

Employment News No.

47

Reopening after COVID-19-Lockdown: Which regulations and recommendations need to be observed by businesses (e.g. retailers and service providers) which are now allowed to reopen their doors, and what are the consequences if the required protective measures are implemented insufficiently or not at all? Employers and managers are currently looking for guidance in the jungle of concepts, official recommendations, directives and regulations.



By **Ueli Sommer**
Dr. iur., LL.M., Attorney at Law
Partner
Phone +41 58 658 55 16
ueli.sommer@walderwyss.com



and **Sarah Eichenberger**
MLaw, Attorney at Law
Phone +41 58 658 58 69
sarah.eichenberger@walderwyss.com

Now that the infection rate has levelled off and the Federal Council has decided that the first shops may reopen after the lockdown, once again many employers have open questions: Which precautions must be taken to protect employees and what protective measures should be implemented? Is the implementation of these measures a prerequisite for reopening, and what are the consequences of non-compliance with the provisions and recommendations of the authorities? This newsletter intends to provide an overview on the measures which need to be implemented in practice to ensure that the reopening proceeds as smoothly as possible.

Requirement for reopening businesses: The protection concept

According to art. 6 para. 3 of the COVID-19-Decree 2 (CD2), the companies mentioned in the paragraph which were affected by the Federal Council's lockdown may reopen their business premises to the public, provided they have established a so-called protection concept ("Schutzkonzept"). These establishments must at least comply with the recommendations of the Swiss Federal Office of Public Health (FOPH) concerning hygiene and social distancing. The protection concepts have the primary purpose to minimize the risk of infection on the premises - both in regard to staff and to customers. It is to be assumed that the same provisions will also apply to those establishments that are affected by the relaxation of the restrictions in the second stage which will be effective by 11 May 2020. Once a protection concept has been established, it must be brought to the attention of the employees and has to be signed by them. The original document must then be kept and made accessible on request to the authorities.

According to art. 6a para. 2 CD2 the FOPH, in collaboration with the Swiss State Secretariat for Economic Affairs (SECO), defines both health and labor law requirements for the protection concepts. A sample protection concept (https://www.seco.admin.ch/seco/de/home/Arbeit/neues_coronavirus/schutzkonzepte.html) and in particular standard protection concepts for do-it-yourself stores and garden centers, for other shops and markets and for businesses providing services requiring physical contact are already available (<https://>

backtowork.easygov.swiss/standard-schutzkonzepte/). It will now be up to the trade associations to draft more concrete concepts for their respective members.

Which measures *MUST* be implemented for reopening?

The CD2 already determines that it is essential to establish a protection concept before reopening. Without this concept businesses are prohibited to make their premises accessible to the public (customers, etc.). According to art. 6a para. 5 CD2 the cantonal authorities (labor inspectorates, commercial police, cantonal medical officer) are responsible for checking whether a protection concept exists, is sufficient and is complied with. The decree itself further states that the FOPH's recommendations concerning hygiene and social distancing must be observed in reopened establishments.

It therefore is to be assumed that the following requirements must be included in the protection concept, irrespective of the sector, and that the employers are obliged to ensure the implementation of the measures in the company:

- Employees and other persons present keep a distance of 2 meters to each other wherever possible.
- If keeping a distance of 2 meters is not possible a glass or plastic protection device must be applied.
- Surfaces and objects are cleaned regularly according to requirements, in particular after their use and if they are touched by several people.
- Employees are instructed to wash or disinfect their hands regularly.

- An adequate protection for "risk group employees" is ensured.
- Sick employees are sent home and instructed to stay in (self-)isolation in accordance with the provisions of the FOPH.
- Employees and all other persons affected are informed about the rules and measures.
- Provisions are established in management to ensure that the protective measures can be adapted and implemented effectively.

Measures regarding high risk employees

Employees who are part of the COVID-19 risk group according to appendix 6 of the CD2 must be particularly protected by the employer. The persons concerned have to hand in a declaration regarding their special risk and the employer may require a medical certificate. If an employee belongs to a COVID-19 risk group, the following cascade must be followed:

1. According to art. 10c para. 1 CD2 the employer must allow risk group employees to perform home office within the scope of operational possibilities. The employer must take the necessary measures (e.g. purchase of IT equipment).
2. If it is not possible to perform the contractual work in home office, the employee concerned for the same remuneration must be assigned with another work activity that can be carried out from home.
3. If the presence of the employee on the business premise is indispensable, the employee may continue to perform the work there under strict conditions. According to art. 10c para. 3 lit. a and b CD2 the workplace must primarily be adapted in a way that any close contact (> 2 meters) with other persons is avoided. This

can be implemented e.g. by allocating the employee concerned in a single office.

4. If compliance with the social distancing rules cannot be ensured, the "STOP-principle" must be applied: Substitution by other activity, taking technical or organizational measures such as attaching a plastic protection device, taking personal protective measures (this last option is possible mainly in health care facilities where staff are trained in the use of personal protective equipment).
5. If none of the above-mentioned measures can be implemented, the employee must be granted paid leave (art. 10c para. 7 CD2).

The employees concerned must be consulted before any of the mentioned measures are implemented (art. 10c para. 5 CD2). If the employee assesses the risk to his or her health as being too high despite of the above-mentioned protective measures, he or she may refuse to perform work, in which case the employer may demand a medical certificate (art. 10c para. 6 CD2).

Which protective measures *SHOULD* be implemented for reopening?

In both the model and the standard protection concepts provided by SECO in collaboration with the FOPH various specifications or "implementation standards" are determined regarding the implementation of the above-mentioned regulations. However, businesses may deviate from these standard measures if justified in the protection concept. The protection concepts include the following provisions (list not exhaustive):

- Employees and customers have to be instructed to wash or disinfect their hands with soap upon arrival. Appropriate equipment shall be provided by the employer.

- Touching of surfaces is to be avoided. Doors are to be let open whenever possible.
- Customers are to be asked to pay contactless.
- Compliance with social distancing rules must be ensured by installing appropriate floor markings. In waiting areas, chairs are to be set up at a distance of 2 meters from each other and on benches the respective distance is to be marked by applying adhesive tape.
- The maximum number of persons being present in a business space is to be limited to 1 person per 10 square meters.
- In cloakrooms, break rooms and other staff rooms no more than one person per 4 square meters should be present.
- At the entrance of the business premise a check point is to be installed where the number of entering persons is being controlled.
- A declaration has to be placed at the entrance to sales and service premises, stating how many people are allowed to be present in the room and what other protective measures have been implemented.
- In businesses where work clothing is used the employees have to be provided with personal clothing. Employees are to be instructed to change work clothes daily.
- Sufficient air exchange has to be provided in business spaces: The workplace is to be ventilated at least 4 times per day for 10 minutes.
- Sufficient stocks of soap, disposable towels, cleaning materials, disinfection and cleaning agents are to be kept available and have to be refilled regularly.

- Employees have to be informed about the protective measures and trained in the use of available protective material. They also must be informed about safe customer contact.

Measures recommended for service providers

SECO keeps its information general and makes only minor distinctions between shops and service providers. In addition to the above-mentioned provisions of the SECO for other businesses the following recommendations can be summarized for service providers (applicable also for "mixed businesses" where retail trade and services are provided):

- Employees who offer consultations and repair services should be supplied with disposable masks and gloves.
- In areas where customer meetings take place all other objects that could be touched by customers (such as magazines) should be removed.
- Whenever possible customers should be asked to make appointments online or by phone prior to appearing at the business location.
- Employees should be instructed to keep customer meetings as short as possible and customers may be informed accordingly.

Consequences of insufficient or missing implementation of the provisions

In the context of closures of businesses by emergency law only violations of art. 6 CD2 are declared as criminal offence by the decree itself. Anyone who opposes to an official closure of business must expect to be fined or even imprisoned; theoretically, this would also include the reopening of a business without a protection concept. However, the ordinance does not directly regulate the sanctioning of violations of other provisions and recommendations of the authorities

regarding the closure or reopening of businesses in connection with COVID-19.

In terms of labor law, the employer has a duty of care towards the employees. In particular, the employer must ensure the protection of the health of its employees (Art. 328 OR). Should an employee get infected with coronavirus in a company and should she or he succeed in evidencing damages and a causal connection, the employer would in principle be liable for damages. The employer's fault is presumed in this regard. However, the employer may avoid such liability if it can prove compliance with the official regulations and recommendations and therefore there is no fault of the employer (exculpatory evidence). Strict compliance with the regulations and recommendations of the federal authorities and appropriate documentation hence are also recommended because of possible claims for damages.

Regarding public law, failure to comply with the official regulations can lead to the (re)closure of the business. The risk of another official closure exists on the one hand if no protection concept has been drawn up for a business at all. On the other hand, according to the Federal Council's further explanations on CD2, a (re)closure may also be ordered if the protection concept is insufficient or insufficiently implemented. For this reason, a standard protection concept of the federal authorities or a concept of the respective industry associations should be used whenever possible.

Some sector associations have already developed a publicly accessible protection concept, e.g. the hairdressers' association (<https://coiffuresuisse.ch/news-media/coronavirus/>) or the association of retailers (https://www.swiss-retail.ch/corona-virus_covid19_de/); however, a consistent concept is still lacking in various sectors up to this day. In general, the situation of employers - also for the benefit of public health - would be greatly facilitated if specific provisions were to be publicly announced for each sector.

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.

© Walder Wyss Ltd., Zurich, 2020

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
Partnerin, Zurich
Phone +41 58 658 56 60
irene.suter@walderwyss.com



Christoph Stutz
Konsulent, 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
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



Flora V. Palovics
Senior Associate, Lausanne
Phone +41 58 658 83 79
flora.palovics@walderwyss.com



Laura Luongo
Associate, Geneva
Phone +41 58 658 30 21
laura.luongo@walderwyss.com



Jonas Knechtli
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



Nadja D. Leuthardt
Associate, Basel
Phone +41 58 658 14 62
nadja.leuthardt@walderwyss.com



Benjamin Sommerhalder
Associate, Basel
Phone +41 58 658 14 66
benjamin.sommerhalder@walderwyss.com



Sarah Eichenberger
Associate, Zurich
Phone +41 58 658 58 69
sarah.eichenberger@walderwyss.com