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Coronavirus and labour law: what are the rights and obligations of employees and employers?

In recent weeks, the coronavirus has been at the heart of current events and concerns. Many questions arise, particularly from the point of view of labour law and the obligations of employees and employers in Switzerland. Many answers, sometimes different, have already been given by speakers from all sides. Here are the recommendations of WILHELM Attorneys at law to employees and employers who are certainly a little lost:

Rather than relying on the different answers given by the various speakers, we advise you to consult the website of the State Secretariat for Economic Affairs (SECO) and to follow its recommendations.

These recommendations, in the form of a table, can be found in a document entitled "FAQ: Pandemics and companies":

<https://www.seco.admin.ch/seco/fr/home/Arbeit/Arbeitsbedingungen/gesundheitschutz-am-arbeitsplatz/Pandemie.html>

These recommendations are addressed to workers and companies, but also to people who are unemployed. These recommendations also address RWH, i.e. reduced working hours or short-time or partial unemployment.

As an example, SECO provides the following answers to the questions that many employees are asking themselves:

- **For fear of being infected, an employee does not want to go to work and stays at home. What are his or her rights?**
 - SECO's answer:
"As long as no instructions have been given by the authorities, it is an unfounded refusal to work. You have no right to have your employer continue to pay your salary. If you continue to refuse to go to work, your employer is entitled to dismiss you with immediate effect. If the employee does not show up for work, this can also be considered as abandonment of position. In both cases, your employer may even be entitled to compensation (for example, a quarter of the monthly salary may be withheld)".

- **Still out of fear of infection, an employee wants to keep his children at home himself so that they are not infected at school and do not go to work. What are his rights?**
 - SECO's answer:
"If no measures have been decreed by the authorities, it is an unjustified absence. Thus, in case of prolonged absence or after prior warning, your employer is entitled to dismiss you with immediate effect. He may even claim compensation from you".

- **If the employee's child is ill, are the rights of the employee who stays at home to look after him/her different?**

- SECO's answer:

"The employer is obliged to give leave to a parent, upon presentation of a medical certificate, for the time needed to care for a sick child up to a maximum of three days per case of illness. Depending on the circumstances, an employee may also be released from the obligation to work for a longer period if medically justified. This dispensation from work is deemed to be an impediment to work through no fault of the employee's own within the meaning of Art. 324a OR. In the event of illness, the salary is thus due for a limited period of time. Parents are obliged to avoid prolonged absences by organizing themselves differently".

- **What if it is the employee himself/herself who is ill?**

- SECO's answer:

"[...] as a rule, your employer must continue to pay your salary. If you do not have daily allowance insurance, your employer will continue to pay your salary in accordance with Art. 324a/b of the Swiss Code of Obligations and the scale provided for (the so-called Bernese, Basel or Zurich scale)".

- **What happens if the canton decides to close schools and kindergartens? What are the rights of employees who have to stay at home to look after children?**

- SECO's answer:

"According to the law, if an employee is prevented from working through no fault of his or her own for the fulfilment of a legal obligation (obligation to maintain the father and mother according to Art. 276 CC), the employer must pay the employee's salary for a limited period of time in accordance with Art. 324a of the Swiss Code of Obligations. Parents are obliged to avoid prolonged absences by organizing themselves differently".

By way of example, SECO provides the following answers to the questions that many employers ask themselves:

- **Can the employer plan a company vacation in order to cope with the absences of certain employees?**

- SECO's answer:

"In principle, no, even if the law provides that it is the employer who sets the dates of the company's vacations. However, the employee's wishes must be taken into consideration and the determination by the employer of the date of the holidays must be made sufficiently in advance so that the employee can make the necessary arrangements. Practice allows in principle a period of three months".

- **What happens if a company has to close down by order of an authority? Does the employer have to continue to pay the wages?**

- SECO's response:

"As the company assumes the risks inherent in the operation and the economy, the employee has the right to receive his or her salary even if this represents a heavy burden for the employer. Due to the obligation of loyalty, the employee may, however, depending on the circumstances, be required to make up for "missed" working hours."

- **Can the employer prohibit time off in the event of a pandemic?**

- SECO's answer:

"In principle, it is up to the employer to set the dates of the company's holidays. However, he must listen to his employees and take their wishes into account. One of the employees' rights is precisely to be informed in good time of the date of their holidays. The postponement of already fixed holidays can only be justified on serious grounds. However, the urgent and unforeseen needs of the company may lead to having to accept a postponement of holidays. In this case, the change must be communicated to the worker as soon as possible".

- **In case of prohibition to take leave, does the employer have to compensate the employee?**

- SECO's answer:

"Yes, one should expect to have to change the date of one's vacation due to urgent and unforeseen professional necessity. The employer must compensate the damage caused to the employee".

- **If, out of fear, the employer himself decides to close down all or part of his business, what are his obligations?**

- SECO's answer:

"In this case, the employer is obliged to continue to pay the salary to the workers concerned. For their part, the workers are not obliged to make up these hours at a later date (except in the case of very short closures). The employee must set off against his wages what he has saved as a result of the impediment to work or what he has earned by performing other work, or the earnings he has intentionally foregone".

- **Can the employer apply for RWH, either reduced work hours or short-time or partial unemployment , if employees cannot meet their work schedule because restrictions make it more difficult to access their workplace?**

- SECO's response:

"Yes, because transportation restrictions are reasons beyond the employer's control."

- **What if employees cannot perform their work because a ban on the import or export of raw materials and goods deprives the company of the necessary resources?**

- SECO's answer:

SECO gives the same answer. The employer can request RWH.

- **What if the employees cannot do their work because the raw materials and goods needed by the company are missing due to delivery difficulties?**

- SECO's answer:

SECO gives the same answer. The employer can request the RWH.

- **What if the employees cannot do their work because the company is banned from operating?**

- SECO's response:

SECO gives the same answer. The employer can ask for the RWH.

- **If the employee has to claim compensation for reduced working hours, can he also do so for employees with a fixed-term contract, an apprenticeship contract or who are sent by a temporary work organization?**

- SECO's reply:

"Yes, if the reduction in working hours is due to measures taken by the authorities, the employer can claim the compensation for reduced working hours for workers with a fixed-term contract. On the other hand, he cannot do so for holders of an apprenticeship contract or for temporary workers. In the case of on-call workers, the employer may claim compensation for reduced working hours on the basis of their average working hours".

- **Can compensation for reduced working hours be claimed for workers who have to stay at home to look after their children?**

- SECO's reply:

"No, because the loss of work is due to a personal circumstance of the worker. It is the worker himself who must assume responsibility for his inability to work".

The above questions and answers are obviously not exhaustive. For all other questions, which are numerous and may change over time, we again advise you to consult the SECO website and the document mentioned above. For all questions which may be more complex or not dealt with by SECO, we advise you to consult a lawyer.

Source :

<https://www.wg-avocats.ch/en/news/covid-19/coronavirus-and-labour-law-what-are-the-rights-and-obligations-of-employees-and-employers/>