No salary payment during a lockdown ordered by the authorities because of the Coronavirus

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Three private school teachers terminated their employment relationships in January 2020 with effect on 31 August 2020. In April 2020, because of the Coronavirus, the authorities ordered a lockdown of the school. The private school, as the teachers' employer, informed them that it would decrease their salaries in proportion to the cancelled work time. The private school did so because it could not request short-time work (Kurzarbeit; i.e., the compensation paid by the state to bridge temporary breaks in available work to save jobs) for employees on notice. The private school then paid the three teachers reduced salaries. The three teachers did not agree with these salary cuts and sought legal recourse to their complaint.

The Swiss Federal Supreme Court decided – following a (rare) public debate – that the lockdown ordered by the authorities to fight the Coronavirus qualified as an objective reason that would affect everyone in the same way (as opposed to employers exclusively). Hence, the lockdown was not part of the private school's operational risk. The private school was thus not obliged to pay salary during the cancelled work time since short-time work compensation (Kurzarbeitsentschädigung) was not possible (BGer 4A_53/2023 of 30.08.2023).

Hence, it is now settled case law that employers are not obliged to continue paying salary during lockdowns ordered by the authorities because of the Coronavirus if the salary cuts were not covered by the short-time work compensation.

Short-time work or short-time work compensation, respectively, is not only excluded in the above-mentioned case of a terminated employment relationship, but also in the following cases (non-exhaustive list):

- Employees who did not consent to short-time work;
- Employees in a fixed term employment relationship (without the possibility to ordinarily terminate their employment prior to the end of the term);
- Employees in an apprenticeship;
- Employees leased from another company;

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- Employees whose cancelled work time could not be determined or could not be reasonably controlled (e.g., because the employer did not register the employee's work time); and
- Employees who – in their capacity as a member of the board of directors of a shareholding company, as a partner in a limited liability company, as a financial participant in the business, or as a member of an upper decision-making body – determined or were able to significantly influence the decisions of the business.

It is to be expected that the new case law of the Swiss Federal Supreme Court also applies to these other cases where short-time work compensation is excluded. However, this would require an assessment of the individual case at hand.

Furthermore, it is questionable whether an employer may claim back or set off salaries that it actually paid even though it was not obliged to do so if assessed in hindsight, pursuant to the Swiss Federal Supreme Court's decision mentioned above. This would, in any event, also require an in-depth assessment of the specific case.

Hence, the Swiss Federal Supreme Court's decision is primarily important for future lockdowns ordered by the authorities or for similar scenarios. The Swiss Federal Supreme Court itself stated that similar scenarios to the lockdown during the pandemic could be, for example, war or economic measures ordered because of war.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this legal update.

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