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## AVOCATS

DROIT DU TRAVAIL

Garden leave ou pas garden leave ?



Auteur: Sandra Gerber | Le : 28 May 2024

## Garden leave or no garden leave?

When an employer decides to make an employee redundant, the question often arises of whether or not the employee should be released from the obligation to work, or what the English-speaking world calls 'garden-leave'. In some sectors (particularly banking and finance), garden leave has become the rule in Switzerland. Garden-leave is also increasingly the subject of negotiation between employer and employee when the employment relationship is terminated.

But beware: this decision may have consequences, particularly in terms of loss-of-earnings insurance, and it is worth pointing out a few things on this subject.

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When an employment contract is terminated, whether by the employer or the employee, the principle is that the employee must work until the end. The decision to release the employee from the obligation to work is a unilateral decision by the employer. The employee therefore has no right to be released from the obligation to work during the leave period;

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The employer's decision to place an employee on garden leave is not subject to any formality. The employer's decision to place an employee on garden leave is not subject to any formality and may therefore be made in writing, orally or by deed;

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If the employer decides to release the employee from his obligation to work, it may cover the entire period of leave or only part of it;

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If the employer releases the employee from the obligation to work, the employee is no longer required to provide his or her services. However, the employer must continue to pay the employee's full salary. The employer will often ask the employee to remain on call if necessary. The employer may also ask the employee to return to work during the period of leave, particularly if the business needs it or if the period of leave is extended for a long time, but of course this should not be done for purely quibbling purposes;

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Although employees no longer have to perform their work while on garden leave, they are still under contract until the date on which their employment relationship ends. If they start a new job during this period, they must inform their 'future former' employer. If the new job pays less, only the difference in salary is payable by the 'future former' employer.

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If the employee is unable to work during garden leave, the employer is obliged to pay the salary in accordance with Articles 324a and 324b of the Swiss Code of Obligations.

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In other words, and in summary, if the employer has not taken out loss of earnings insurance, he must pay the salary during the periods provided for in the Bernese scale, which applies in particular in the canton of Vaud. If the employer has taken out loss-of-earnings insurance, provided that the insurance benefits are equivalent and that the employer has fulfilled his obligations by paying the premiums, he is in principle released from the obligation to pay the salary after the insurance waiting period and it is the insurance company that decides.

**It is this last point and the practice of certain loss of earnings insurers that lead the author to say that the decision to release an employee from the obligation to work during the notice period is not a trivial one.**

The undersigned author has noted that some loss-of-earnings insurers refuse to pay compensation in the event of an employee's incapacity to work during the leave period on the grounds that the employer has released the employee from his obligation to work. For these insurers, the refusal to pay benefits is justified by the fact that there is no economic damage resulting from the state of health. The insurance company considers that it should only intervene in the event of incapacity for work if this results in a loss of income. However, if the employee is released from the obligation to work, the employer does not expect the employee to perform any work, but nevertheless agrees to pay the salary. According to these insurances, there would therefore be no damage to the employee as a result of his illness, since he is paid by the employer without having to perform any work.

**The author does not intend to comment here on the merits or not of the position taken by these insurers. However, employers should take this into account when deciding whether or not to place an employee on garden leave during the leave period, and should check the loss of earnings insurance policy before making a decision.**