

Employment News No.

64

Reimbursement of expenses for mandatory working from home

In order to reduce the currently high number of COVID-19 cases, mandatory working from home was reintroduced in Switzerland on 20 December 2021. Although mandatory working from home is not new as a measure to combat the pandemic, the question of whether or not employers must pay for the expenses associated with working from home (share of rent, internet, electricity, etc.) has arisen again as a result of changes in the legal basis.

Do employers have to pay for expenses associated with working from home?



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The current version of the COVID-19 Special Situation Ordinance is silent on the issue of reimbursement of expenses incurred during mandatory working from home. This is in contrast to the previous versions which explicitly stated that employers do not have to finance the expenses of employees working from home. This change gives rise to legal discussions. What applies now?

When do employers have to reimburse expenses?

The Swiss Code of Obligations (CO) stipulates that employers must reimburse employees for all expenses necessarily incurred in the performance of the work (Article 327a(1) CO). This is a relatively binding norm, i.e. the parties may not deviate from this legal regulation to the disadvantage of employees by means of an agreement. The reimbursement of expenses may however be paid as a lump sum (e.g. by means of lump-sum expenses). Any agreements whereby employees have to bear all or part of such necessary expenses are null and void (Article 327a(3) CO). Overall, there is very limited contractual freedom in the reimbursement of expenses. This is relevant in connection with working from home as expenses are also incurred there. For example, an internet connection is needed when working from home and higher electricity and water costs are incurred. Furthermore, space is required in the employee's flat for working from home, which can be quantified as a share of the rent. Whether these expenses are to be borne by employers depends on whether these expenses are actually *necessary*. Expenses are to be distinguished from work tools and materials (e.g. laptop, printer, paper, etc.) since the legislator has not provided for any restrictions on contractual freedom for work tools and materials (Article 327 CO). For example, the parties can agree that employees provide their own work tools and materials and are compensated accordingly (keyword: "Bring Your Own Device") or receive no separate

compensation at all. Unless otherwise provided by agreement or custom, employers must provide employees with the tools and materials that the work requires (Article 327(1) CO).

When are expenses for working from home necessary?

If employers provide a permanent and suitable workplace, usually in their offices, the expenses for working from home are not necessary expenses. This is because employees have the opportunity to come to the office and work there. In such a constellation, working from home is often more of an incentive for increased flexibility and compatibility of work and family for employees. The situation is different if the parties agree that the employee will only work from home and the employer does not provide a workplace. In this case, the employer must reimburse these expenses, as they necessarily arise in connection with the performance of the work. These expenses (share of rent, electricity, internet costs, etc.) can be compensated by an appropriate lump sum for working from home. However, a written agreement (i.e. a signed agreement such as an individual employment contract) is required for the lump-sum reimbursement of expenses or the possibility of lump-sum reimbursement is regulated in a collective employment contract (Article 327a(2) CO).

Reimbursement of expenses in case of mandatory working from home due to a pandemic?

As working from home appeared to be a suitable measure to combat the virus,

the reimbursement of expenses was the subject of legal and political discussions. In summary, it was argued that “working from home due to Corona” was only situational and temporary and that employers did not have to finance these expenses for working from home, even if employees incurred de facto additional costs. In the predecessor version of the COVID-19 Special Situation Ordinance (until 26 June 2021), Article 10(3) explicitly stated that employers did not have to reimburse employees for expenses as a result of mandatory working from home. The regulation on the reimbursement of expenses could be found for the first time in the version of 18 January 2021, i.e. at the same time as the last state-imposed mandatory working from home. This clarification was intended to eliminate the legal uncertainty about the reimbursement of expenses, which had been looming since the beginning of the pandemic.

Surprisingly, the COVID-19 Ordinance has been silent on the subject of reimbursement of expenses since 26 June 2021, even though mandatory working from home was reintroduced on 20 December 2021 and an explicit regulation would have been appropriate in view of Article 327a CO. The sentence at the time concerning the reimbursement of expenses was dropped without replacement.

This is in contrast to the regulation for working from home for particularly vulnerable employees. For this group of persons, the issue of reimbursement of expenses was addressed in Article 27a(1) COVID-19 Ordinance 3, with the indication that no reimbursement of expenses is to be paid by employers if employees are not to appear for work on site due to medically indicated reasons.

Editorial error or deliberate amendment?

The subject of legal discussions is now whether the lack of a reference to the reimbursement of expenses in the cur-

rently valid version is an editorial oversight or whether the silence should be interpreted as meaning that employers have to reimburse expenses. The problem is further accentuated by the fact that the legislator has denied the reimbursement of expenses for particularly vulnerable employees and has included this in the wording of the Ordinance. Some people now take the view that the current mandatory working from home differs from earlier working from home episodes since mandatory working from home now counts as a risk that employers and employees must reckon with and employees also take appropriate precautions. This can be seen, for example, in the fact that employees rent larger flats. Since mandatory working from home is no longer an unforeseeable event, it could be well argued that the legislator wanted to transfer the expenses to employers. The authors of this article are however of the opinion that the deletion of the provision on the reimbursement of expenses was probably done hastily and without evaluating the consequences. The reference was deleted in June 2021 at a time when mandatory working from home no longer applied and working in the office was possible under appropriate protective measures. With the reintroduction of mandatory working from home on 20 December 2021, the reference was possibly forgotten, although a reference in the Ordinance on the financing of expenses would have been welcomed. However, even the silence of the legislator does not change the legal assessment according to the view represented here. The contractual place of work remains fundamentally unchanged even during temporary mandatory working from home (e.g. at employers' headquarters) and employers also provide a workplace. Reimbursement of expenses is only owed if the parties agree, for example, that the place of work at home is at employees' place of residence and it is therefore unnecessary for employers to set up workstations in the office. Although employees cannot currently use their workplace in the office, manda-

tory working from home is a temporary state measure that is outside the contractual agreements of the parties. The lack of possibility to use the workplace in the office is due to objective reasons that neither employers nor employees have caused. The financial consequences associated with working from home should therefore not be passed on to employers as mandatory working from home does not fall within the pure risk of employers. Swiss labour law has a similar provision in the context of continued payment of wages (Article 324a CO). If every pandemic-related measure that prevents employees from actually using the workplace due to a state act leads to reimbursement of expenses at employers' expense, then it would be logical to also reimburse expenses for working from home for the duration of isolation and quarantine, which would also be questionable (provided, of course, that there is no incapacity to work and the activity can be carried out entirely at home). Furthermore, with regard to the regulation of particularly vulnerable employees, it makes little sense if these persons do not receive any compensation, while persons without risk factors are entitled to compensation from employers.

Conclusion and recommendation for action

Finally, it is up to a judicial assessment how the silence of the legislator on the reimbursement of expenses is to be evaluated. However, there are very good arguments against an obligation on the part of employers. In any case, regardless of the situation caused by COVID-19, employers should issue a working from home policy so that employees are informed about their obligations while working from home. In particular, regulations on working hours, data protection and confidentiality as well as health protection should be included in such working from home policy. Furthermore, special risks for cross-border commuters must be evaluated. If employers wish to

provide financial benefits for their employees in the event of increased working from home, it must also be stated in the working from home policy that these are voluntary benefits and not compensation for a contractual obligation.

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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