



How to Deal with the Coronavirus at the Workplace? Guidance for Employers

On February 28, 2020, in reaction to the spread of the COVID-19 (coronavirus) in Switzerland, the Federal Council issued a ban for large-scale events involving more than 1,000 people. In parallel, some cantonal authorities have already issued bans for large-scale events involving less than 1,000 people on their territory (e.g., in Graubünden). Further measures from cantonal authorities are expected. In this Bulletin, we answer the most important questions on the impact of the COVID-19 on employment relationships.

What measures must employers implement to protect employees' health?

So far, the authorities have not ordered companies to take specific measures related to employees. However, based on a general obligation to protect the employees' personality, employers must take sufficient measures to protect the employees' health (and in this respect employees must be informed and consulted with under the Participation and Labor Acts). This includes providing information on the recommended conduct in case of a pandemic, such as washing hands or avoiding

handshakes (as well as making sure that the employees can implement such conduct, e.g., by providing soap or disinfectant). If possible, and depending on the seriousness of the pandemic, the risk of being infected at the workplace, and | or the risk for the individual employee (e.g., employees with a preexisting condition), the employer should allow for home office or remote work solutions.

Measures taken by the employer must remain proportionate, and all measures and instructions have to take the employees' personality rights into consideration. In particular, instructions that affect the employees' private life, such as travel restrictions, must be considered carefully. In case of a pandemic, employees can in our view be asked to inform the employer about personal travel to affected areas (as defined by the Federal Department of Foreign Affairs (**FDFA**, *Eidgenössisches Departement für auswärtige Angelegenheiten*; *Département fédéral des affaires étrangères*) and about the existence of symptoms typical of the coronavirus. Far-reaching measures such as mandatory medical screenings, however, cannot be ordered, unless in very specific circumstances.

The Federal Office of Public Health (**FOPH**, *Bundesamt für Gesundheit (BAG)*; *Office fédéral de la santé publique (OFSP)*) and cantonal authorities recommend companies to prepare a pandemic plan. The FOPH has published an informative handbook in this respect, directed at small and medium enterprises. Depending on the evolution of the COVID-19, such a plan may become mandatory.

Employees must comply with their employer's instructions, provided they remain proportionate. Failure to comply may result in disciplinary measures (to be assessed on a case-by-case basis) and potentially a dismissal. If an employee fails to comply with instructions and cannot work because he | she is quarantined, the employee may lose the right to continued payment of salary.

What must employers do in case of a suspected infection?

Employers who suspect employees to have contracted COVID-19 (e.g., sick employees who have travelled to affected areas) must take appropriate measures to make sure that the virus does not spread to the workplace and infect other employees. Such measures include instructing suspected employees not to come to the workplace, at least during the incubation period of the virus (i.e., usually between 3 to 7 days but up to 14 days) and – to the extent possible – allow for home office or remote work solutions. If an infection is medically confirmed, the employee will have to be quarantined (e.g., at home), and should not be allowed to return to the workplace until not contagious anymore. During the quarantine, the employee can be required to work home office, unless actually sick and unfit to work, and to the extent reasonably possible.

When do employers have to pay the salary?

Do employers have to pay the salary to employees if the offices are temporarily closed?

If the employee cannot work due to circumstances that fall within the employer's business risk, the employer must continue to pay the salary. Risks such as a fire or power breakdown affecting the employer's offices generally fall within the employer's business risk. Hence, salary must be paid despite work interruptions. The State Secretariat for Economic Affairs (**SECO**, *Staatssekretariat für Wirtschaft; Secrétariat d'Etat à l'économie*) takes the (non-binding) view that the coronavirus pandemic represents such a business risk and that salary must be paid even if the employees cannot work due to a business closure based on the orders by public authorities. Under specific conditions, employers are entitled to apply for compensation for reduced work hours (*Kurzarbeit; réduction de l'horaire de travail*).

In our view, it is doubtful whether a general pandemic affecting a certain region can be compared to events such as a fire or a power breakdown. In particular, if an employer must close its offices based on an order of the authorities that primarily aims at preventing a virus from spreading and therefore protecting the public, the risk arguably does not fall into the employer's sphere of responsibility. If the employee cannot work because the authorities have ordered a temporary closure, both parties to the employment relationship can in our view be considered as unable to perform under the employment agreement and are released from their obligations: the employee must not work, and the employer must not pay the salary.

If the employer decides of its own accord, however, temporarily to close its business, it will likely remain obliged to pay the salary. Again, the employer may be able to apply for compensation for reduced work hours under certain conditions.

Do employers have to pay the salary to employees in quarantine?

If the employee is quarantined and cannot work remotely, the employer's obligation to pay the salary during a quarantine period depends on whether the employee is – or not – responsible for his or her incapacity to work. The following scenarios may be envisaged:

- If the employee – through no fault of his or her own – is placed in quarantine by either Swiss or foreign authorities, the employer will have to pay the salary during a limited period of time (as the case may be, the employee or the employer will be entitled to insurance benefits depending on the insurance coverage).
- If the employee – through no fault of his or her own – is placed in quarantine at the employer's request (e.g., as protective measures designed to prevent the virus from spreading to the workplace and thus infect other employees), the employer is *de facto* waiving the employee's obligation to work (similar to a *garden leave*) but remains liable to pay the salary.
- However, regardless of whether the quarantine was decided by the authorities or by the employer as a protective measure, if the employee is responsible for his or her placement in quarantine, the employer may refuse to pay the salary during this period. It is advisable for the employer to warn employees in advance of this possible consequence. In our view, this is in particular the case where the employee voluntarily decided to travel to affected areas against the recommendations issued by the FDFA and without a valid reason to do so. To date, affected areas include China, Iran, South Korea, Singapore and in Italy the regions of Lombardy, Piedmont and Veneto.

If the employer has taken the necessary measures and given the appropriate instructions, the employee is required to comply with the instructions and continue working, at the workplace or at home.

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