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The coronavirus has serious consequences for the Swiss economy. Tourism and event industries are suffering and it is expected that manufacturing enterprises will soon be affected as well. Short-time work can provide a remedy and reduce the economic consequences of the coronavirus for employers and employees.



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In recent days, various Swiss companies suffering from the consequences of the corona epidemic have submitted applications for short-time work compensation. Some of these applications have already been approved by the cantonal authorities. This article examines the circumstances under which affected companies may apply for short-time work compensation and which obstacles could prevent the requests from being granted.

Entitlement to Short-Time Work Compensation due to Absences Caused by Coronavirus

Short-time work is the temporary reduction or suspension of labor in a company, while the employment contract remains in force. The purpose of short-time work is therefore to compensate for temporary employment slumps and ultimately to preserve jobs. With short-time work compensation ("SWC") the state partly compensates a part of the loss of working hours and thereby offers an alternative for employers in order to avoid imminent dismissals. For employees, the SWC offers the advantage of preventing unemployment, retaining the full protection of labor law, and securing the consistent continuation of the contributions to occupational benefits insurance.

The cantonal authorities may only grant SWC under strict conditions. A condition for SWC is in particular that the absence from work must have emerged due to one of the following two reasons:

- i. unavoidable economic reasons; or
- ii. governmental measures which the employer cannot avoid and for the damages resulting of it the employer cannot hold a third party liable (in particular an insurance company).

It is questionable whether the currently spreading epidemic caused by coronavirus can be considered as a substantiating basis for a SWC claim. The State Secretary for Economic Affairs (SECO) announced on 2 March 2020 that it does not consider the appearance of the coronavirus and its effects as normal

operational risks. On that subject the SECO has provided some examples in a FAQ "Pandemic and Operations" dated 28 February 2020. Therefore it can be assumed that losses of working hours resulting from governmental measures will give rise to a claim for SWC; recent examples for such measures are the Federal Council's ban on major events with more than 1'000 people until at least 15 March 2020 (the cantons have in some cases set lower figures), official restrictions on transportation that impede access to the work location, the lockdown of towns (quarantine) or an operating ban for which the employer is not responsible. Similarly, work losses due to economic (i.e. both cyclical and structural) causes may also give rise to a claim to SWC. This may apply for example if the loss of work hours is caused by a drop in demand due to fears of infection (e.g. loss of walk-in customers) or a drop in production/sales due to delivery difficulties. The employer is usually not responsible for such circumstances and they could therefore constitute grounds for SWC.

The distinction between work absences which are attributable to the employer's normal operating risk and therefore are to be borne by the employer (employer default according to Art. 324 of the Swiss Code of Obligations) on the one hand and the unavoidable economic reasons which justify a claim to SWC on the other hand has not been conclusively clarified. According to the view represented here, the employer must at least in those cases be entitled to a SWC, in which it is forced to completely or partially close down the business because it can no longer

guarantee safety or proper production in the work place due to the absence of part of the workforce due to illness. The employer, on the other hand, is in default and cannot pass on the wage payment risk to the state if it closes its business only as a precaution to prevent further contagion.

No SWC for Involuntary Incapacity to Work due to Illness or for Self-imposed Quarantine

There is no entitlement to SWC if the employer is obliged to continue to pay wages in accordance with Art. 324a of the Swiss Code of Obligations (illness of the employee, etc.). This applies particularly to cases, in which employees are unable to work for personal reasons but through no fault of their own, such as when employees themselves fall ill with COVID-19 or have to care (for a limited period of time) for sick family members.

If employees stay at home for fear of illness, without being unable to work through no fault of their own and do not perform home office work, the employee is subject to the principle of "no work, no pay" and there is no entitlement to SWC.

Further Conditions of Eligibility for SWC

The cantonal labor authorities may furthermore only grant SWC if a loss of work is temporary and if it is to be expected that jobs will be protected thanks to the short-time work. As a result, employees who have been given notice of termination of employment and employees with fixed-term contracts are not entitled to SWC. Employees who are members of the highest decision-making body of the company are also not entitled to SWC. An important exception also applies to temporary employees: neither the enterprise offering services for hire nor the company of deployment is entitled to SWC for these employees.

Moreover, employees must agree to short-time work. The consent must be obtained in writing on a designated form

and submitted to the competent authority together with the preregistration. If the employees do not agree, they are basically still entitled to remuneration in accordance with their employment contract. The SWC, on the other hand, amounts to only 80% of the creditable loss of earnings, although the insured earnings are limited in amount (currently CHF 12'350 per month). An entitlement to SWC also prerequisites that the loss of working hours is equivalent to at least 10% of the hours normally worked in the business. The basis for this comparison is the contractually agreed working time, the maximum being the working hours customary to a particular region or sector of industry. The employer hence must substantiate and prove the actual loss of working hours of the employees concerned for the duration for which it requests SWC – a mere operational plan is not sufficient. This means that companies which do not record their employees' working hours at all, or whose employees have legally waived the recording of working hours, will have difficulties in enforcing a claim for SWC against the unemployment insurance fund. In the case of failure to record working time, the affected employer is recommended to unilaterally instruct its employees to record their working time. However, the employer is only able to revoke the waiver concerning the recording of working times annually. In such cases, the employer therefore needs to obtain the consent of the respective employees to record their working hours at least for the duration of the SWC.

Procedural Questions and Employers' Obligations

If a company wishes to apply for SWC, the cantonal authorities must be notified in writing at least ten days before the planned period of short-time work begins using a designated form. The notification period is only three days if the employer is able to prove that short-time work must be introduced due to sudden unforeseeable circumstances. There is no

entitlement to SWC during the notification period. Preregistration forms are provided by the competent cantonal authority.

The employer has thereafter the following obligations:

- to pay the employee concerned the SWC amounting to 80% of the creditable loss of earnings (obligation to make an advance payment);
- to pay the full wage costs for two or three waiting days (deductible of employer) per half-year;
- to pay in the full (i.e. on the basis of the 100% wage) statutory and contractually agreed social security contributions (AHV, IV, pension fund etc.) during short-time work. However, the employer may deduct the full employee contributions from the employee's salary. In addition, the unemployment insurance fund reimburses the employer for employer contributions.

The accounts are always settled retroactively through the unemployment insurance fund and the employer must assert its claim within three months from the end of each month (or four weeks) of short-time work. If the employer misses these deadlines, its claim is forfeited.

Outlook and Recommendation

It is not yet possible to predict the development of the corona epidemic and to determine the extent of the resulting economic damages. With SWC, the Swiss legislator has created an instrument that is able to support Swiss companies. Employers should examine the necessity and conditions for SWC at an early stage so that, if necessary, a preregistration to the competent authority can be implemented quickly.

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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