



Social Security and Labour Law: The Covid-19-reponse of Switzerland

Kurt Pärli

I) 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 2020, the government (in Switzerland, as you know, there are seven equal members) decided that an extraordinary situation now existed.¹ In June 2020, the extraordinary situation ended and since then democracy has been established, i.e. Parliament is again involved in decision-making on the Covid 19 measures. However, the government still has a very large competence to decide on measures. With the Covid 19 Act, the parliament has created the basis for the power of the executive.²

During the crisis, which is still ongoing (February 2021), numerous measures have been and are being taken to contain the pandemic.³ Economic activities have been and are being restricted by official orders. In the following, the content and structure of the labour and social security measures are examined in more detail.

II) 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.

¹ <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-78454.html>

² <https://www.fedlex.admin.ch/eli/cc/2020/711/en>

³ <https://www.bag.admin.ch/bag/en/home/krankheiten/ausbrueche-epidemien-pandemien/aktuelle-ausbrueche-epidemien/novel-cov/massnahmen-des-bundes.html#850493620>

1. Expansion of entitlement to short-time work 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 ordinance⁴, even temporary employees or persons in employer-like positions have a right to short-time work compensation. The instrument of short-time work compensation proved and still proves to be a very efficient form of support for the economy. Up to a quarter of all employees in Switzerland have temporarily received short-time work compensation.

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:

- 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.
- People who have tested positive for the coronavirus must go into isolation. People who have had close contact with a person who has tested positive must go into quarantine.⁵
- As a result of the orders in COVID-19 Ordinances, 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.⁶

3. Particularly vulnerable workers⁷

⁴ <https://www.admin.ch/opc/fr/classified-compilation/20200805/index.html> (no official translation in English available).

⁵ <https://www.bag.admin.ch/bag/en/home/krankheiten/ausbrueche-epidemien-pandemien/aktuelle-ausbrueche-epidemien/novel-cov/isolation-und-quarantaene.html#-883252542>

⁶ <https://www.bsv.admin.ch/bsv/fr/home/assurances-sociales/eo-msv/grundlagen-und-gesetze/eo-corona.html> (no official translation in English available)

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 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 Government 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 solution finally found 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. but the employer can claim back the expenses for the salary from the social security. Employees at especially high risk must provide their employer with a personal declaration to that effect. The employer may request a doctor's certificate.

4. Some employment Law Covid-19 Issues and Answers

In terms of labour law, Covid-19 raises a number of questions. Covid-19 positive workers who are unable to work because of Covid are uncomplicated. Here, as with other illnesses, the employer must pay wages for a limited period of time. Likewise, there are no particular questions about the protection against dismissal for employees who are ill because of Covid-19 and are therefore unable to work (there is protection against dismissal for a limited period of time). What is controversial, however, is whether employees who are in quarantine or isolation and cannot do home office work are protected against dismissal. There is no explicit legal regulation on this in Switzerland.

⁷ <https://www.bag.admin.ch/bag/en/home/krankheiten/ausbrueche-epidemien-pandemien/aktuelle-ausbrueche-epidemien/novel-cov/krankheit-symptome-behandlung-ursprung/besonders-gefaehrdete-menschen.html> ; the special rules for the vulnerable employees are based on art. 27a of covid-19-Ordinance, see: <https://www.news.admin.ch/news/message/attachments/64873.pdf> (french only, no official translation in English available)

Health protection at the workplace is very important. In addition to the general provisions in the Labour Contract Law and the Labour Act, the government has also issued a number of ordinances, which can be summarised as follows:

1. The employer shall take *further* measures in accordance with the STOP principle, namely physical separation, separate teams or the wearing of face masks in outdoor areas. The STOP principle includes (in order of priority):⁸
 - S = Substitution ("replace"): Arrangement of home office.
 - T = technical measures: Separation discs, markings to keep a distance of 1.5 metres, sufficiently ventilate work rooms, regular hand washing/hand disinfection, cleaning of frequently touched objects (door handles, lift buttons, coffee machines, etc.).
 - O = organisational measures: Do not mix people or teams. In the case of group transports, make several trips.
 - P = personal protective measures: Wear protective equipment (besides face masks, e.g. gloves or similar).
2. In principle, there is a home office obligation, unless this is not possible due to the nature of the activity or cannot be implemented with reasonable effort. The employer shall take the appropriate organisational and technical measures to enable home office. The employer does not owe the employee any compensation for expenses for home office that is arranged in accordance with this provision.

III) Summarizing assessment

Extraordinary times call for extraordinary measures. The Federal Council has recognized that social acceptance of the restrictive measures that are necessary from an epidemiological point of view) also depends on the provision of rapid and not bureaucratic support to the persons affected. This is particularly important in order to avoid exacerbating the coming economic crisis and to mitigate its consequences.

All in all, it was possible to prevent a wave of mass redundancies, at least for the time being, mainly thanks to the instrument of short-time work compensation. It should also be positively emphasised that the Federal Council and, since its "resurrection", also parliament (Covid 19 Act and other parliamentary resolutions) have recognised in principle that, in the current crisis, financial protection for people in precarious employment (fixed-term and or temporary employment) in particular is essential.

In the aftermath of the Covid 19 crisis, it must be critically asked to what extent labour law should still allow such precarious forms of employment in the future. It is clear that the labour market and global competition require flexibility and (a new trend word...) agility from employees. Such skills are to be promoted and demanded. However, this must and must not necessarily go hand in hand with a lack of or only weak social security.

This paper has shown that the provisions of labour and social law have an epidemiological reference. Here it is also important to learn from the experience in the fight against HIV infection. It is true that not all parts of the HIV/AIDS epidemic can be compared with the situation regarding Corona virus/Covid-19 disease. The "fight against AIDS" has shown that respect for fundamental rights and effective social protection are an essential part of responsible behaviour towards oneself and others.

⁸ https://www.seco.admin.ch/seco/fr/home/Arbeit/Arbeitsbedingungen/protection-des-travailleurs/covid-19/pflichten_employeur_covid19.html (no official translation in English available)

Particular importance is attached to the newly created social security benefits within the framework of compensation for loss of earnings. The necessity of integrating self-employed persons into a social security system in case of loss of income is already evident during the first wave in spring 2020. This has become even more evident since autumn 2020. Especially in the event and culture industry, there are many fully or partially self-employed persons who have lost part or all of their income due to the event bans. Without the opening of the social security system for these groups of people, the proportion of people who are or will be dependent on social welfare would be much higher.

The problem of social security for the self-employed is (is) also evident in the context of the emergence of new business models via internet platforms. The experiences with the protection of the self-employed during the Covid 19 crisis can and should be made fruitful in the necessary political discussion on self-employment and social security. However, some conceptual work is still needed here.

The role of the social partners is central in time of crisis. Quite rightly, their role is therefore also expressed in the Covid 19 Act. Particularly when ordinances and amendments to ordinances have to be issued under great time pressure in view of a changed epidemiological situation (e.g. the emergence of the highly contagious virus mutation), it is essential to draw on the expertise of the social partners. This not only serves to improve legislation, but also supports acceptance in practice.

Kurt Pärli
Professor for Social Private Law, University of Basel