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Ordering home office – The employer's toolkit under exceptional circumstances

Due to the increasing spread of the coronavirus, numerous companies in Switzerland have already ordered home office work for their employees. This article addresses, inter alia, the question of whether employers can unilaterally order home office work in the current situation and what consequences this might have.

Home office by directive of the employer due to the corona pandemic

In order to prevent infection with the coronavirus, numerous companies have already issued binding directives for their employees to work from home. From an employment law perspective, this raises various questions.



By **Philippe Nordmann**
Dr. iur., LL.M., Attorney at Law
Partner
Phone +41 58 658 14 50
philippe.nordmann@walderwyss.com



and **Fabian Looser**
Dr. iur., Attorney at Law
Certified Specialist SBA Employment Law
Phone +41 58 658 14 61
fabian.looser@walderwyss.com

1. Basic conditions for home office work

From a general point of view and irrespective of the current situation concerning the coronavirus, the following general conditions particularly apply to home office work from an employment law perspective.

- **Implementation of home office:** Without a particular agreement in place between the employer and the employee, the employer cannot unilaterally order an employee to work from home by making use of its right to issue instructions. Employees, for their part, have no legal entitlement to perform their contractual duties from home.
- **Applicability of the Employment Act:** The Employment Act and thus in particular the provisions on working hours, rest periods and health protection are also applicable to work performed in the home office. The employer must record the working time of the employees in the home office and has to ensure compliance with the regulations regarding maximum working time, daily rest periods as well as the prohibition of night and Sunday work. Regarding health protection, it must be ensured that the employee has an ergonomic workplace.
- **Work tools:** The employer must provide the employee with the work tools (computer, printer, etc.) required for the home office; if the employee provides his private work tools, he is entitled to compensation (Art. 327 Swiss Code of Obligations, CO). If the home office work is based on the employee's request and a workplace is available to him at the employer's premises, it is questionable whether the work equipment for the home office is actually "needed" for the work. In this case, in our opinion, there are good arguments in favour of the employee himself having to provide the work tools without compensation. Since the legal provision is dispositive, the parties can in any case agree that the employee himself provides the work tools without compensation.
- **Expenses:** The employer must reimburse the employee for all expenses necessarily incurred in the performance of the work (Art. 327a CO). Working from home, expenses include in particular the costs of electricity, internet and heating. In a recent ruling, the Swiss Federal Supreme Court ruled that the employer must also reimburse the employee for rental expenses for using a room for home office work. However, the employer did not provide the employee with a suitable workplace in this specific case. Contrary to the legal provision concerning work tools, the provision on reimbursement of expenses is mandatory and the parties cannot deviate from it by contractual agreement at the expense of the employee. If the home office work is based on the employee's request, it is our opinion that the expenses are not necessarily incurred in the course of the work, which is why the reimbursement of expenses can be excluded in this case.

- **Social insurance law subjection of commuters:** As is generally known, commuters who live abroad and are employed by a Swiss employer are subject to Swiss social security contributions, as long as they do not carry out a substantial part of their employment (at least 25%) in their country of residence. In particular, a commuter worker may also be subject to the social security legislation of the country of residence if he works for his Swiss employer to the extent of at least 25% of his workload in his home office in his country of residence.

2. Particularities of home office work with regard to the coronavirus

a) Implementation of home office

Due to the current situation with regard to the coronavirus and the recommendations of the Federal Office of Public Health (BAG) regarding "social distancing", flexibilisation of working hours and avoidance of public transport, we believe that there is an exceptional situation of such magnitude that the employer, based on its right to issue instructions, can unilaterally order the employee to work from home at short notice. This also applies if the employment contracts contain a fixed place of work and no mobility or home office clauses. Based on his duty of loyalty, the employee is obliged to follow the employer's instructions to the extent that this is conscionable to him.

On the other hand, we believe that the individual employee has no general right to work from home, even in the current situation. Exceptions may apply if there are respective government directives, the employee belongs to a particularly vulnerable risk group or the employer seriously violates its duty of care and fails to take the necessary (and reasonable) protective measures. In the latter case, the employee could possibly work from home against the employer's will. In this case, a prior warning with the setting of a reasonable period of time by the employee is mandatory.

b) Employment Act

The current situation in connection with the coronavirus does not change the applicability of the Employment Act to home office work.

In the case of a short-term and largely comprehensive arrangement of home office work in medium-sized and larger companies, the implementation of a time recording method and the monitoring of health protection at the home office workplace will cause additional difficulties. In this case, we believe that a pragmatic solution would be for the employer to issue a directive temporarily delegating the recording of working time to the employees, and for employees to be required to comply with the regulations on working hours, rest periods and health protection. The employer can also ask employees for a self-declaration confirming that they comply with the provisions of the Employment Act. However, the responsibility for compliance remains with the employer.

Hopefully, the responsible authorities will assess any issues arising in connection with the Employment Act with the appropriate sense of moderation due to the current exceptional situation.

c) Working tools and expenses

If the employer unilaterally orders home office work due to the current situation in connection with the coronavirus, the employer would have to provide the employee with the necessary working material (or compensate him for the use of the private working material) and reimburse the employee for expenses (see para. 1 above) if the employment law provisions are strictly applied.

Due to the current exceptional situation, however, we believe it is necessary to apply the legal provisions in a manner appropriate to the situation and individual cases: Insofar as the employee already has the necessary infrastructure for a home office workplace, there are strong

arguments in favour of the fact that, due to his duty of loyalty, he is obliged to make this working material and the infrastructure temporarily available for the home office work without the employer having to pay additional compensation. In particular, the above-mentioned case law regarding the pro rata covering of rental costs by the employer cannot be applied to the situation of temporary home offices as a result of a pandemic, since the employee would have a workplace at the employer's premises and the arrangement of home offices serves the health protection of the employee.

However, if an employee does not have sufficient infrastructure to perform his work from home, the employer must provide the employee with such infrastructure or at least reimburse the corresponding costs. For example, if an employee does not have an Internet connection at home, the employer must provide him with mobile Internet or at least reimburse the initial costs for setting up an Internet connection.

The employer must ensure that it procures any necessary specific working tools in due time and provides employees with such tools. If, for example, special laptops or software are required for a specific job, the employer must procure a sufficient number of such hardware and software licenses at its own expense.

However, there is still a risk that a court will strictly adhere to the statutory provisions and, in particular, accept additional compensation obligations at the expense of the employer despite the current exceptional situation.

d) Data protection

Since home office usually mixes business and private spheres, data protection is of great importance. As a matter of principle, the employee must ensure that business secrets are protected and that family members and third parties do not have access to business data.

Usually, from the employer's point of view, it is advisable to implement additional security measures such as firewalls, software for encryption, virus protection, etc. However, if home office work is implemented at short notice, the time and means to implement such measures may be lacking. Even in this case, it is advisable for the employer to issue a unilateral directive to ensure minimum standards of data security (e.g. requirements for passwords).

e) Social insurance law subjectation of commuters

According to the Federal Social Insurance Office (FSIO), the Swiss authorities consider the current situation to be a state of emergency. The FSIO takes this fact into account by stating that cross-border commuters, who in principle perform their work in Switzerland and are now forced to work from home due to the coronavirus and thus exceed the materiality limit of 25%, are still subject to the Swiss social security system from a Swiss perspective. According to the FSIO, this applies both to employees who do not have a home office clause in their employment contract and to those who have already worked in a home office but did not reach the 25 % threshold. However, the FSIO may issue supplementary or differing instructions at any time.

It should be noted that the FSIO practice described above only concerns the Swiss legal situation. According to the FSIO, it is currently not (officially) known how foreign social security authorities will handle the situation at hand. It can therefore not be ruled out that foreign authorities that would claim social security contributions from the Swiss employer for a commuter residing in their country would continue to strictly adhere to the materiality threshold of 25%.

f) Conclusion

In our opinion, the current exceptional situation in connection with the coronavirus justifies a situation-adapted application of the legal provisions and recognised principles with regard to home office. In particular, the employer may unilaterally and at short notice introduce home office work. In addition, the employer can initially focus on basic regulations regarding the modalities of home office work (e.g. recording of working hours, data protection, etc.) by means of unilateral instructions.

If the employee already has an infrastructure required for home office work, it can be expected of him in the current situation that he will provide such infrastructure temporarily for home office work without additional compensation.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Contact persons



Ueli Sommer
Partner, Zurich
Phone +41 58 658 55 16
ueli.sommer@walderwysw.com



Philippe Nordmann
Partner, Basel
Phone +41 58 658 14 50
philippe.nordmann@walderwysw.com



Daniel Staffelbach
Partner, Zurich
Phone +41 58 658 56 50
daniel.staffelbach@walderwysw.com



Davide Jermini
Partner, Lugano
Phone +41 58 658 44 02
davide.jermini@walderwysw.com



Olivier Sigg
Partner, Geneva
Phone +41 58 658 30 20
olivier.sigg@walderwysw.com



Irène Suter-Sieber
Partnerin, Zurich
Phone +41 58 658 56 60
irene.suter@walderwysw.com



Christoph Stutz
Konsulent, Zurich
Phone +41 58 658 56 57
christoph.stutz@walderwysw.com



Fabian Looser
Managing Associate, Basel
Phone +41 58 658 14 61
fabian.looser@walderwysw.com



Simone Wetzstein
Managing Associate, Zurich
Phone +41 58 658 56 54
simone.wetzstein@walderwysw.com



Alex Domeniconi
Associate, Lugano
Phone +41 58 658 44 06
alex.domeniconi@walderwysw.com



Nadine Mäder
Associate, Zurich
Phone +41 58 658 56 31
nadine.maeder@walderwysw.com



Flora V. Palovics
Senior Associate, Lausanne
Phone +41 58 658 83 79
flora.palovics@walderwysw.com



Laura Luongo
Associate, Geneva
Phone +41 58 658 30 21
laura.luongo@walderwysw.com



Jonas Knechtli
Associate, Basel
Phone +41 58 658 14 82
jonas.knechtli@walderwysw.com



Gaurav Bhagwanani
Associate, Zurich
Phone +41 58 658 52 80
gaurav.bhagwanani@walderwysw.com



Yannik A. Moser
Associate, Basel
Phone +41 58 658 14 85
yannik.moser@walderwysw.com



Nathalie Möri
Associate, Zurich
Phone +41 58 658 53 03
nathalie.moeri@walderwysw.com



Nadja D. Leuthardt
Associate, Basel
Phone +41 58 658 14 62
nadja.leuthardt@walderwysw.com



Benjamin Sommerhalder
Associate, Basel
Phone +41 58 658 14 66
benjamin.sommerhalder@walderwysw.com