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Factsheet

Coronavirus – Doing Business in the Event of an Epidemic or Pandemic

The new coronavirus is spreading rapidly worldwide. This factsheet presents the most important aspects your company should consider in its day-to-day business in the event of an epidemic or pandemic.

GENERAL HEALTH ADVICE

In its “*Pandemic Plan – A Manual for Workplace Preparedness*”, the Federal Office of Public Health (FOPH) formulates principles for minimising the risk of infection at the workplace and for maintaining the workplace infrastructure. These principles include the preparation of a catalogue of measures in the event of a pandemic (definition of key functions, prioritisation of processes, identification of exposed personnel, etc.) as well as the most important hygiene measures.

The *Pandemic Plan* is available on the FOPH's website. Every company should be aware of its existence and implement the suggested measures if necessary: www.bag.admin.ch/bag/de/home/das-bag/publikationen/broschueren/publikationen-uebertragbare-krankheiten/pandemiebroschuere.html (ge, fr, and it)

Further information:
www.pandemia.ch (ge, fr, it, and en)

MEASURES IN YOUR COMPANY

If many of your employees do not show up for work due to individual illness or other causes related to an epidemic, such as

quarantine measures, problems are bound to ensue. Your company's ability to provide contractually agreed-upon services on time (or in the agreed-upon quality) may be affected. The customer can then invoke various contractual and legal remedies to the prejudice of your company. In particular, the customer may wish to terminate the contract prematurely or even seek compensation for alleged damage. Your company may even face claims from downstream operators.

In order to minimize your risks in this regard, your company should observe the following **recommendations**:

1. Your company must take all reasonable measures to minimise the consequences of an endemic-induced upsurge of absences among its workforce at an early stage. In addition to the general health measures, one should consider the following:
 - Set up (additional) deputy arrangements among different posts;
 - prioritise work;
 - cancel meetings, internal office events (e.g. further training events), customer events etc.; consider their substitution by telephone conferences and such;
 - restrict or monitor the employees' **travel** activities.

2. If difficulties arise in meeting agreed-upon deadlines, you should immediately contact the concerned business partner with a view to finding an appropriate solution. Such a solution should be recorded in writing, be it as a written confirmation by your business partner or minutes from your side, in order to ensure its continued retraceability.
3. In the unlucky event that your company indeed defaults in the performance of contractually owed services before having reached a solution with your business partner, he or she must be informed immediately (preferably within the period agreed for the fulfilment of the contract). Reference should be made to (i) the default, (ii) its reasons (high illness/absence rate in among the relevant workforce) and (iii) the taken – albeit unsuccessful – mitigating measures from your side (planned solution, which also failed due to sickness/absence, etc.) At the same time, your business partner must be assured that you will perform the contract as soon as possible. However, you should avoid to (pre-emptively but in most cases unnecessarily) recognise possible consequences of default.

CONTRACT LAW ASPECTS

Failure to perform a contractual obligation which is due will result in *default* by the party obliged to perform (Art. 102 of the Swiss Code of Obligations [“CO”]). Default occurs automatically when a deadline for performance is agreed (i.e., a clearly defined date). In the absence of a clear deadline, the other contracting party can trigger default by serving an overdue notice. Default occurs irrespectively of any fault from your side.

If one party to the contract is in default, it owes the other party *damages for delayed performance* (Art. 103 para. 1 CO). The defaulting party, however, can exempt itself from liability if it can prove that the delay occurred *without any fault* on its side (Art. 103 para. 2 CO).

In the event of a pandemic wave of illness or other causes for high absences among your workforce (e.g. a quarantine), the exemption of Art. 103 para. 2 CO may be successfully invoked if all reasonably possible precautionary and mitigating measures have been taken and the extent of the wave of illness or absences in this form was not foreseeable nor avoidable.

Special rules apply when the *SIA Standard 118 (General Conditions for Construction Works)* applies to a contract: According to its Art. 95, the entrepreneur must take all “necessary measures to meet the contractual deadlines”. He or she is obliged to take “all additional reasonable measures” in order to preserve the deadline, and to inform the client about these measures. In contrast to the statutory default mechanism of Art. 102 CO, Art. 96 of the *SIA Standard 118* provides that no default occurs (and consequently no liability for damages caused by default) if the delay is not the fault of the entrepreneur. In such a case, the deadline shall be deemed extended “appropriately”.

Contracts (e.g. purchase, supply and work-and-service-contracts) often contain special clauses such as “*Force Majeure*”, “Acts of God” or similar, according to which certain events exempt the obligor from his or her liability or grant an extraordinary right of termination. Such clauses are admissible and valid under Swiss law and federal jurisdiction, whereby “force majeure” is generally qualified as an unforeseeable, unavoidable and insurmountable event. In our opinion, the coronavirus epidemic can be qualified as such a force majeure. It is therefore advisable to check whether your contracts contain

an explicit or implicit “force majeure” clause, and to consider invoking it if appropriate.

EMPLOYMENT LAW ASPECTS

Questions of employment law will also arise, in particular the question of the employer's **obligation to continue to pay wages** to employees who are prevented from performing their tasks. Three scenarios can be distinguished:

1. The employee cannot perform the assigned task *due to the employer's fault* or due to circumstances within the *employer's sphere of risk*. This is the case, for example, if the employee duly offers to perform, i.e. if he or she shows up at the workplace, but the employer cannot assign him or her any tasks due to a corona-induced lack of orders. In such a situation of redundancy, the employer is all the same obliged to pay wages without the employee being obliged to make up for it in any manner (Art. 324 para. 1 CO). The employer is only entitled to reduce the owed wages by the amount the employee has saved because of the redundancy, or acquired through other working opportunities (Art. 324 para. 2 CO).
In case of redundancy, however, an employer might “prescribe” holidays for the employee. Indeed, if the employee's vacation for the current year has not yet been fixed, the employer can set the time of vacation (at least partially) to a period where redundancy occurs (Art. 329c CO).
2. The employee cannot perform his or her work *for reasons that are within his or her control*, such as illness, accident, fulfilment of legal obligations or the exercise of a public office, but with no fault of his or her own. This is

the case, for example, if the employee has fallen ill with the coronavirus. Here, too, the employer is obliged to pay the employee due wages for a limited period of time (cf. Art. 324a CO).

3. The employee cannot perform his or her tasks *for reasons beyond his or her control* and through no fault of either the employer or the employee. This is the case, for example, if an Italian cross-border commuter is unable to work in Switzerland because the border between Switzerland and Italy has been closed. Under such circumstances, the employer is not obliged to continue to pay wages. This is because Art. 324a CO requires for continued payment of wages that the reasons for the prevention of performance lie in the person of the employee (such as illness, accident, etc.). However, this prerequisite is not met in the above example where *external circumstances* prevent the employee from performance.

Further questions might arise in connection with **trips abroad** (e.g. to Asia). It is important to distinguish private trips from business trips:

1. *Business trips abroad*: Within the scope of his or her right to issue instructions (Art. 321d CO), the employer can prohibit the employee from taking a scheduled business trip to the abroad.
2. *Private trips abroad*: The employee must observe the travel recommendations of the Department of Foreign Affairs (DFA). If an employee undertakes an abroad trip to a sensitive area contrary to these recommendations, the employer can prohibit the employee from resuming work after his or her return and instead order,

for example, home office (quarantine). Indeed, under such circumstances, the employer's duty to protect the health of his or her other employees (Art. 328 CO) takes precedence.

Finally, an employer might have to deal with an employee preferring to **stay away from** work out of fear of infection. Following distinction must be made:

1. The refusal is *justified*: A refusal to perform is justified when either the employer or the authorities order an individual employee to stay away from the workplace. Objective reasons, such as failure by the employer to take protective measures or a lack of hygiene in
2. The refusal is *unfounded*: If there is no order from the employer or the authorities and there are no other objective reasons for refusing performance (fear of infection during the commute or at the workplace as such do not suffice), the refusal to perform is deemed unfounded and the employer's obligation to pay wages is suspended. Quite to the contrary, the employer might even request compensation for unjustified no-show (Art. 337d CO).

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