

Employment News No.

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## Coronavirus: Potential employment issues related to Covid-19 in Switzerland

The coronavirus continues to spread and has now also arrived in Switzerland. As the Swiss government ramp up efforts to contain the spread of the virus, employers and employees also need to be aware their rights and obligations at the workplace. In this Newsletter, we discuss some frequently asked questions regarding potential employment issues related to the Covid-19 in Switzerland.

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Ever since the first individuals have been tested positive for the new coronavirus in Switzerland, uncertainty is also increasing among the Swiss population. Especially at the thought of overcrowded trains and buses, some employees would certainly be happy if they could stay at home. But can employees refuse to come to work by fear of contamination? Or could an employer oblige his employees to stay at home or work from home? And what about the salary? We will try to clarify some frequently asked questions regarding potential employment issues related to the Covid-19 in Switzerland.

## 1. Protective measures at the workplace

### 1.1. Duty of care of the employer

The law stipulates the employer's duty to protect the health of its employees. It is already known that the employer must therefore design the operational facilities and work processes in such a way that a risk to the health of employees can be avoided. However, in the absence of precedent, it is not yet clear what concrete measures the employer has to take in the event of a possible pandemic.

It can be assumed that in the event of a pandemic, the employer must take concrete precautions to keep the risk of infection in the companies as low as possible. First and foremost, this certainly includes the obligation to comply with the hygiene rules recommended by the Federal Office of Public Health (FOPH). In view of the current situation, it would be appropriate for employers to take the following measures to protect their employees:

- Information and education of employees about the chances of contamination
- Flyers with rules of conduct for employees (e.g. wash your hands thoroughly, cough and sneeze into a paper tissue or the crook of your arm, use disinfectant, avoid shaking hands and close physical contact)
- Establishment of rules of conduct in the event of signs of infections of

employees, in particular immediate release from work and request for medical examination

- Reminder of the employee's duty to inform when travelling to risk areas and countries
- Avoiding business trips to risk areas and countries

In case the coronavirus continues to spread rapidly, employers should also offer their employees the opportunity to work from home (home office); provided of course, that this is possible from a business perspective. Because even if employment agreements provide for fixed places of work and do not contain a mobility clause, it can be assumed that the employer can ultimately order employees to work from home office in such an exceptional situation.

### 1.2. The involvement and participation of employees

However, it is usually forgotten that employees also have specific rights of participation and involvement in matters of health protection at work (article 48 of the Swiss Labor Act and article 6 of the Ordinance 3 to the Swiss Labor Act). The exercise of these rights requires that the employer provides early and comprehensive information about the planned occupational health and safety measures. Subsequently, the employer must not only take note of the concerns of its employees regarding the protective measures to be taken, but must also deal with

them in a concrete and direct discussion. The aim is to find solutions that are accepted and implemented by both sides. Should the employer not or only partially take into account the suggestions and objections of the employees, the employer must justify the decision in detail.

In the event of ongoing disagreements that cannot be resolved internally, it may be appropriate, by mutual agreement, to seek advice from external experts or the authorities. It should be clear that delaying necessary precautions must be avoided in any case.

## **2. The employer's obligation to pay the salary**

The principle is clear: "no work, no pay". However, no principle without exceptions. For example, the employee is still entitled to his salary if the work performance is not possible because the employer is in default of acceptance (article 324 Swiss Code of Obligations (SCO)) or if the work performance becomes impossible for a reason that lies within the employer's sphere of risk. It follows that, in order to determine the employer's obligation to continue to pay the salary, it must always be clarified whether the relevant event falls within the employer's sphere of risk or not.

In application of this principle, the employment law assessment of the main scenarios in the context of the coronavirus would have to be carried out as follows:

### **2.1. The employee wishes to stay away from work by fear of contamination**

If the employee refuses to come to work by fear of contamination, without any instructions have been given by the authorities or being justified because the employer does not comply with hygiene regulations or does not take sufficient protective measures, this is qualified as an unfounded refusal to work and therefore, the employee has no right to have

the employer continue to pay his/her salary. Such conduct could even result in disciplinary measures for the employee, including termination with immediate effect.

However, if the employee refuses to come to work because the employer does not fulfil its duty of care mentioned above and takes no or not sufficient measures to protect the employees' health, the employer is obliged to continue to pay the salary.

### **2.2. The employee is already tested positive or could be infected**

If the employee is already tested positive for the coronavirus or at least shows symptoms, it is essential that he/she stays away from work. As the employee is prevented from working by personal circumstances at no fault, such as illness, the employer must pay his/her salary for a limited time in accordance with article 324a SCO. It is irrelevant when and where the employee notices a possible infection. Even if the employee gets infected during vacation, is therefore not able to travel and cannot return to work at all, he/she is still entitled to his/her continued salary payment.

Because of his/her duty of loyalty, the employee must inform the employer about infections in his immediate environment. If there is then a risk that the employee is also infected through no fault of his/her own and the employer therefore instructs him/her to stay at home for the time being, his/her absence is considered to be excused and he/she is entitled to continued salary payments. However, if the employee will be quarantined because of contact with other people who have been tested positive for the coronavirus (without any instructions given by the employer), his/her resulting absence is excused, but he/she is not entitled to any salary payments for this period. A quarantine of an employee who has entered a risk area specified by the

federal government (areas with travel warnings) on his own responsibility is considered to be self-inflicted and therefore, the employee is not entitled to any salary payments during his/her absence.

### **2.3. Restrictions on public transport**

If public transport is restricted and thus makes it impossible for the employee to reach his/her place of work (on time), his/her absence is excused, but there is no obligation of the employer to continued salary payment. The same applies if the employee cannot return to work or cannot return in time due to other travel restrictions caused by the coronavirus.

### **2.4. Closure of business – voluntarily or by official order**

If, as a precautionary measure, the employer closes its business on own initiative without having been instructed to do so by the authorities, the employer is obliged to continue paying salaries as a result of the business risk to be attributed to the employer.

However, the legal situation is different if the business is closed on the instruction of the cantonal or federal authorities or because of the employer's duty of care, as several employees tested positive for the coronavirus despite protective measures at the workplace. In our view, the scenario of a transnational pandemic cannot be assigned to either the employee's or the employer's sphere of risk, as extending the operational risk to such circumstances would go much too far. Such a case is accordingly not regulated by law at all. Therefore, SECO's general statement that in such situations the employer is per se obliged to continue to pay salaries is not convincing in our view. Rather, in the event of impossibility of work performance for which neither party is responsible – as in the case of closure of business by order of the authorities or as a result of the employer's duty of care in the case of several infected

employees – the general default rules pursuant to article 119 SCO would apply. The application of these provisions would result in the consequence "no work, no pay" and the employer would therefore not be obliged to continued salary payment in this scenario.

### 3. Possibility of short-time work in case of closure of business

Although doctrine and case law are largely silent on the subject, the question of the applicability of short-time work in the event of the spread of the coronavirus arises from a legal perspective. If a business would have to be closed due to an official order, it would be possible under certain circumstances to apply for short-time work compensation from the unemployment insurance. As short-time work is considered not only a temporary reduction, but also the complete cessation of work in a company, whereby the contractual relationship under employment law is sustained. The advantage for the employer is considerable cost savings for staff changes and the maintenance of short-term availability of the workforce. The advantages for employees are particularly the avoidance of unemployment, the maintenance of social protection and the avoidance of gaps in contributions to occupational pension schemes. According to article 32 para. 3 of the Unemployment Insurance Act, work absences are also covered by the provisions on short-time work compensation if they are due to official measures or other circumstances for which the employer is not responsible, cannot be avoided by other measures and no third party (particularly no insurance) can be held liable for the loss. This hardship clause therefore governs situations that are attributable to exceptional circumstances and thus go beyond the normal operating risk of the employer. In our opinion, it is justifiable to assert such a

case of hardship in the event of a closure of business due to the coronavirus and to demand the payment of short-time work compensation accordingly. It seems currently that the authorities follow this rule.

### 4. Risk management for employers

As the impairment of production processes represents an enormous financial risk for employers, insurance solutions should certainly be considered. However, whether the risk of continued salary payments in the event of an officially ordered closure of business could be reduced by short-time work compensations will only be clarified when this scenario actually occurs. We can only hope that it will not come to that with the coronavirus.

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