for calculation has been finally clarified.

#### **Conclusions**

The Federal Supreme Court has made it unequivocally clear that SECO's previous practice of not taking into account vacation and public holidays when calculating furlough compensation for employees on monthly wages is unlawful.

It is recommended for the companies

concerned to include vacation and public holiday compensation in the furlough compensation settlement for future settlement periods. For past furlough compensation settlement periods, it is advisable to file a request to restore the deadline, which can be combined with a request to suspend the application until SECO has determined the further procedure in this regard as a result of the Federal Supreme Court judgement.

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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