

COVID-19 and Labour Law: Switzerland

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Abstract

The coronavirus epidemic has hit Switzerland hard. Like many other countries, Switzerland has used restrictive measures to shut down public life and economic activities in large areas. In addition, various social security benefits have been provided, particularly in the event of short-time working. However, benefits were also made available for self-employed persons and employees affected by the official measures in other ways. In terms of labour law, the employer's obligations to protect particularly vulnerable employees were increased.

Keywords: Covid-19; Labour Law; Social security benefits; Short-time work; Vulnerable employees.

1. Legal basis of the governmental measures

Switzerland is a semi-direct democracy with a strong federalist structure, in which the cantons have a great deal of autonomy, particularly in the area of health care. However, the Federal Constitution provides in Art. 185 para. 3 that "The Federal Government may, directly based on this article, issue ordinances and orders to meet existing or imminent great disturbance of the public order, the external or the inner security. Such ordinances have to be limited in time". In the event of an epidemic, the Federal Epidemics Act is also relevant. This law differentiates between a particular and an extraordinary situation. In an extraordinary situation, the powers to combat the epidemic are transferred from the cantons to the Confederation. On 16 March, the government (in Switzerland, as you know, there are seven equal members) decided that an extraordinary situation now existed. Since then, the government has issued numerous ordinances that are directly applicable throughout the country¹.

At the time of writing, the federal government in Switzerland, in line with many other states, has closed borders, schools, bars, restaurants and all shops that do not sell food or other important goods (for example medicines). In addition, sporting and cultural events have been banned and a prohibition of assembly for groups of more than five people has been issued. Meetings of five or less persons are only allowed if social distancing rules are

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¹ See the main ordinance: <https://www.admin.ch/opc/en/classified-compilation/20200744/index.html>. For an overview of all "covid-19"-regulations: <https://www.buchzik.ch/lexcorona>

observed. A general exit ban has not been imposed, however an unprecedented official information campaign has encouraged the population to stay at home. All these measures, which were adopted without the participation of Parliament or the possibility of a popular referendum, which normally exists in Switzerland, infringe on fundamental rights guaranteed in the Constitution. However, the government was faced with the dilemma of protecting the fundamental right to life and health, which required measures to restrict freedom.

2. Regulations in the field of social security and labour law

The shutdown of numerous shops and the situation in hospitals heavily burdened with Covid-19 patients quickly required official measures in the areas of labour law and social security. The Federal Council recognized that social acceptance of the restrictive measures (both in terms of personal freedom and, in particular, economic activities) that are necessary from an epidemiological point of view would depend on the provision of rapid and readily accessible support to the persons affected. This is particularly important in order to avoid exacerbating the coming economic crisis and to mitigate its consequences.

2.1 Expansion of entitlement to short-time working compensation

Unemployment insurance, which is mandatory for all employees, uses the instrument of short-time working. Employees receive 80% of their wages from the unemployment insurance and can thus keep their jobs. Short-time working is approved by the competent authorities in the event of an exceptional situation. Immediately after the closure of shops by the authorities, the Federal Council recognized the coronavirus crisis as a reason for short-time working and the eligible group of persons was considerably expanded compared to the normal situation. According to the relevant ordinance², even temporary employees or persons in employer-like positions have a right to short-time work compensation.

2.2. Introduction of new social security allowances

On the basis of emergency legislation, the Federal Council has also introduced new social security benefits for self-employed persons and for employees who are prevented from working because of official measures in connection with coronavirus. Particularly noteworthy is the setting up of social security benefits for self-employed persons due to loss of earnings.

The background to these emergency measures is as follows:

² <https://www.admin.ch/opc/fr/classified-compilation/20200805/index.html> (no official translation in English available).

- The official measures to fight against the epidemic are far-reaching, particularly with regard to school closures. This poses a problem for employed persons in that smaller children in particular cannot simply be left to fend for themselves. Parents have an ethical-social duty to look after their children and it is so far unclear whether an employer has to pay the salary in such a situation. The situation is even more precarious for self-employed persons, because the risk of looking after the children themselves due to the closure of the schools is not insured and probably not insurable.
- As a result of the orders in COVID-19 Ordinance 2, numerous companies have had to close down temporarily and countless events cannot take place. The question here is whether a company in this situation must continue to pay wages despite the lack of employment opportunities. The decisive question is *whether or not an epidemic or its consequences are part of the employer risk*. This question has not yet been settled by the highest court. The views in jurisprudence are divided.
- According to the current legal situation, self-employed persons have to bear the risk of the economic consequences of an epidemic entirely on their own. There is neither an employer against whom a wage claim can be asserted, nor is there a claim to unemployment insurance benefits.

The law now allows self-employed persons and employees in the aforementioned categories to be entitled to social security benefits.

2.3. Special provision for health workers

Some of the Covid-19 regulations directly concern the working conditions of hospital staff. Art. 10a para. 5 of the Covid-19 ordinance Nr. 2 states that the regulations on *working hours and rest periods* according to the Labour Law are suspended in those hospitals that have experienced a massive increase in workload as a result of COVID-19 illness. In a first version of the regulation, this also affected provisions on overtime compensation and indemnification. However, after broad protests, the government changed the decree. Overtime bonuses are now also payable in the coronavirus crisis.

2.4. Particularly vulnerable workers

The Covid-19 regulations also take into account the increased risk to certain persons. Particularly vulnerable persons should stay at home and avoid crowds. Persons over 65 years of age and persons who have the following illnesses in particular are considered to be particularly at risk: high blood pressure, diabetes, cardiovascular diseases, chronic respiratory diseases, diseases and therapies that weaken the immune system, or cancer.

The Federal Council faced a difficult task. How can particularly vulnerable employees be protected from being infected with the coronavirus on the way to work and during work at the workplace? On the one hand, this is important to protect the *health of these employees*. In

contrast to people who are not particularly at risk, the effects of coronavirus infection are extremely serious. On the other hand, the protection of particularly vulnerable persons also has an *overall social dimension* (protection against overwork in hospitals and clinics). But how can this necessary protection be designed in such a way that the measures are acceptable for individual employees and the economy as a whole? And how can *contradictions of judgement* be avoided, in which particularly endangered persons should virtually go into self-isolation even without any concrete suspicion of infection, and at the same time be obliged to accept a possibly long journey to work and encounters with a large number of people at the workplace?

The new version of Art. 10b and 10c of the Covid-19 Regulation adopted on 16 April represents an overall successful attempt to reconcile the diverging interests. The cascade-like regulation provides the companies and their employees with a *framework for action* within which various *solutions adapted to the specific company conditions* are possible. Employers must allow vulnerable employees at risk to work from home and must undertake the necessary organisational and technical measures, and if necessary, allow them to undertake appropriate alternative tasks. If a person at especially high risk is only able to perform their work at the workplace, the employer must adapt the workplace or working procedures accordingly to ensure that the person is protected. If the employer fails to do so, the employee at risk must be placed on leave but continue to receive their wages. If it is not possible for the employee concerned to work from home and if they consider the risk to their health to be too great, they may refuse to work at the workplace. The employer must then place the employee on leave while continuing to pay their wages. Employees at especially high risk must provide their employer with a personal declaration to that effect. The employer may request a doctor's certificate.

3. Summarizing assessment

Extraordinary times call for extraordinary measures. The Federal Council has recognised that social acceptance of the restrictive measures that are necessary from an epidemiological point of view also depends on the provision of rapid and unbureaucratic support to the persons affected. This is particularly important in order to avoid exacerbating the coming economic crisis and to mitigate its consequences. The various measures taken by the Federal Council must therefore be seen in an overall context. Once again, the importance of the instrument of short-time work compensation is evident. It is also true that the group of those entitled to compensation has been expanded, at least for the duration of the epidemic. On the basis of experience, the regular legislator can then - hopefully once again - examine whether it makes sense to extend eligibility for compensation for less dramatic situations.

The new framework to protect vulnerable employees (Art. 10b and Art. 10c Covid-19 Regulation 2) is an important step in the right direction. In order to ensure that the sophisticated *protection concept* is *effective in favour of particularly vulnerable workers and in the interest of public health*, the courts are called upon to interpret the existing provisions on the temporal and material protection against unfair dismissal in the interest of the Covid-19 Regulation.

Furthermore, in view of the potentially heavy financial burden on employers, a solution should be sought to finance employees released from work with full pay through Social Security.

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