

## **CORONAVIRUS – FAQ ON THE EMPLOYMENT RELATIONSHIP**

### **Should and must the employer take protective measures?**

Within the scope of his duty of care, the employer is obliged to take all measures necessary to safeguard the employees' health. To the extent possible, the employer must ensure that the coronavirus is not spread at the workplace. Firstly, protective measures ordered by authorities must be strictly adhered to. It should be noted, however, that in addition to protective measures ordered, authorities often only make recommendations it remains the employer's task to analyze the situation on a company level and independently take all necessary and reasonable measures. In addition to the obvious hygiene regulations, such measures include instructing employees to stay away from work if there is a well-founded suspicion of an infection.

### **Does the employer have to pay the employee's salary in case of absence from work for fear of infection with the coronavirus?**

In principle, the following rule applies: If the employee stays away from work without justifiable reason, he loses his entitlement to salary. If the employee becomes contracted with the coronavirus, he may (and must) stay away from work and obviously has an excusable reason for doing so. In this case, the employer's obligation for continued wages payment will apply for a limited period of time, or in most cases, the extended benefits of the employer's daily sickness allowance insurance. If the employee merely suspects that he/she has become infected with the coronavirus, he/she should contact a doctor and inform the employer accordingly, as the employer is obliged by his duty of care to take all reasonable precautionary measures against a (threatening) spread at the workplace. A possible solution would be for the employer arrange home office for affected employees. It should also be noted that an infection with the coronavirus - depending on the symptoms - is not necessarily to be equated with the employee's inability to work.

If the employee stays away from work for fear of infection with the virus, there is usually no entitlement to salary. However, if the absence from work is otherwise justified, e.g. if the employer or authorities order the (individual) employee to stay away from work, the wage entitlement remains intact. Other objective reasons, such as the lack of necessary protective measures taken at the workplace by the employer, can also justify an employee's refusal to appear for work under certain circumstances (e.g. if there is an increased risk of infection by a contracted employee at the workplace).

**What measures can be taken by the employer if the employee is absent without cause?**

If the employer considers the employee's absence from the workplace to be unjustified (due to the circumstances), the employee can be given a formal warning, combined with further disciplinary measures in the event of continued refusal to perform work (e.g. reduction of salary and claims for damages). However, a dismissal with immediate effect by the employer does not seem justified (under the circumstances of the public being faced with a spread of an unknown virus). Even if the employer decided to give (ordinary) notice of termination following the absence of the employee, there is a certain risk that the employer will face legitimate claims as a result of wrongful termination. In both cases, the employer could face a penalty payment of up to six months' salary of the employee concerned. It should be noted here that the assessment of the general situation - until complete cessation of everyday work is ordered by authorities - will always, to a significant degree, remain a question of interpretation, which - naturally - is likely to be answered differently by employer and employee. Therefore, an appeal to the self-discipline of both employee and employer seems quite appropriate.

**Is the employee entitled to salary if he/she is prevented from work is prevented by traffic restrictions official closures of entire public areas?**

If the employee is unable to reach work (in time) due to restrictions of public transport or due to official closures of public areas by authorities, his/her absence or delay is to be deemed excusable, however, no salary is owed by the employer. In particular, the same rule applies, if the employee is unable to return from holiday on time due to air traffic restrictions.

**All schools and kindergartens will remain closed for the time being by the current official order. Can employees stay at home to look after their children?**

Employees must be given the opportunity to look after the children if no other form of care can be organized. Employees are normally expected to find alternative care within three days. In the current situation, however, it is to be expected that courts would not insist on these three days but would consider a few more days as appropriate. A major factor in this regard is that in emergency situations, grandparents often take over childcare, which the Federal Council expressly advised against under the present circumstances, as they belong to the group of persons at risk. However, the cantons may provide childcare facilities for primary schools in order to prevent children from being looked after by their grandparents. Overall, what is now called for are creative solutions on the one hand, and an understanding of the respective interests of both sides on the other.

**Does an employer have to pay wages if employees look after the children because the schools are closed?**

This issue currently remains highly controversial. During the swine flu epidemic, the Zurich Labor Court ruled that employees are not entitled to continued payment of their wages because the prevention of work is not due to the personal circumstances of the employees, but to a situation similar to an epidemic. At that time, however, the schools were not closed by order of the authorities, but rather individual day-care centers, which closed down on their own initiative. Therefore, the arising question is whether the current situation will be treated differently because of the official order. Ultimately, the question is whether the closure of the schools by order of the authorities is attributable to the sphere of risk of the employer or the employee. This is not entirely clear, but we believe that this risk falls within the sphere of the employees, which is why no continued payment of wages is due during the period.

However, it cannot be ruled out that a court would find that the employer has an obligation to continue to pay wages. In any case, the obligation to continue to pay wages is only valid for a limited period of time, as long as the inability to work is still excused (see previous question). With the latest announcements by the government that parents who are forced to stay home (and away from work at the same time) will be compensated by special decree. Any (mandatory) additional benefits from the employer should become obsolete under these circumstances.

The case is clear if the employees work at home - then wages are due, even if the performance of the employees during "home office" while the children remaining at home may be limited to a certain degree.

**If a business is closed by order of the authorities, does the employer still have to pay wages?**

The official closure of a business falls within the employer's sphere of risk (business risk). Employees are therefore entitled to continued payment of wages. However, employees may be required to compensate overtime or the company may apply for short-time work to cushion the effects.

**Can an employer stipulate that employees must stay at home and this time is deducted from their holiday balance?**

Unless otherwise agreed in the contract, the employer may in principle determine the point in time of the holidays. In doing so, he must take into account the wishes and needs of the employees. If the employer determines the time of the holidays, he must give sufficient notice. A notice period of at least three months applies.

This period of notice must always be observed even in the current situation. If a company decides at short notice that employees must stay at home, this time may not be deducted from the employees' holiday credit.

**Does this also apply if, due to the coronavirus, the order backlog is declining to such an extent that not all employees can be fully employed?**

In this exceptional case, the employer can order compulsory holidays, which can be deducted from the holiday credit. However, they must be based on an urgent operational need. In some cases, the opinion is expressed that such holidays can be ordered at short notice. However, several courts have ruled that the three-month notice period must also be taken into account for compulsory holidays.

This means that companies should not reduce the holiday credit of their employees. Alternatives include arranging home office (where possible) or, if the order backlog means that it is no longer possible to keep all employees fully employed, considering short-time work, possibly in combination with compensation of overtime.

**An employee has booked holidays which he cannot take because of the current situation. He would like to come to work anyway. Do I have to allow him to do so as an employer?**

This question has not been conclusively clarified. In principle, however, the employer can insist on the already planned holidays as long as the employee is still able to relax, even if the employee cannot pursue his original holiday plan. In the current situation (no curfew), this should generally still be the case. This assessment could change if more extensive official measures are ordered.

**Can an employer pass a directive that employees must compensate overtime if there is not enough work or if the company has to close down?**

Overall, the compensation of overtime requires the consent of the workers concerned, both to the principle of compensation in general as well as to the timing and duration of such compensation. However, if there is not enough work or the company is even closed down, we believe that the employer can exceptionally order the compensation of overtime unilaterally. Employees must take the interests of the company into account. For example, it is not acceptable to save overtime for times when the business is running better again - this may be an abuse of rights.

**If employees work from home ("home office"), does the employer have to provide the equipment (e.g. laptop, printer, telephone) and pay for the telephone costs?**

This situation is a little more complicated and a distinction must be made between the equipment and the expenses. Normally the employer equips the workers with the necessary equipment. Only where it is otherwise agreed or usual, the employees have to bear these costs.

If the employee incurs necessary expenses (e.g. telephone costs), these must always be reimbursed and the costs cannot be passed on to the employee, not even with his consent. However, this only applies to "necessary" expenses incurred. Expenses are not considered necessary, for example, if the employee works from home ("home office") at his or her own request, but would have a workplace available where these costs are covered by the employer. In the current situation, however, it is questionable whether home office - which should be arranged and carried out whenever possible - can still be regarded as voluntary and therefore not necessary. If the employer instructs employees to work at home, the employer must also reimburse any necessary expenses incurred. These include, for example, additional telephone costs, unless the employer already pays a part in any case.

**The authorities recommend that people who do not work in the primary care sector should not send their children to the day care center, even if it is open. Can employees rely on this to stay at home? Is there a right to continued payment of wages during this period?**

In principle, employees must probably be allowed to stay at home to look after their children in the current situation. Another question is whether employees have to compensate for overtime or take holidays or whether they are entitled to continued pay.

This question will depend primarily on whether employees can do their work at home. If the work can normally also be done at home, the answer is clear: the wage is due. If the work can be done, but the benefit is - due to childcare - somewhat limited, the same probably applies. If there is a severe restriction or if no service can be provided at all, there is basically no entitlement to continued payment of wages without overtime being compensated or holidays being taken, especially since the decision to look after the children at home lies with the parents. However, employers should show flexibility as far as possible on the basis of their duty of care, for example by allowing work to be performed at times other than normal.