Coronavirus Information Hub: FAQ Employment (Furlough, Compulsory Leave, Remote Working, COVID-19 Vaccination, etc.)

1. Furlough

1.1. What is furlough?

Furlough is defined as temporary reduction of the agreed working hours or a temporary complete suspension of work in a company, while the employment relationships remain in force.

1.2. Under what conditions does the state grant furlough compensation?

1. The loss of working hours is not due to circumstances that are part of the employer's normal operating risk, i.e.:
   - economic reasons (structural and cyclical reasons) which result in unavoidable loss of working hours; or
   - official measures or other circumstances (e.g. force majeure) for which the employer is not responsible, unless the employer can avoid the loss of working hours by taking suitable, economically viable measures or cannot hold any third parties (e.g. insurance companies) liable for the damage caused.
2. The loss of working hours is expected to be temporary and it may be assumed that the jobs can be preserved through furlough.
3. The loss of working hours of the individual employee is verifiable (this is not the case, for example, if the working hours are not sufficiently monitored).
4. Employees consent to being furloughed (for further details see question 1.18.).

In case of loss of working hours due to economic reasons, this loss must be at least 10% (see question 1.11.).

In the context of the COVID-19 pandemic, furlough may in particular result from plant closures ordered by the authorities, transport restrictions and shortages of raw materials and supplies required for operations (cf. State Secretariat for Economic Affairs (SECO), FAQ "Pandemie und Betriebe", answers to questions 57 to 62).

1.3. Which employees are entitled to furlough compensation?

A condition for receiving furlough compensation is that employees are required to pay unemployment insurance contributions or have not yet reached the minimum age for the compulsory contributions under the old-age and survivors' insurance (AHV). In principle, employees whose employment relationships have been terminated are not entitled to furlough compensation.

The Unemployment Insurance Act (**UIA**) excludes certain groups of persons from being entitled to furlough compensation, such as persons who are in a fixed-term employment relationship, in an apprenticeship relationship or are employed by a temporary work organisation. Moreover, employees whose loss of working hours cannot be verified or whose working hours cannot be sufficiently monitored, a working spouse of the employer and employees considered to be similar to employers are also not entitled to furlough compensation.

To mitigate the economic consequences of the COVID-19 pandemic, the Federal Council has been given the authority to extend the group of persons entitled to furlough compensation. Based on the Federal Council's special regulation, furlough compensation can currently be claimed for the following persons:

- employees in a fixed-term employment relationship (this exception is expected to apply until 30 September 2021, although since 1 July 2021, employees with a fixed-term employment are only entitled to furlough compensation if they are completely prevented from taking up their work duties due to official orders);
- under certain conditions, apprentices, i.e. persons who are in an apprenticeship relationship (this exception is expected to apply until 30 September 2021);
- vocational trainers on furlough spent on the training of apprentices, although there is no actual loss of working hours;
- employees on call whose level of employment is subject to strong fluctuations (more than 20%) if such employees

have been working in the company that applied for furlough for a minimum of 6 months (this exception is expected to apply until 30 September 2021, although since 1 July 2021, furlough compensation can only be claimed if the employee is completely prevented from taking up their work duties due to official orders).

1.4. Which process must be followed to receive furlough compensation?

The procedure for obtaining furlough compensation can be divided into three stages. The following answer provides an overview of the respective stages, while the subsequent questions and corresponding answers will provide more details in regard to each stage.

(a) Pre-registration procedure:

The pre-registration form for furlough must be submitted by the employer to the competent cantonal labour office prior to the start of furlough (for further details, see answers to questions 1.6. and 1.8.).

(b) Start and execution of furlough:

Furlough can be introduced by the employer at any time. However, the loss of working hours may only be credited after a period of 10 days after the pre-registration for furlough compensation ("pre-registration period").

(c) Submitting the specific furlough compensation application:

The application for specific furlough compensation must be submitted to the unemployment insurance fund designated in the pre-registration within three months of the end of each payroll period (*Abrechnungsperiode*), usually a calendar month (see question 1.8.).

1.5. How does the employer have to apply for furlough compensation?

On 23 June 2021, the Federal Council decided to extend the claim for furlough under a **simplified procedure** until 30 September 2021.

The employer must submit the completed "COVID-19 pre-registration for furlough" form (available in German, French and Italian) to the competent cantonal labour office. Based on the filed pre-registration, this office determines whether the legal eligibility criteria for furlough compensation are met.

The pre-registration must be made individually on a separate form for each operations department affected by furlough.

The employer must explain in the pre-registration why furlough is introduced. Loss of working hours due to the COVID-19 situation is generally considered as temporary and unavoidable (cf. question 1.2.). Nevertheless, the cantonal labour office must be provided with further information on the employer's business performance, such as information on turnover generated so that other operating risks (e.g. seasonal operating fluctuations) can be excluded.

In order to facilitate the pre-registration procedure, the Federal Council and the State Secretariat for Economic Affairs (SECO) have taken various measures to provide rapid support for those employers affected by furlough due to COVID-19. The major facilitations valid for the time being can be summarised as follows:

- pre-registration for furlough can be made by telephone (written confirmation must be submitted subsequently) or online via eService;
- the explanation for the requested furlough can be kept shorter in the pre-registration as long as it is plausible;
- the individual employees' consent to furlough as well as the extract from the commercial register do not have to be presented to the competent cantonal labour office; however, the employer needs to confirm in writing that it has obtained the employees' consents (the consent requirement still applies, cf. question 1.18.); and
- no waiting period ("deductible" ("*Selbstbehalt*") of 2-3 days) is deducted from the creditable loss of earnings, which would have to be borne by the employer. The lifting of the waiting period will be applied until 30 June 2021. On 23 June 2021, the Federal Council decided not to extend the lifting of the waiting period. Hence, as of 1 July 2021 the regular waiting period of one day applies.

1.6. What changes will result from the lifting of the simplified procedure for the furlough application?

On 19 March 2021, the Federal Council extended the applicability of the simplified procedure introduced in the spring of 2020 until 30 June 2021 and on 23 June 2021 the Federal Council decided that the simplified procedure shall apply until 30 September 2021. The respective amendment to the COVID-19 Ordinance on Unemployment Insurance entered into force on 1 July 2021. Whether after 30 June 2021 the ordinary regime for furlough (Article 31 et seqq. UIA) will be reintroduced or there will be new facilitations has not yet been determined.

In the spring session of 2021, the Swiss Parliament approved all amendments to the unemployment insurance regulation

proposed by the Federal Council in its dispatch of 17 February 2021. These amendments to the COVID-19 Act entered into force on 20 March 2021 and since then the following applies:

– The pre-registration period for furlough has been definitively abolished. In addition, it is possible to authorise furlough with a duration of more than three months as of 1 July 2021, but no longer than until 31 December 2021 (Article 17*b*(1) COVID-19 Act). Article 17*b*(1) COVID-19 Act enters into force retroactively as of 1 September 2020 and is expected to remain in force until 31 December 2021.

– Likewise, companies that are affected by furlough as a result of the official measures adopted since 18 December 2020 can now apply for authorisation of furlough retroactively from the entry into force of the corresponding measures. The respective application must be submitted to the competent cantonal office by 30 April 2021 (Article 17*b*(2) COVID-19 Act). Article 17*b*(2) COVID-19 Act is also expected to remain in force until 31 December 2021.

All new claims arising from Article 17*b*(1) or (2) of the COVID-19 Act must be filed with the competent unemployment insurance fund by 30 April 2021 at the latest (Article 17b(3) COVID-19 Act).

1.7. To which authority must the employer apply for furlough compensation?

The employer must submit the pre-registration form to the competent cantonal labour office at the employer's registered office or, if a single operations department is affected, at the registered office of the operations department. In derogation of the ordinary regulation, the current rules provide for a simplification of the administrative procedures (expected to be in force until 30 September 2021): the cantonal labour offices at the employer's registered office are responsible for all pre-registrations for furlough compensation, even if several operations departments in different cantons are affected by furlough. If different operations departments of a company are affected, several pre-registrations are required (cf. question 1.5.).

1.8. What else must the employer do to ensure that furlough is compensated?

Compensation for furlough is not paid by the cantonal labour offices, but by the unemployment insurance funds. If furlough is granted by the cantonal labour office, the employer must submit an additional application to the selected unemployment insurance fund to obtain compensation for the loss of earnings.

Under the simplified procedure regime the 2b-2e form entitled "COVID-19 application and settlement of furlough" must be used for the settlement of furlough (see FAQ). In its decision of 19 March 2021, the Federal Council extended the simplified procedure until 30 September 2021 as well.

The application must be submitted within three months of the end of each payroll period. This three-month period begins on the first day after the payroll period has ended. If the last day of the payroll period is a Saturday, Sunday or a public holiday recognized in the respective canton, the period ends on the next working day. The three-month period for lodging a claim is a forfeiture period, failure to observe of which will result in the loss of the claim. In principle, forfeiture periods can neither be extended nor interrupted.

Due to the simplified procedure, the employer currently only has to submit one form with five items of information to the unemployment insurance fund:

1. number of employees entitled to furlough compensation;
2. number of employees affected by furlough;
3. total number of contractually agreed working hours for all eligible employees;
4. total number of working hours lost due to economic factors for all employees affected by furlough; and
5. OASI wage ("*AHV-Lohn*") of all employees entitled to furlough compensation (maximum amount of CHF 12,350 per person).

If furlough also affects employees with a low income (see question 1.11.) the loss of working hours must be separately calculated for each income category. Separate COVID-19 forms are available for this purpose.

The form must be accompanied by documentation on the contractually agreed working hours, the economically induced lost hours and the total amount of salary paid (i.e. working time sheets, wage statements, etc.). As of 1 July 2021, the "report on economically induced lost hours" ("Rapport über die wirtschaftlich bedingten Ausfallstunden") was introduced and all companies claiming furlough compensation must submit this form as of the payroll period July 2021. The employees affected by furlough must sign this form by the end of each month. By signing, the employees acknowledge that their lost hours claimed by the employer are correct and that they still agree with being on furlough. The "report on economically induced lost hours" is a mandatory supplement to the form "COVID-19 application and settlement of furlough" and must therefore also be submitted to the competent unemployment insurance fund.

The signature cannot be substituted by any e-mail or text message confirmation of the respective employee. In case the employee's signature cannot be obtained, furlough

compensation may only be granted under exceptional circumstances (e.g. when the signature could not be provided due to valid reasons and the employer submits a written justification). However, large companies (companies with approximately 100 or more employees) do not have to provide a signed confirmation from each individual employee, if:

– there is an internal furlough compensation arrangement with a recognisable pattern which applies to all affected employees (e.g. first group Monday and Tuesday; second group Wednesday and Thursday) and

– the works council confirms the lost hours per month in writing.

1.9. For how long will furlough compensation be paid?

Under normal circumstances, furlough compensation is paid for a maximum of 12 and in the current situation (due to the Ordinance of the Federal Council) for a maximum of 18 payroll periods within a two-year framework period

With the amendment to the COVID-19 Act of 19 March 2021, Parliament has granted the Federal Council the authority to independently regulate the maximum duration of furlough compensation in derogation of the UIA (cf. Article 17(1)(h) COVID-19 Act). With the amendments to the COVID-19 Ordinance on Unemployment Insurance of 23 June 2021, the Federal Council has made use of this authority and has extended the maximum duration of furlough compensation to another 12 months. Hence, the maximum duration of furlough compensation now amounts to a total of 24 months within the two-years framework period. This extension is expected to stay in force until 28 February 2022.

In view of the ongoing challenging economic situation due to the COVID pandemic, the Federal Council has suspended the maximum duration of furlough compensation of four months for companies with a loss of working hours of more than 85% until 31 December 2022. Furlough compensations received in the period of 1 March 2020 to 31 March 2021 will not be considered for the calculation of the maximum duration of a subsequent furlough compensation from 1 April 2021.

1.10. Which rules must be observed regarding the recording of working hours during furlough?

During furlough, the working hours of the employees affected must be recorded by means of working time checks by the company (e.g. timecards, hourly reports). These checks must include:

– the hours worked daily, including any overtime and/or excess hours;

– the hours lost for economic reasons; and

– all other absences, such as holidays, illness, accidents or military service absences.

If no working time recording has been carried out until the time furlough is introduced, employees must be instructed to record their working hours during furlough.

1.11. What is the furlough compensation amount for the employees and for the employer?

If the loss of working hours is due to economic reasons and if such loss is unavoidable, the total amount of lost hours needs to exceed 10% of the total hours normally worked by all employees of a company or an operations department in order to receive furlough compensation.

The employees' compensation depends on the extent of working hours cancelled. If furlough is granted, the employer must pay its employees their normal salary for the hours effectively worked and 80% of the loss of wages attributable to the working hours which were cancelled. For the loss of wages, the maximum insured income is CHF 148,200 per year (or CHF 12,350 per month).

There is a deviation from the principle set out above for employees with low income which will be in force until 30 September 2021 (cf. Article 17a COVID-19 Act):

– Employees working full-time and earning less than CHF 3,470 will receive 100% of the loss of wages due to the cancelled working hours;

– Employees working full-time and earning between CHF 3,470 and 4,340 will receive CHF 3,470 in case of a total loss of wages (partial loss of wages will be calculated on a pro rata basis).

For employees working part-time, it is necessary to calculate the existence of a low income in relation to the employees' working hours (e.g. the upper limit of low income for a 50% workload is CHF 1,735). The minimum amount for furlough compensation (CHF 3,470 for working full-time) must also be reduced accordingly.

Despite the reduced salary, the employer is obliged to pay the full statutory and contractually agreed social security contributions ("*AHV, IV, EO, ALV, BVG, etc.*") on the basis of the employee's full contractually agreed salary. However, the employer may deduct the employee's contribution to social

security from the amount to be paid. Unless agreed otherwise, the employer may make the deduction based on the full (100%) salary.

The compensation paid by the unemployment insurance fund to the employer may differ from the benefits owed to the individual employee. This is a consequence of the simplified procedure (see question 1.8.), which leads to simplification but also to inaccuracy. In general, it can be said that because of the lump-sum settlement, employers receive more furlough compensation the more employees with relatively low wages experience relatively large loss of working hours.

1.12. Does the unemployment insurance fund pay furlough compensation for sick employees who are not able to work?

According to SECO, the employer shall not receive any furlough compensation for sick employees. However, this opinion does not have any basis in statutory law.

In order to avoid unfair results, sick employees should be assumed to receive only 80% of their wages for the time of hypothetical loss of working hours. However, this has not yet been dealt with by the Swiss courts. It has also not yet been clarified in court whether the employer may refuse to pay wages altogether if it does not bear the risk of continued payment of wages under civil law (more information can be found here).

1.13. Does the employer have to advance wages/furlough compensation?

Furlough compensation for one month is paid in the following month. In principle, the employer is obliged to advance furlough compensation and to pay the employees' salary on the regular payment date, i.e. the regular salary for the hours effectively worked and 80% for the loss of wages attributable to the hours not worked and for which furlough compensation is paid. In the event of liquidity shortfalls, the employer may apply for an advance of furlough compensation to the competent unemployment insurance fund.

1.14. What is the salary amount that the employer must pay at the end of each month?

Practically, in many cases it will not be possible to determine the exact amount owed to each employee on the regular pay date. The employer must make the payment on the basis of a preliminary estimate and set off the respective amounts against the employee's entitlements for the following months. It is therefore recommended for employers to include a reserve in the payrolls regarding a possible set-off against payments of the following months. It should be noted that claims for furlough compensation against the unemployment insurance are not forfeited if the employer pays its employees more than it should.

As a rule, the claims are settled retroactively through the unemployment insurance fund (see question 1.13.). Generally, the unemployment insurance fund will implement settlement and make payments within one month after receipt of the employer's payroll. However, with the workload the unemployment insurance funds are facing during the COVID-19 pandemic, it is likely that there will be delays. In addition, the competent authority may grant advances if the application for furlough compensation cannot be processed within 30 days because the calculation of the claim is difficult due to the activity of the eligible person (Article 17d COVID-19 Act).

1.15. Are special compensations such as gratuities, bonuses, incentives, etc. taken into account when calculating furlough compensation?

Special compensations such as gratuities, bonuses and incentives are considered to be income that generally needs to be taken into account when calculating furlough compensation, irrespective of whether such compensations qualify as salary components from a labour law perspective. Whether or in what amount such additional compensation is paid is usually definitively determined after the end of the business year and cannot be predicted – especially under the continuing extraordinary circumstances. For this reason, the employer can initially only apply for furlough compensation for the known base salary, i.e. without taking into account any special compensation that has not yet been specified. However, as soon as a decision has been made on the payment of any special compensation, the employer is entitled to request a recalculation of furlough compensation and a corresponding subsequent payment from the competent unemployment insurance fund. The unemployment insurance fund must inform the employer of this possibility.

In this context, it should be pointed out that a formal application for settlement of furlough compensations must always be submitted within three months after the end of a payroll period (see question 1.8.). This is also required for any claim for subsequent payment. Only the application for recalculation of furlough compensation and subsequent payment due to a subsequently determined special compensation may be submitted even after the expiry of the three-month period.

Any 13th/14th monthly salary does not qualify as a special compensation as set out above if the claim thereto and the

respective amount are contractually agreed. The 13th/14th monthly salary is therefore a fixed salary component that must already be included in the relevant income on the payroll form provided by the employment offices (see question 1.8.) under "total salary amount subject to OASI".

1.16. Is a compensation for vacation and public holidays taken into account for furlough compensation?

Under normal procedure, i.e. apart from the current COVID-19 pandemic, the authorities do not pay furlough compensation for the time an employee is on holiday leave or for public holidays. Nevertheless, Article 34(2) UIA states that a compensation for vacation and public holidays must be included in the employee's salary. Depending on the salary model, this inclusion can be calculated differently: for employees with an hourly wage the calculation is made by adding surcharges to the hourly wage, for employees with a monthly wage the salary is divided by the monthly **net** working time. Hence, for employees with a monthly wage, only the effective working hours are taken into account and, by deducting the hours resulting out of their vacation and of public holidays from the annual working time, the divisor "working time" is reduced and the creditable hourly wage increases accordingly.

1.17. Is a compensation for vacation and public holidays taken into account for furlough compensation due to the COVID-19 pandemic?

In accordance with the simplifications introduced for furlough compensation due to the Corona pandemic (see questions 1.5. and 1.6.), the SECO has issued simplified, lump-sum payroll forms (see question 1.8.). Using these payroll forms is compulsory at the moment, but it is not possible to include surcharges for vacation and public holidays for employees with a monthly wage. In the SECO's opinion and contrary to Article 34(2) UIA (see hereto question 1.16.), unemployment insurance funds do not have to pay surcharges for vacation and public holidays for employees with a monthly wage. According to them, this obligation only exists for employees with a hourly wage.

In the recently published judgment LU 5V 20 396 of 26 February 2021, the Cantonal Court of Lucerne disagreed with the opinion of the SECO stationed above. In this judgment, the highest cantonal authority took the view that the simplifications introduced by the COVID-19 Ordinance on Unemployment Insurance only deviates from the UIA in terms of the formal settlement procedure. With regard to the assertion and settlement of furlough compensation the COVID-19 Ordinance on Unemployment Insurance does not provide for any substantive deviations from the UIA, i.e. by leaving certain salary components pursuant to Article 34(2) UIA unconsidered. Therefore, the Cantonal Court of Lucerne ruled that the opinion of the SECO is an incorrect and unlawful concretion of the provisions in the COVID-19 Ordinance on Unemployment Insurance.

Following this judgment of the Cantonal court of Lucerne, the SECO published a public statement announcing that it would appeal against the judgment and moving the case before the Federal Supreme Court. Therefore, the question whether a compensation for vacation and public holidays needs to be taken into account for the furlough compensation due to COVID pandemic remains unclear and controversial until the Federal Supreme Court has made a final decision in this regard (for a detailed discussion of this issue, including practical advice for companies, see Walder Wyss Employment News No. 58).

1.18. Is it necessary for employers to obtain the consent of their employees to furlough in order to receive furlough compensation?

Yes. The employees' consent forms a prerequisite for the furlough compensation claim.

However, in the context of the simplified procedure for the pre-registration for furlough compensation, the designated consent form signed by all employees affected does no longer have to be submitted together with the pre-registration for furlough. The employer must submit to the cantonal labour office together with the pre-registration a declaration confirming that consent for furlough has been given by the employees affected. The simplified procedure for the registration for furlough is expected to be in force until 30 September 2021 (see question 1.6.).

For reasons of civil law (reduced wage claims of employees), employers are strongly advised to obtain the consent of all employees to furlough individually and verifiably, e.g. in writing (more detailed information can be found here).

1.19. What are the consequences if the employee does not consent to furlough?

In the absence of the employee's consent, no furlough compensation can be claimed for the lost working hours. The unemployment insurance fund will not grant any compensation in this case, because without the employee's consent there is no "chargeable loss of working hours". Under such circumstances, the employer is obliged to pay the employee the contractually agreed full salary. Without the employee's consent to furlough there is no (temporary) amendment to the employment agreement regarding any wage cuts.

In our opinion (cf. Walder Wyss Employment News No. 46), the employer is not obliged to pay any salary to an employee who refuses to consent to furlough, if the reasons for the loss of working hours cannot be attributed either to the employer or to the employee. In a pandemic situation, this applies, for example, to employers that no longer have any room for manoeuvre when it comes to the closing of their business, because the business must be closed in order to comply with official orders or if the loss of working hours is objectively unavoidable. The loss of working capacity is in this situation no longer within the employer's sphere of risk, which is the reason why the employer is no longer obliged to pay any wages. On the other hand, the employee is under such circumstances not obliged to perform any work ("no work, no pay").

However, a loss of working hours resulting from COVID-19 does not automatically justify the application of the principle "no work, no pay". It has to be assessed in each individual case whether or not the individual loss of working hours can be attributed to the employer's sphere of risk. However, it must be noted that SECO has a different opinion in this regard. Hence, it is difficult to predict how a court would decide on the issue of continued payment of wages in such cases.

If employees do not consent to furlough, they risk that the employer terminates their employment for operational or economic reasons. Any termination of the employment agreement by the employer which is only based on employees' refusal to consent to furlough is not considered to be wrongful. The Swiss Federal Supreme Court assumes in such cases that the termination is issued because of economic reasons (case law prior to the COVID-19 crisis).

1.20. What are the consequences if the employment agreement is terminated during furlough?

A requirement for furlough is that the employment agreement of the employee affected by the loss of working hours is not terminated. After all, furlough serves to preserve jobs and to avoid terminations in times of (presumably) temporary loss of working hours. Therefore, no furlough compensation is granted for employees whose employment agreements have been terminated, irrespective of whether the employer or the employee has terminated the employment agreement. According to the practice of SECO (UIA practice regarding furlough), it does not matter what the reasons for the termination were.

If an employee was entitled to receive furlough compensation before the employment agreement was terminated, the claim for furlough compensation shall expire with the start of the contractual or statutory notice period and not on the date the termination letter is received. This opinion reflects the position of SECO (cf. the source above), but it is not undisputed in legal doctrine. However, it is clear that the employee who no longer receives any furlough compensation is entitled to receive the full contractually agreed salary during the remaining notice period (early termination by termination agreements remains reserved). This applies irrespective of whether during the notice period the employee performs full or reduced work due to the loss of working hours. However, in our opinion this only applies as long as the reasons for the loss of working hours is attributable to the employer, but not if the loss of working hours can no longer be attributed to the employer's sphere of risk (see question 1.17.). Additionally, employees who have been terminated during furlough should be able to claim from the employer any loss of pay incurred during the period of furlough so that they receive the full salary at the end. This claim may be based on the fact that the employees agreed to furlough (and the accompanying loss of pay) because they assumed (and were entitled to assume) that they would be able to keep their job. In our opinion, this also means that such a claim should only be possible if the termination is related to the loss of working hours, but not if the termination was based on any non-economic reasons, for example insufficient performance by the employee or the employee's conduct at the work place (more detailed information on this e.g. here). Furthermore, it must be noted that the termination of several employees might lead to a mass redundancy process (cf. question 4.4.).

1.21. What are the consequences if the employer terminates employees after furlough has ended?

In the view presented here, the unemployment insurance fund has no right to reclaim furlough compensation paid to the employer during an approved furlough period, provided furlough compensation was requested in good faith, which means that the employer was entitled to assume that the loss of working hours was only temporary and that jobs could be saved by introducing furlough.

Legal doctrine is of the opinion that employees are entitled to reclaim their loss of wages resulting from furlough even if (see question 1.18.) they are terminated shortly after the end of the furlough period. However, it always depends on the individual case the and specific circumstances, in particular the communication in connection with obtaining the employees' consent to furlough (see question 1.16.).

1.22. What were the most recent (ordinary) revisions in the context of furlough?

On 19 June 2020, the Swiss Parliament decided on a partial revision of the UIA and as of 1 July 2021 the respective amendments entered into force. The revision implements the issues raised with the motion Vonlanthen "UIA. Reduction of administrative burdens in the context of furlough" submitted in 2016.

As the name of the motion already indicates, this partial revision of the UIA shall implement in particular the Federal Government's "e-Government" strategy into the unemployment insurance regulation. The revision creates the possibility to apply for and submit applications for all benefits of the unemployment insurance, including furlough compensation, electronically. In the light of the simplification introduced due to the COVID pandemic (see questions 1.5. and 1.6.), this amendment, although welcome, seems to have come too late. The question arises whether these simplifications due to COVID-19 would have been necessary at all if the motion Vonlanthen had been implemented earlier.

In addition to the implementation of the "e-Government" strategy, the obligation to accept and seek interim employment in case of furlough and bad weather compensation was abolished. With the revisions the respective Article 41(1) UIA was deleted without replacement. Since this provision was not applied in practice, the Parliament considered it to be redundant and decided on its deletion.

Additionally, the revision also facilitated the possibility of increasing the maximum duration of furlough compensation. Before the revision, the UIA required persistent and substantial unemployment to increase the maximum duration of furlough compensation. In comparison, the new Article 35(2)(a) UIA makes an increase possible if the number of pre-registrations for furlough has increased compared to the previous 6 months and if a forecast indicates that unemployment will increase or at least remain at the same level. Also with regard to this amendment the question arises whether the relevant provisions in the COVID-19 Ordinance on Unemployment Insurance (see question 1.9.) would have been needed if the revision had been implemented more quickly.

Even though the revision of the UIA hat limited substantial impacts, particularly the implementation of the "e-Government" strategy leads to administrative simplifications for all parties involved. However, in view of the current COVID-19 pandemic the entire revision seems to be too late.

2. Working from Home (Remote Working)

2.1. When may the employer or the employee demand that the employee work from home?

In times in which no specific pandemic regulations apply, employees are only entitled or obliged to work from home if there is a special contractual basis (e.g. a provision in existing staff regulations or in an individual employment agreement). In the absence of such a contractual agreement neither employees nor employers have an enforceable right to demand remote working. However, in extraordinary situations employers may determine that their employees are obliged to work from home based on the employees' duty of loyalty, although there is no contractual agreement to do so. On the other hand, special circumstances, such as e.g. a high risk of infection with COVID-19 at the workplace, may oblige employers based on their duty of care to allow employees to work from home.

As of 26 June 2021, working from home is no longer mandatory in Switzerland but has been modified by the Federal Council to a recommendation. Therefore, working from home is still recommended in all areas where it is possible and does not involve disproportionate effort or costs. Pursuant to the "COVID-19 Special Situation Ordinance", employers remain obliged to take preventive measures: employers must ensure that employees can comply with the hygiene and distance rules recommended by the Federal Office of Public Health (FOPH). For this purpose, employers must implement appropriate measures within the workplace (Article 25(1) COVID-19 Special Situation Ordinance). Additionally, employers remain obliged to apply the measures according to the so-called STOP principle (substitution, technical measures, organisational measures, personal protective measures), notably the possibility to work from home, physical separation, separate teams, regular ventilation of rooms or wearing a face mask (Article 25(2) COVID-19 Special Situation Ordinance).

According to the "COVID-19 Ordinance 3" (status as of 26 June 2021), employers still have to allow their employees who are considered to be persons at high risk to work from home, as far as this is possible for the performance of their regular work duties and, if not, to provide them with equivalent substitute work (with the same salary). Currently, the following persons are considered persons at high risk and can therefore benefit from special protection measures: unvaccinated or not fully vaccinated (i.e. vaccinated with one dose of a vaccine requiring two doses) pregnant women and persons suffering from a disease or genetic anomaly pursuant to Annex 7 of the COVID-19 Ordinance 3 who cannot be vaccinated due to medical

reasons. However, pregnant women no longer constitute persons "at high risk" as defined in the COVID-19 legislation if they have been fully vaccinated against COVID-19 (for questions regarding the vaccination within the employment relationship, see 3.). Likewise, persons suffering from a disease or genetic anomaly pursuant to Annex 7 of the COVID-19 Ordinance 3 are no longer considered persons "at high risk" if they have been infected with COVID-19 and have recovered therefrom or if vaccination would be possible from a medical perspective.

2.2. Is the employer obliged to reimburse the expenses incurred by the employee working from home?

As of 26 June 2021, working from home is no longer mandatory in Switzerland (see question 2.1.). In cases where an employee insists on working from home and the employer allows the employee to do so (given there is no contractually agreed entitlement to work from home), the remotely performed work generally takes place on a voluntary basis in the employee's interest. Under these circumstances, the regular provisions of the Swiss Code of Obligations (CO) regarding the supply of work materials (Article 327 CO) and work-related expenses (Article 327a CO) apply to any claim for compensation by the employee. A comprehensive discussion of the legal situation in this respect may be found in our Walder Wyss Employment News No. 45.

In a nutshell: given that the employer offers the employee an adequate workplace at any time, the employer does generally not, subject to any contrary agreement between the parties, owe any compensation for expenses incurred by the employee's performance of his/her work duties from home (e.g. electricity, Wi-Fi or rental costs). However, if the employer has dismantled workspace or reduced existing office structures in the meantime and can therefore no longer provide an adequate workspace for all employees at any time, the employer is in principle obliged to reimburse expenses to employees who are "forced" to work from home. The amount of this reimbursement has to be determined individually on a case-by-case basis and depends on the specific circumstances. In practice, the parties often agree on a lump sum compensation ("remote work lump sum").

2.3. What do employers and employees need to consider with regard to health protection when employees work from home?

Employers' duty to protect the health of their employees is based on Article 328 CO as well was Article 6 Labour Act and its Ordinance 3. These regulations are equally applicable when working from home (see for health protection while working from home: SECO, Arbeiten zu Hause – Homeoffice, p. 6 et seqq.). Therefore, employers are obliged to protect the health of their employees with all measures that are necessary due to experience, applicable due to the state of the art and appropriate due to the nature of business. Within the scope of employers' obligations under labour law to inform and instruct their employees, employees must be informed about possible health hazards and related measures and employers must instruct their employees accordingly. In order to fulfil this obligation, employees' support and participation is required. Regarding the health protection of employees working from home, high expectations are imposed on employees' individual responsibility as the work is performed in employees' private environments and not on employer premises.

When working from home some specific health hazards may occur:

- poor indoor climate, insufficient light, disturbing noise;
- furniture and work equipment that lead to an ergonomically unfavourable body posture;
- excessive working hours and increased stress (e.g. when employees are under surveillance); and
- psychosocial risks such as isolation, little communication and lack of interaction with work colleagues.

3. Vaccination against the Coronavirus while being employed

3.1. Can the employer demand that the employee be vaccinated?

In the context of the employment relationship under private law, compulsory vaccination may be based on employers' right to issue instructions (Article 321d(1) CO). However, this is only the case if higher-ranking legislation or ordinances, collective or standard employment agreements, company regulations or the individual employment agreement do not already provide for a corresponding obligation (subsidiary validity of employers' right to issue instructions).

According to Article 321d(1) CO, employers are entitled to issue instructions regarding the performance of work and the conduct of employees in their business. The right to issue instructions must be exercised in a factual or function-related manner and is limited by employees' privacy rights. Therefore, in each specific case a balancing of interests must be carried out, whereby the following applies: the more intensive employers' operational interests, the more employers may interfere with employees' personal rights. Additionally, it must

be considered that employers might even be obliged to issue instructions if the protection of legal interests of the respective employees or third parties (e.g. other employees) requires such instructions. In the context of the Coronavirus Article 82(1) of the Swiss Accident Insurance Act might be relevant, which obliges employers to take measures in order to prevent occupational diseases and accidents.

Ordering employees to be vaccinated affects the physical integrity of the employees concerned and therefore interferes with their personal rights. It is an interference in employees' constitutionally protected personal rights which can only be justified by considerable operational interests. Therefore, ordering employees to be vaccinated against COVID-19 based on employers' right to issue instructions must be justified by the nature of business activities. Moreover, there must not be less intrusive measures available which would achieve the same result (e.g. regular hand washing and disinfection, wearing protective suits, face masks, etc. or ordering employees to work from home).

In our opinion (cf. Walder Wyss Employment News No. 53), employers may request from all employees who have physical contact with persons in the risk group to be vaccinated against COVID-19, unless there are less intrusive measures available which would achieve the same result. The occupational groups concerned include, for example, geriatric nurses, people with direct contact with cancer patients, people with chronic respiratory diseases, diabetics, etc. However, it should be considered that employers' interest in requiring proof of vaccination from caregivers decreases the more persons in care are vaccinated and are therefore no longer considered to be at high risk (cf. question 2.1.).

In addition, mandatory vaccination seems reasonable for employees who regularly travel internationally, considering that numerous countries require proof of vaccination/immunity upon entry. Furthermore, persons with a recognised COVID-19 vaccination are exempt from any quarantine requirements (Article 3a(1) COVID-19 Act). In particular, this exemption from quarantine requirements applies to the travel quarantine after entering Switzerland from abroad. In the context of international passenger transport fully vaccinated people entering Switzerland are exempt from all quarantine measures (Article 8(2)(e) Ordinance on International Passenger Transport Measures), provided that they do not enter from a country with an immune evasive variant of the virus (immune evasive means that pathogens, such as viruses, evade being recognised by the immune system due to a specific mechanism or mutation). According to the list of the FOPH (status as of 26 June 2021), no countries with an immune evasive or potentially immune evasive variant of the Coronavirus exist. Therefore, fully vaccinated people can currently enter Switzerland from all countries without having to undergo quarantine. Against this background, we believe that there are substantial reasons for employers to require vaccination from employees who regularly travel to countries for which quarantine measures apply when (re)entering Switzerland (as of 23 July 2021 these countries are: India, Nepal and the United Kingdom). This might be even more true if similar exemptions from quarantine requirements apply to other countries. Ultimately, it must be determined on a case-by-case basis whether a softer measure needs to be preferred over employers' request for vaccination; for example, if the countries concerned recognise alternative practical measures for a (quarantine-free) entry.

3.2. Can the employer require information from employees whether they are vaccinated against the Coronavirus?

Whether employers are allowed to ask their employees in the future if they are vaccinated against COVID-19 has legally not yet been finally decided. In general, questioning employees about their vaccination status is not allowed and employees or job applicants can refuse to answer or even lie (so-called "self-defence right to lie"), if the question has neither a connection to employees' suitability for the job nor is required for the performance of the employment agreement (Article 328b CO). Therefore, the admissibility of this question mainly depends on whether employers may take measures against employees if they are not vaccinated against COVID-19.

For practical purposes, this means the following: where employers may require their employees to be vaccinated (see question 3.1.), the question of whether employees are vaccinated against COVID-19 must be generally permissible. In all other cases it must be decided based on a balancing of interests on the basis of the specific circumstances whether or not employers may ask their employees about their vaccination status. In our opinion, facilitation of the business and work organisation, which can be achieved by vaccination against COVID-19, should be considered. In addition, Parliament has decided in the second revision of the COVID-19 Act that persons vaccinated against COVID-19 are exempt from travel and contact quarantine requirements (see question 3.1.). In view of these liftings of official restrictions in case of vaccination against COVID-19, employers should be allowed to ask whether or not employees specifically affected by such measures (e.g. business travellers; see question 3.1.) are vaccinated.

Additionally, the creation of the so-called COVID certificate allows that questions regarding employees' vaccination status or "COVID status" must be permissible in certain businesses (according to the Federal Council, the certificate is used in three zones, cf. hereto "Where is the COVID certificate used in Switzerland?"). Article 6(4) COVID-19 Special Situation

Ordinance states that all employees who have contact with guests, customers or visitors of a publicly accessible business open only to people with a valid COVID certificate (e.g. clubs, dance events, or restaurants/bars which decide to use the COVID certificate) must be able to show a COVID certificate themselves when working on site. If this is not possible, all employees (including those in possession of a valid COVID certificate) are obliged to wear protective face masks. In view of this provision and for the purpose of the performance of the employment agreement, it must be permissible that at least the employers of the respective businesses (orange and red zone of the COVID certificate) can or even must inform themselves about the vaccination or certificate status of their employees. Otherwise, the respective employers would not be able to issue the appropriate general orders on whether or not all employees are exempt from the mask requirement.

3.3. Can the employer treat vaccinated employees differently from unvaccinated employees?

If employers treat their employees differently based on whether or not they are vaccinated, the issue of unlawful discrimination arises. The prohibition of discrimination is enshrined in Article 8 of the Swiss Federal Constitution as a fundamental right, which primarily binds official authorities. Private individuals, on the other hand, are only indirectly bound to comply with the protection of fundamental rights.

Unlawful discrimination of unvaccinated employees might be assumed in the following cases, unless different treatment is justified by objective and overriding interests: for example if unvaccinated employees (unlike vaccinated employees) have to work from home, have to wear face masks or are not allowed to attend company parties. Whether there are operational needs or interests of vaccinated persons that could justify the above-mentioned and similar measures is questionable and is to be denied in our opinion.

Furthermore, the problem arises that unequal treatment of unvaccinated employees makes it known to third parties, especially other employees, which employees have been vaccinated and which have not. This means that sensitive personal data is disclosed to third parties, which is a violation of privacy, if such disclosure cannot be justified (e.g. explicit consent of the data subject, overriding private or public interests or legal basis).

In view of the described provision of the COVID-19 Special Situation Ordinance under question 3.2. (alternative obligation of a vaccine certificate or general requirement to wear masks in publicly accessible businesses), the Federal Council holds that unequal treatment of employees is at least in the red and, possibly, the orange zone of the COVID certificate not permitted. As stated in the respective legal provision and further described in the respective explanatory notes, *all* employees must wear face masks unless *all* of them are in possession of a valid COVID certificate. Hence, it is not permissible that the respective businesses request only the employees who do not want to or cannot present a COVID certificate to wear masks at work. Whether this opinion of the Federal Council can be applied to other employment relationships is not yet clear. Currently, this may only be determined on the basis of a balancing of interests considering the circumstances of the specific case.

4. Further Coronavirus-related Questions

4.1. Is the employer entitled to order compulsory leave?

Although employers basically determine the time of employees' holidays, they must consider the employees' wishes (Article 329c CO). According to case law and legal doctrine, an announcement period of up to three months for holidays ordered by employers is appropriate. SECO and some legal scholars assume that employers must respect this three-month announcement period even under extraordinary circumstances (e.g. a pandemic). However, there is also the opinion among other legal scholars that in such situations employers should have the right to order employees to use up their holidays accumulated up to that point (but not their future holidays). However, the courts have not yet decided this question and therefore, the legal position is uncertain.

The situation is different if employers and employees mutually agree that employees will use up their holidays. This possibility exists at any time, which means also at short notice.

4.2. Is the employer entitled to instruct the employee to reduce overtime?

According to statutory law, overtime may only be compensated by time off with employees' consent (Article 321*c*(2) CO). This means that employers may not unilaterally order the compensation of overtime without the employees' consent. For this reason, the employment agreement or the staff regulations (which form an integral part of the agreement) often stipulate that employers may unilaterally order that overtime be compensated. Therefore, the contractual provisions should always be consulted first.

Whether employers can unilaterally order that overtime be compensated in times of the COVID-19 pandemic – under the condition that there is no corresponding contractual provision – has not yet been conclusively decided by the courts, but it is likely to be affirmed in emergency situations.

4.3. What happens if the employer is eventually forced to consider terminating several employees (mass redundancy)?

Most importantly, there are specific procedural requirements to be observed, if employers intend to terminate a certain number of employees of a business within 30 days for reasons not pertaining personally to the employees affected ("mass redundancies" pursuant to Article 335d et seqq. CO).

Employers intending to carry out such mass redundancies must inform their employees (or the employees' organisation if any) in writing about the details of the mass redundancies and at least provide employees with the opportunity to submit proposals on how to avoid the terminations and to limit the number and how to mitigate the consequences of these terminations. If employers fail to consult their employees accordingly, the respective terminations are abusive and may lead to potential claims against employers of up to two months' salary per employee (see Article 336a(3) CO). Employers intending to carry out mass redundancies must additionally notify the cantonal labour office accordingly and must provide their employees with a copy of that notification.

Furthermore, there are specific reporting obligations for employers, for example under the Swiss Employment Services Act, if employers terminate a larger number of employees (possibly as few as six employees).

See questions 1.18. and 1.19. with regard to the impact of terminations on furlough compensation.

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Coronavirus Information Hub
Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

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