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COVID-19: various legal issues

Since the adoption by the Federal Council of the Ordinance on Measures to Combat the Coronavirus (COVID-19) of 28 February 2020, the effects on the Swiss economy have become immediately apparent. A number of legal questions have arisen, for instance in relation to reduced working hours compensation and loss of earnings compensation, debt enforcement and bankruptcy law, the law of civil and administrative procedure, general labour law as well as contract law. An assessment of a number of labour law issues is already available in our previous krfacts issue "Labour Law and COVID-19". This issue will briefly summarise several selected questions regarding the issues mentioned above.

I. Emergency ordinances

Pursuant to Article 185 of the Swiss Federal Constitution, the Federal Council is able to take action to safeguard internal security and for this purpose to issue ordinances and orders. It has done so by issuing the COVID-19 Ordinances, which have implications on contractual performance.

1. Reduced working hours compensation – also available for shareholders of an AG [company limited by shares] or members of a GmbH [limited liability company]

Previously only employees but not shareholders of an AG or members of a GmbH were entitled to receive reduced working hours compensation, as such persons had a quasi-employer status, exercising a significant influence on decisions made by the employer. It is now possible for a shareholder/member and any spouse or registered partner involved in the business to receive reduced working hours compensation (for further information see leaflet 2.13 OASI Contributions, https://www.ahv-iv.ch/p/2.13.d).

2. Corona loss of earnings compensation

The measures to avert the economic consequences of the further spread of the Coronavirus for affected companies and employees, which are limited to six months, will benefit in particular the following persons:

a. parents with children under the age of 12 who are required to interrupt their gainful activity on the grounds that third party childcare is no longer available;
b. persons who are required to absent themselves from work due to a requirement to self-quarantine (maximum 10 days);

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c. self-employed persons, including *inter alia* freelance artists, who suffer a loss of earnings owing to a requirement to close their place of business or a ban on holding events imposed under federal law.

(For further information see leaflet 6.03 OASI loss of earnings compensation, https://www.ahv-iv.ch/p/6.03.d)

3. Suspension of limitation periods under debt enforcement and bankruptcy law as well as under the laws of civil and administrative procedure

On 18 March 2020, the Federal Council ordered an extraordinary suspension of limitation periods under debt enforcement and bankruptcy law. It applies from 19 March 2020 until 4 April 2020 and extends to the entire territory of Switzerland. The ordinary debt enforcement holiday suspensions will apply from 5 April 2020 until Sunday 19 April 2020. No debt enforcement procedures will in principle be carried out during the suspension of limitation periods and during debt enforcement holiday suspensions, i.e. no payment orders will for instance be served. However, exceptions from this rule are permitted, in particular in relation to non-deferrable actions in order to secure assets.

The Federal Council has suspended limitation periods until after Easter also in the area of civil and administrative procedure. The judicial recess started on 21 March 2020, and will end on 19 April 2020. It should be noted in this regard that the suspension of limitation periods does not apply to all types of procedure (e.g. conciliation procedures are not covered by it). Moreover, only pending procedures are affected. This means, for example, deadlines for the registration of a building lien or for contesting a protocol of the condominium owners' community continue to run normally.
The suspension of limitation periods basically only applies within administrative procedures if the procedure concerned is covered by the suspension of limitation periods over Easter. In contrast to the Federal Government, the Canton of Lucerne does not have a suspension of limitation periods in administrative procedures. By means of an ordinance, the State Council of the Canton of Lucerne has now introduced a suspension of limitation periods in administrative procedures with retroactive effect as of 21 March 2020 and until 19 April 2020 for the statutory deadlines and those ordered by the authorities. However, this suspension does not apply to procedures concerning suspensive effect and other precautionary measures, planning and construction law and public procurement.

4. Federal surety for instant loans

During the coming days, the Federal Council will issue further measures in order to provide short-term liquidity to companies affected by COVID-19. In order to secure short-term liquidity, it is anticipated that companies will obtain a bridging loan directly from their local bank for up to a maximum of 10% of their turnover, subject to a ceiling of CHF 20 million. The credit terms are expected to be favourable, although the interest rate and duration of these loans are not yet known.

The Federal Government provide banks with a guarantee for loans of up to CHF 500,000, which means that the Federal Government will pay any outstanding amount directly to the banks in the event of a default by the borrower. For loans above CHF 500,000 the Federal Government will only guarantee up to 85% of the amount loaned.

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The Emergency Ordinance is set to come into force within the next two days, although some banks are already accepting applications.

II. Selected labour law issues

As a result of the current situation, legal questions are also arising in relation to work and salaries. We have summarised some of the most important questions and answers for you:

An employee is unable to work due to sickness. Is she still entitled to be paid?
There is a temporally limited entitlement to continuing salary payments by the employer if the employment relationship has been established for more than three months or has been ongoing for more than three months, provided that the employee is unable to work through no fault of her own.

Do employees in self-isolation (= persons with symptoms of the illness should stay at home until 48 hours after the symptoms have passed) or self-quarantine (= no symptoms of their own but contact with an infected person) have a right to receive their salary?
If an employee is in self-isolation or self-quarantine, he may nonetheless be fully or partially fit for work. It is therefore necessary to examine whether he can work from home, insofar as he is fit for work. If this is the case, work should be performed as far as possible and the regular salary should be paid in line with the work performed. If it is not possible to work from home (e.g. for a plasterer), the salary will be payable despite the unavailability for work.

An employee does not want to go to work and stays at home because she fears becoming infected. Is this conduct permitted?
As long as the employer takes the action recommended by the official authorities in order to protect the health of its employees, those employees are obliged to go to work. If any employee does not appear for work, the employer may cease salary payments and issue a formal warning to her that she risks dismissal without notice.

Childcare as a result of school closures. Is there any entitlement to salary?
If an employee is unable to work owing to a statutory duty to care for his children, the employer must continue to pay his salary for a limited period of time. However, the parents must endeavour to make suitable arrangements in order to avoid any further absences. It is also necessary to establish with reference to the individual circumstances whether the parents are entitled to loss of earnings compensation based on the measures adopted by the Federal Council on 20 March 2020.

III. Failure to perform under contract – what then?

If an event is cancelled or a contractual partner is unable to provide the agreed service, a question arises as to what should happen. Who must be required to bear the resulting losses?

Swiss law incorporates the principle of "*pacta sunt servanda*", i.e. contracts must be honoured. The risk of a change in circumstances must in principle be borne by the party that is affected by the adverse consequences. However, this principle is not absolute. It may be set aside by *force majeure* or an unforeseeable change in circumstances. The following aspects must be examined:

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1. **Examination of the contract or the general terms and conditions**
   The first step is to check whether a contract or (validly accepted) general terms and conditions contain a *force majeure* clause or provisions governing any other change in circumstances. If so, the contractual terms apply. It has not yet been conclusively clarified whether the Coronavirus constitutes a *force majeure* occurrence, although this is generally considered to be the case. The answer will be more clear-cut if the contract expressly refers for example to an "epidemic", "pandemic" or "governmental decrees". If there is a *force majeure* clause and that clause is applicable, consideration must be given in particular to any contractual notification duties.

2. **Non-contractual *force majeure***
   Even if not expressly provided for under contract, the doctrine of *force majeure*, which is not expressly regulated under Swiss law, may be applicable with reference to the notion of "good cause" or "impossibility". If the contract itself does not contain any such stipulation, the specific provisions of the Swiss Code of Obligations (CO) apply on a subsidiary basis; these include for instance the provisions governing "good cause", where an option for termination is often envisaged. In the event that performance has become definitively impossible, Article 119 CO will ultimately apply, according to which an obligor is not required to perform where performance has become impossible through no fault of the obligor. Under bilateral contracts the requirement of reciprocal performance also lapses, without any obligation to pay damages owing to the absence of fault.

3. **"*Clausula rebus sic stantibus*"**
   If performance has not become definitively impossible, where not expressly provided for under the contract, here too the specific provisions of the Swiss Code of Obligations apply on a subsidiary basis. In such cases the rules applicable in relation to default will be engaged in the first instance, i.e. the obligee is required to set a reasonable grace period to the obligor in order to perform (Article 107 CO); it is unclear how long this grace period has to be in circumstances falling under the COVID-19 Ordinances. Here too, other specific provisions of the Swiss Code of Obligations, such as those concerning "good cause", apply alongside or instead of the consequences of default. Finally, the doctrine of "*clausula rebus sic stantibus*" may also apply. This legal institute allows a contract to be adjusted in the event of a change in circumstances that was not foreseeable and that causes a serious disruption of the contractual equilibrium, i.e. a major imbalance between performance and consideration.

It is a complex matter to identify the specific legal position in any given situation, and the outcome will depend upon the specific individual circumstances. It is therefore recommended that the individual circumstances of the case be analysed in detail.

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IV. Rent

As mentioned above, it is an open question whether COVID-19 should be classified as *force majeure*, affecting rented premises such as restaurants, hairdresser salons, sporting facilities etc. Since the virus epidemic will in all likelihood abate after some time, resulting in a relaxation in the corresponding restrictions, it may be presumed that the impossibility to use premises will only be temporary.

It is currently a matter for debate whether this impossibility to use premises should be deemed to constitute a defect within the property leased, for which the lessee is not responsible, with the result that the lessor can thus claim in particular a reasonable reduction in the rent pursuant to Articles 259a and 259d CO. It is also debated whether the situation gives each party the right to terminate the lease with good cause on the grounds that performance has become unconscionable pursuant to Article 266g CO, in which case the courts will determine the consequences under property law taking account of all of the circumstances.

As far as is known, there is no case law in the area of tenancy law concerning epidemics or pandemics. It is therefore recommended that lessors and lessees attempt to agree on a solution that is reasonable for both parties.

V. Condominium

Unless otherwise provided in the regulations, the condominium owners’ community can only pass resolutions at the owners' association assembly or by circular letter. However, the adoption of resolutions by circular letter requires unanimity. It would be conceivable to hold the meeting in the form of a telephone or video conference. However, this should only be possible in small communites. In addition, the technical challenges that cannot be overcome by individual owners could entail the risk of the resolutions adopted in this way being challenged. It is questionable whether the Ordinance 2 on Coronavirus Measures (COVID-19) will apply to the condominium owners’ community. The condominium owners' community is not a company. The adoption of resolutions in writing on the basis of the aforementioned ordinance entails the risk that the conclusions reached may subsequently be declared invalid. The same applies to the possibility of authorizing the management to conduct the assembly in the absence of the condominium owners but with their binding voting instructions. Resolutions adopted in this way could be revoked on appeal on the basis of the condominium owner's right to participate in an assembly.

In view of this legal situation, it is recommended that condominium owners’ assemblies currently only be held in writing if a resolution must be passed urgently. In all other cases, the meeting should be postponed to a later date.

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VI. Further questions

Due to the developing situation and the different circumstances of each individual case, we recommend that you contact us with any legal questions.

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