

NKF Client News

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Coronavirus COVID-19: Legal issues

The new coronavirus COVID-19 (short for **coronavirus disease 2019**) has spread worldwide in recent weeks. Infections have occurred in Switzerland, numerous European countries and the USA; China, Iran, South Korea, Singapore and Italy are particularly affected.

The Federal Council classifies the situation in Switzerland as a special situation under the Swiss Epidemics Act¹ and has temporarily banned major events involving more than 1,000 people until 15 March 2020. Some cantons have already adopted more far-reaching measures.

This newsletter contains an overview of legal issues arising in this context in the areas of labour law, contract law and corporate law.

1. Labour law

General Principle: Protection of the health of employees²

- The employer is obliged by law to protect the health of the employees and to take all measures which are necessary according to experience, applicable according to the state of the art and appropriate to the conditions of the business. He must identify any risk of exposure to micro-organisms at the workplace and take all necessary measures to minimize the employee's risk of infection at the workplace.
- The employee is obliged to follow the employer's instructions regarding occupational safety and health care.
- The Federal Office of Public Health (FOPH) has not currently ordered any specific measures for workplaces and companies in relation to COVID-19. Recommendations can be found in the publication "Pandemic Plan: Manual for workplace preparation" of the FOPH.³

Protection of health at work

- Compliance with hygiene rules (FOPH campaign "How to protect ourselves"⁴).
- Social distancing: Limiting meetings or replacing them by telephone and video conferences; introducing staggered working hours; home office.
- Physical protection measures for workers at particular risk.
- Clear internal company communication based on federal and cantonal guidelines.

¹ Epidemics Act (EpG, SR 818.101).

² Legal basis: Swiss Code of Obligations (SR 220), Labour Act (SR 822.11); Ordinance on the protection of workers from the risks related to micro-organisms (SR 832.321).

³ Available in German: <https://www.bag.admin.ch/bag/de/home/krankheiten/ausbrueche-epidemien-pandemien/pandemievorbereitung/pandemieplan.html>

⁴ <https://www.bag.admin.ch/bag/en/home/krankheiten/ausbrueche-epidemien-pandemien/aktuelle-ausbrueche-epidemien/novel-cov/so-schuetzen-wir-uns.html>

Directions of the employer

- Home office: Order that employees work from home (home office) for a limited period of time or under certain circumstances (return from particularly affected areas; symptoms of illness). In principle, the necessary infrastructure must be provided by the employer.
- Follow the recommendations in case of illness/quarantine: The employer may order the employees to follow the recommendations of the authorities and in particular instruct the employees to stay at home in case of fever or cough.
- Overhours and overtime: Employees may be ordered to work overhours and overtime in order to compensate for employees who are absent due to illness; in accordance with legal requirements, an increase in maximum weekly working hours is also permitted.
- Business trips: The employer may instruct employees to limit business trips, or to avoid business trips to certain destinations altogether. In view of the employer's duty to protect the health of employees, employees should – absent exceptional circumstances – not be requested to take business trips to particularly affected areas; travel recommendations of the authorities shall be taken into account.
- Private travel: In case of urgent and unforeseen needs, it is permissible for the employer to request the employee to postpone planned holidays or to cancel holidays. Under such circumstances, a ban on private travel to certain destinations also seems justifiable. However, a ban of private travel is a very restrictive measure that shall only be applied with restraint. Both in case of a holiday and a travel ban, the employer must compensate the employee for the damage he or she has suffered as a result of such measure.

Rights of the employee, in particular in the event of being prevented from performing his or her work

- Illness of the employee or the employee's children: The employee who is unable to perform his or her obligations due to illness is entitled to continued payment of wages in accordance with the law or daily sickness benefit insurance; in case of illness of the employee's children, the employee is generally entitled to time off to care for them (up to three days per case of illness).
- Absence from work for fear of infection: Such absence may only be justified in the case of (i) an explicit order by the authorities or (ii) failure by the employer to comply with the obligation to protect the health of the employee. In all other cases, such absence would be deemed to be an unexcused absence from work which does not give rise to a right to continued payment of wages and may constitute grounds for dismissal.
- Absence of the employee due to restriction of public transport preventing the employee from reaching the work place: The employee has no obligation to perform the work, but also no wage entitlement, unless the work is done remotely (home office).

2. Contract Law

Existing contracts

- If under an existing contract a promised service cannot be performed in time or not at all or goods cannot be delivered in time or not at all and such non-performance or delay is the direct or indirect result of the outbreak of COVID-19, the legal consequences depend on the particularities of the individual case.
- First, the underlying contract should be consulted with respect to the law applicable to the contract and as to whether the contract contains a force majeure clause that may be applicable to the individual case.
- M&A agreements sometimes include material adverse change clauses that grant the contractual parties a right to rescind the contract in cases of acts of god, pandemics and

similar circumstances; other clauses specifically exclude such rescission rights in case of such general occurrences unless the enterprise to be acquired is particularly hit by them.

Force Majeure

- If the contractual relationship is governed by Swiss law, and the underlying contract does not contain a specific regime, a default would typically be dealt with under the doctrine of force majeure.
- As a matter of principle, the service provider is liable for damages incurred by the counterparty resulting from the non-performance or a failure to perform on time, unless it can prove that it is not at fault (proof of exoneration).
- A possible proof of exoneration is the invocation of force majeure. Swiss law does not know an explicit definition of force majeure. In general, force majeure is defined as an unforeseeable, extraordinary event that occurs due to an unavoidable external force. Whether COVID-19 qualifies as force majeure depends on the exact line of causation between COVID-19 and the default.
- If a service cannot be provided or goods cannot be delivered on time due to legal obstacles, such as orders by the authorities, e.g. in the case of officially ordered plant closures or events involving a number of persons exceeding the permissible limitations, recourse to force majeure appears to be valid in principle.
- In the case of factual obstacles, such as interruptions of the supply chain or illnesses in the workforce, it will depend in whose sphere of risk the obstacle falls or whether it is serious enough to justify non-performance or late performance. The service provider must take precautionary measures to protect the workforce from infections and, in the event of performance disruptions with key suppliers, look for alternative suppliers in good time, etc.

Force Majeure in cross border Relationships with Counterparties from China

- The China Council for the Promotion of International Trade (a body of the Chinese government) issued a large number of "Force Majeure Certificates" to Chinese firms, which give official support to the invocation of Force Majeure. By contrast, it seems that Western courts are more hesitant to grant excuses from performance obligations due to the outbreak of COVID-19.

Objective Impossibility

- If the performance is not only delayed but becomes impossible (such as in the case of events that can neither be held nor postponed), the doctrine of factual or legal objective impossibility (*tatsächliche oder rechtliche objektive Unmöglichkeit*) may excuse the provider from its duty to perform, provided that the impossibility is not attributable to the provider. The counterparty is also excused from its payment obligations and payments already made can be reclaimed.
- According to the jurisprudence of the Swiss Federal Supreme Court, the impossibility must not have been foreseeable.
- In cases of objective impossibility, the provider has the burden of proof that it bears no fault for the non-performance. The likelihood that such evidence can be produced successfully is higher in cases where the performance is no longer permitted under the applicable measures imposed by the government (legal impossibility).
- By contrast, such production of evidence may be more challenging in cases of factual obstacles, because the question of possible precautionary measures is more relevant in cases of factual obstacles.

Clausula rebus sic stantibus

- The legal concept of "clausula rebus sic stantibus" allows the parties to a long term contractual relationship to request the change of certain contractual parameters, provided that a number

of requirements are fulfilled: (i) There must be a subsequent change of circumstances, which (ii) causes a serious equivalence disruption (i.e. a significant disproportion between performance and consideration), (iii) was not predictable at the time of the conclusion of the contract, and (iv) the party invoking the concept must not have fulfilled the contract without reservation after the circumstances have changed. Depending on the circumstances of the individual case, COVID-19 may permit the invocation of this concept.

Contracts yet to be concluded

- For contracts yet to be concluded, it is advisable to explicitly foresee in the contract the consequences of potential performance defaults as a direct or indirect result of the outbreak of COVID-19.

3. Corporate Law

- Due to the federal prohibition of gatherings of more than 1'000 people, companies expecting more than 1'000 people at their general meeting may face a legal impediment to hold their general meetings.
- Companies expecting less than 1'000 people at their annual general meeting must consult with the cantonal authorities as to whether the gathering is permissible and, if yes, under what circumstances.
- It may not be excluded that the threshold at the federal level may be lowered or that cantonal authorities may enact further stricter rules. Consequently, a larger circle of companies could be affected by these restrictions with the passage of time.
- Under the current law, shareholders have a right (i) to personally and physically attend the general meetings, (ii) to participate in the discussions at the general meetings and (iii) to vote following the conclusion of the discussion on the board of directors' motions.
- The participation and voting via video conference and/or internet will be permitted under the new law, which has, however, not yet entered into force.

Swiss companies have the following possibilities to address these issues:

- They may ask shareholders to make use of their right to appoint the independent proxyholder and to follow the discussion via livestream.
- Such a request may be accompanied by the cancellation of meals and the mailing of shareholder gifts, which are usually handed out at the general meeting.
- Shareholders may be given the opportunity to vote in advance in writing and to submit motions or questions, which shall be read out and commented at the general meeting.
- Companies may hold the general meeting in separate rooms so that the crowd is subdivided into sub-groups of a permitted size, whereas statements made in each room are projected to all rooms.
- If necessary, the general meeting may have to be postponed to a later date. According to applicable law, the ordinary general meeting shall take place within 6 months after the end of the business year. This is, however, a mere rule of order without any specific sanctions.

4. Further developments

In view of the current uncertainty regarding COVID-19, the information and recommendations presented in this newsletter are subject to change at short notice and should always be adapted to the specific situation.

This newsletter is based on the official recommendations of the Swiss authorities as of March 4, 2020. For information on the latest developments and current recommendations, please refer to the information provided by the Federal Office of Public Health FOPH⁵ and the cantons⁶.

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⁵ <https://www.bag.admin.ch/bag/en/home/krankheiten/ausbrueche-epidemien-pandemien/aktuelle-ausbrueche-epidemien/novel-cov/so-schuetzen-wir-uns.html>

⁶ For the Canton of Zurich (in German):

<https://gd.zh.ch/internet/gesundheitsdirektion/de/themen/coronairus.html#medienmitteilungen>

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

