

Employment News No.

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Corona Income Compensation for Employees in Quarantine?

Intensified contact tracing, the launch of the so-called SwissCovid app as well as the new regulations of the Federal Council regarding the entry from coronavirus risk regions to Switzerland are all leading to an increase in the number of cases in which employees must undergo quarantine. Especially in the upcoming summer holiday season, employers will therefore be increasingly faced with the question of how employees in quarantine are to be remunerated and whether social insurance benefits may be claimed for the loss of work during the quarantine.



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
Telefon +41 58 658 58 69
sarah.eichenberger@walderwyss.com

In order to prevent (or at least slow down) the further spread of coronavirus despite the lockdown having been lifted, the competent authorities are relying on more extensive testing as well as rigorous contact tracing. In particular due to the SwissCovid app which has been installed on over one million Swiss smartphones by 4 July 2020, the risk of employees having to undergo quarantine increases. This newsletter intends to provide an overview of the requirements according to which the so-called corona income compensation can be claimed and in which cases the employer is obliged to continue paying salaries to employees in quarantine.

Corona Income Compensation

The traditional income compensation according to the Income Compensation Act (**ICA**) is a social security benefit paid for employees who are either performing civil protection, civil or military services or participating in a so-called Y+S (Youth and Sport) leadership course. This same social security scheme also covers maternity benefits which are paid during the compulsory maternity leave for 14 weeks after birth.

On 20 March 2020, the Federal Council introduced the so-called corona income compensation which is paid out by the cantonal compensation funds in the same way as the other benefits under the ICA. According to the current Ordinance on Measures in the Event of Loss of Earnings due to the Coronavirus (COVID-19 Ordinance on Loss of Earnings, **OLE**), employees who had to interrupt their work due to official measures in connection with the COVID-19 pandemic in accordance with the Epidemics Act (**EpidA**) are entitled to an income compensation provided that they are compulsorily insured with the Old-age and Survivors' Insurance (**OASI**).

Like the income compensation under the ICA, the compensation according to the OLE is paid in the form of daily allowances and amounts to 80% of the average income subject to the OASI which the respective person earned before the beginning of the coronavirus related loss of earnings. The maximum daily allowance amounts to CHF 196, with the consequence that employees with a monthly

salary of CHF 7,351 or more will only be paid this maximum amount and not 80% of their actual salary.

Due to the fact that the corona income compensation is largely based on the ICA and the principle of maternity and military service compensation, it can be assumed that any obligation of the employer to continue paying salaries in the event of quarantine is fully covered by this income compensation, even though the federal authorities have not (yet) taken a position on this question. This means that, as is also the case with the income compensation under the ICA, the employer does not have to top up the 80% or the lump-sum compensation of CHF 196 per day to the employee's full salary.

The corona income compensation is not paid automatically, but rather must be requested from the cantonal compensation fund by 16 September 2020, at the latest. There is a specifically prepared application form which can be downloaded using this [link](#). The compensation funds normally pay the compensation retroactively and directly to the employee entitled to it. However, if the employer continues to pay the salary, it is authorised to assert the claim and the corresponding payments are paid out to the respective employer.

Right to Income Compensation in the Event of Ordered Quarantine

An *ordered* quarantine due to an increased risk of infection after contact with a person who has tested positive for COVID-19 is a measure according to the

EpidA which basically results in a claim for corona income compensation (Article 2 para. 1^{bis} letter a section 2 ICA). The right to income compensation arises on the first day of quarantine and is limited to ten days per quarantine case since within this period any possible infection can usually be diagnosed, or the all-clear signal can be given on the basis of (multiple) negative test results.

According to the circular letter of the Federal Social Insurance Office (FSIO) on corona income compensation, quarantine must be ordered either by a doctor or by the competent authorities in order to trigger a corresponding compensation claim. Together with the corresponding application, either a medical certificate stating that quarantine is required or proof of the official order must therefore be submitted to the cantonal compensation fund. In addition, when applying for the compensation, it must be declared whether the respective employee can carry out their work from home as in these cases there is regularly no right to income compensation.

Income Compensation in the Event of Quarantine after Alarm by SwissCovid App?

Since the alarm by the SwissCovid app alone does not constitute an obligation to undergo quarantine, according to the circular letter of the FSIO such alarm is *not* sufficient to justify a claim for corona income compensation. Anyone who enters quarantine only on the basis of the app's contact alert and thus does so voluntarily cannot enforce a claim for compensation due to the lack of an official order. If the app sounds an alarm, a reference to the SwissCovid infoline of the Federal Office of Public Health (FOPH) appears. It is generally recommended for employees whose SwissCovid app has triggered an alarm and who are no longer able to carry out their work in the event of quarantine to contact the corresponding infoline through which the official or medical order for quarantine may be initiated, if necessary.

Income Compensation in the Event of Quarantine after Return from Risk Region?

According to Article 2 of the COVID-19 Ordinance on International Passenger Transport Measures, from 6 July 2020 all persons returning from a risk region listed in the annex to this Ordinance must undergo quarantine for ten days. Although the FOPH shortly after announcing this new quarantine obligation stated contrary information, the OLE now explicitly regulates that in the case of a quarantine obligation due to the return from a risk region there is no compensation claim (Article 2 para. 2^{bis} OLE). According to the circular letter of the FSIO, this applies to all returnees who travel or have travelled to a risk region from 6 July 2020. Conversely, this must mean that persons who have already travelled to a country that is on the FOPH's list of risk countries before 6 July 2020 are entitled to corona income compensation. Furthermore, according to the view represented herein, the same would have to apply to employees who travel to a country which was not yet included on the risk list at the time of their departure and is only subsequently qualified as a risk region by the FOPH (after entry into the corresponding country). However, the federal authorities have not yet made any explicit statements on the latter constellation and it should be noted that the wording of Article 2 para. 2^{bis} OLE, according to which there is no right to corona income compensation in case of quarantine after return from a risk country, does not differentiate whether the respective country has been added to the list of risk regions already before or only after entry to the country.

Obligation to Continued Payment of Salaries to Employees in Quarantine

Due to the possibility of applying for corona income compensation and since, according to the view expressed herein, salary claims are fully compensated by the payment of the cantonal compensation funds, in most cases the question

whether there is an obligation for the employer to continue to pay salaries during the quarantine of employees can remain unanswered. For some employers, however, the question will arise, particularly in view of the upcoming summer holidays, whether they must continue to pay their employee's salary if the employee must undergo quarantine for ten days after returning from a risk region designated by the FOPH.

There seems to be general agreement to the extent that compulsory quarantine ordered on the basis of the EpidA normally constitutes an absence from work through no fault of the employee. Hence, according to Article 324a para. 1 CO, the employer would generally be obligated to continue to pay salaries, if this obligation was not covered by the corona income compensation. However, if an employee now travels to a country which is already on the FOPH's risk list before their departure, and the employee must therefore be aware of the quarantine obligation after the return to Switzerland, the corresponding absence from work can no longer be considered to be through no fault of the employee.

Article 324a para. 1 CO and thus the employer's obligation to continued payment of salaries despite the absence of work is an exception to the principle of "no work, no pay", which only applies if the employee is not at fault for the loss of working capacity. Thus, if an employee had to expect the mandatory quarantine before departure and if such employee cannot perform their work from home, as may be the case with a service technician or a warehouse clerk, there is, according to the basic principle of "no work, no pay", no obligation for the employer to continue to pay salaries.

If, however, the respective employee has a sufficient vacation or overtime credit, they must generally be allowed to draw this credit during the period of quarantine (unless there are good operational reasons for not doing so), in which case the employer is obliged to continue to pay the employee's salary.

Excusus: Obligation to Continue to Pay Salaries if Employee falls Ill after Staying in a Risk Region?

In connection with the list of risk countries created to clarify the quarantine obligation, the question arises whether the employer must continue to pay the employee's salary if the employee actually falls ill with COVID-19 after staying in a risk country.

On the one hand, there is no apparent objective reason to treat the employee who actually falls ill with COVID-19 after staying in a risk region better than the employee who does not fall ill but is subject to quarantine obligations. On the other hand, the obligation to continue to pay salaries in the event of illness would also have to be assessed on the basis of Article 324a para. 1 CO, which, as mentioned above, requires the employee's blamelessness. Both aspects argue against the employer's obligation to continue to pay salaries after an employee has been infected in a country which was already on the FPOH's risk list when the employee departed. The employee then has deliberately and intentionally exposed themselves to a highly increased risk of infection. Although infection with coronavirus is not foreseeable to the same extent as the quarantine obligation after returning to Switzerland, the fact that a country is on the FPOH's risk list must nevertheless at least be interpreted as a (rebuttable) presumption of fault on the part of the employee, which reduces the applicability of Article 324a para. 1 CO.

In the case of an employee's illness following a stay in a risk country, due to the comparatively lower predictability of the corresponding absence from work the individual circumstances will have to be specifically considered. The loss of work capacity in the case of a coronavirus infection after staying in a risk area is not a direct legal consequence of the trip, unlike the mandatory quarantine, which is the reason why fault cannot always be affirmed but only assumed, and can therefore be rebutted in individual cases.

In this context, it should be noted that the employee's fault leading to the exclusion of the employer's obligation to continued payment of salaries in the event of illness must also be of a certain severity.

In particular, as an objective element of fault, it must always be examined whether the conduct of the person concerned in the specific circumstances of the case deviates from the conduct of an "average reasonable third party". For example, the assessment of the question of fault will be different in the case where the employee takes a pleasure trip to Sweden than in the case where the employee visits their grandmother in Serbia who is dying. Another decisive factor may also be whether the employee while staying in a risk country enjoys the nightlife in an entertainment district or spends the entire holiday at home or in a holiday home. It is to be expected that the courts will deal with these differentiations and that in cases in which an employee is at first prevented from working because of a mandatory quarantine and subsequently falls ill with COVID-19 during or after this quarantine, the employer's obligation to continue to pay salaries for the duration of the employee's absence from work due to illness following the quarantine will often be affirmed.

Coordination of Corona Income Compensation with Other Benefits

According to Article 2 para. 4 OLE, the Corona income compensation is subsidiary to all benefits provided by other social insurance schemes or insurance schemes that are subject to the Insurance Contract Act. This means in particular that no compensation is provided for loss of work that has already been compensated by short-time working compensation or daily sickness allowance.

According to the ambiguous wording of the OLE, corona income compensation is furthermore subsidiary to the employer's "continued payment of salaries". However, the FSIO directive makes it

clear that if the employer has continued to pay the salary to the respective employee, the employer can claim the compensation directly from the cantonal compensation fund. In quarantine cases, many employers will continue to pay salaries as before, as it will always involve an effort to adjust monthly salary payments in individual cases. These employers should not be put at a disadvantage compared to those who discontinue salary payments, which is why they are authorised to assert a respective claim for compensation. The subsidiarity of corona income compensation as opposed to continued payments of salaries is probably intended to clarify that Article 324a para. 1 CO, and thus the employer's obligation to continue payments of salaries in the event of the employee's illness, if applicable, takes precedence over the claim for corona income compensation. Thus, if an employee has actually fallen ill with COVID-19, no compensation can be claimed. This is congruent with the fact that in the event of actual illness isolation is ordered instead of quarantine. Hence, the scope of application of Article 2 para. 1^{bis} OLE is no longer affected anyway.

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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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