PESTALOZZI

ATTORNEYS AT LAW

Return to the workplace: Protective measures and their permissibility under labour and data protection law

26.07.2021

As of 26 June 2021, the Swiss Federal Council decided to abolish the requirement to work from home – alongside the general obligation to wear a mask at work – and replaced these measures with a mere recommendation to continue working from home. Whether or not, and to what extent, employees must return to, and wear a mask inside the workplace, will be decided by the cantons and employers. The return of the workforce to the office raises questions for the employer on what protective measures are to be taken in order to comply with its legal duty to create a safe work environment. Given the growing acceptance of remote working and the desire of many to maintain some level of remote work, the need to maintain good privacy and data security hygiene will persist. At the same time, the return of employees to the workplace triggers new concerns regarding physical distancing, vaccination status and testing strategies.

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

Key takeaways

- **Before employers can initiate the return of their employees, adequate protective measures must be implemented to minimise the risk of infection. Moreover, the employees or their representatives need to be informed and consulted with regard to such envisaged measures prior to their implementation.**
- **If working from home is mandated by the employer, compensation for the costs incurred in relation to remote work is to be paid to the employee.**
- **Employers may inform employees about vaccinations and provide access to them. However, they must refrain from any action that could be interpreted as exerting pressure to undergo vaccination or that discriminates employees who have not received or do not wish to receive the vaccination.**
- **Employers cannot introduce general mandatory COVID-19 testing. However, testing may be ordered for certain groups that are particularly exposed to the risk of infection; the interests of all parties concerned must be weighed up against each other.**
- **Constant surveillance of employees is forbidden. When it comes to checking employees' compliance with social distancing protocols, employers must therefore refrain from taking measures that prove too extensive.**
- **Relevant documentation, such as data privacy policies and internal guidelines, have to be prepared and updated regularly.**

Return to the office

Establishment of protective measures for employees returning to the office

With the discontinuation of the Federal Council's official requirement to work from home, the employer can demand that employees return to their place of work in the office. However, the employer has a legal duty of care towards its employees, which includes an obligation to protect the employees' health and personal integrity by taking appropriate measures. This could include regular testing of the workforce, as stated by the Swiss Federal Council. Given that employees have a right to be informed and consulted with regard to such measures, and must be able to submit proposals before relevant decisions on such envisaged measures are made, the return to the office should be planned thoroughly. Thus, prior to instructing their employees to return to the office, appropriate protective measures concerning the risk of SARS-CoV-2 infection must be introduced. In addition, employees or their representatives have to be informed and consulted in advance.

What measures are appropriate depends on the nature of the business, taking into account all interests at stake. Thus, organisations that work with vulnerable persons or perform highly exposed activities (e.g., hospitals, nursing homes, coronavirus test centres), are required to take other and more extensive measures to protect employees and customers. Besides the applicable general duties (general hygiene measures, social distancing, masks, etc.) imposed by the Federal Office of Public Health (FOPH), potential further measures to be implemented by the employer could include the wearing of FFP2 masks, automated contact tracing, regular testing, temperature measurement when entering the premises, etc.

Employees exempted from returning to the office

With regard to employees belonging to, or living with a person that is part of, a high-risk group, an individual assessment should be made as to whether the protective measures taken in the workplace are sufficient to provide adequate protection. Thus, it can be decided whether it is proportionate to order and enforce such an employee's return to work. Disproportionality can be deemed to exist in particular if the employee can perform his or her work from home without restrictions. Conversely, if an employee currently working remotely refuses to return to the office, although neither he/she, nor anyone in his/her close environment belongs to a risk group, and the employer has taken all necessary reasonable measures to protect the employees' health and wellbeing in line with authority regulations, the refusing employee may be subject to disciplinary measures (e.g. warnings) or even dismissal.

Transition period recommended

Given that many employees appreciate the new found flexibility of working remotely, and in consideration of the fact that some may have mixed feelings or concerns about returning to the office, a transition period seems appropriate to encourage a positive readjustment experience. Employers might even want to offer their employees options to work from home fully or partially, regardless of the pandemic situation. Such employers could consider implementing a permanent remote working policy for the future.

Introduction of the option to work from home

Outside of a government-mandated requirement to work from home, the key question regarding the introduction of a remote or hybrid work model is whether:

- The employee is instructed to work remotely by the employer and there is therefore no workplace available for the employee at the employer's office, or
- Remote working is desired in whole or in part by the employee and a workstation in the office would, in principle, be available to the employee.

If there is no workstation available for the employee and/or the employee is instructed to work from home by the employer, the employer has to reimburse the employee for the costs incurred by the employee in relation to performing his/her work from home. Such costs might include work equipment such as a printer, cartridges, paper, etc. (if not already provided by the employer), additional costs for internet and power, or even a contribution to rental fees, if the employee requires an additional room or a bigger apartment. Similarly, reducing office work

spaces for social-distancing reasons can have the effect that the employee is forced to work fully or partially from home. Again, compensation should be paid by the employer for work performed remotely in such case. If working from home or hybrid work is to be offered to employees, a corresponding policy is recommended in which the amount of potential compensation to be paid by the employer is specified in individual addenda to the employment agreements.

Vaccination

No general vaccination duty

Taking into account recent developments in neighbouring countries, the question is often raised as to whether an employer can make vaccination mandatory for its employees. Unfortunately, there is no general answer to this in Switzerland. Rather, all circumstances in an individual case must be taken into account and the relevant interests balanced against each other. It is, however, clearly established that – absent a federal obligation – no general duty to vaccinate can be imposed on all employees, as this would be considered an excessive interference with their personal rights. Under certain circumstances, the employer may instruct certain employees to undergo vaccination, if justified by the nature of those employees' activity and reasonable to protect third parties in the workplace (e.g. nursing staff working in hospitals or care homes for the elderly). In any case, such contractual duty must be proportionate (i.e. no less intrusive measure is available) and should consider all the interests at stake (e.g. employee's self-determination with regard to health, interest of colleagues or employer's customers to be protected, interest of the employer to keep the workplace safe and the business going, etc.). In most cases, however, such coercion on the part of the employer will not be permissible. It will probably be the exception rather than the rule for an employer having a right to require its employees to be vaccinated.

Nevertheless, if an employee who performs a particularly exposed activity refuses to be vaccinated, it cannot be forced. Rather, the employer must, if possible, offer an alternative activity within the company that does not require vaccination (e.g. back office work instead of caring for elderly people). If no adequate alternative is available, the employment may be terminated. However, there is a certain risk that such a termination might be considered abusive in the individual case, triggering a compensation duty of the employer in the amount of up to six monthly salaries.

Balancing act

For most employers, the vaccination issue will probably prove quite the balancing act. For the time being, many big companies in Switzerland are doing what is currently possible, which is to proactively inform their employees about the risks and benefits of the vaccination and to encourage them to undergo vaccination voluntarily. Whilst employers are allowed to provide active support in the vaccination process – making vaccination appointments or even by setting up in-house vaccination centres, for example – employers should refrain from any behaviour that could be interpreted by the employee as exerting pressure to undergo vaccination. Moreover, the employers must make sure that an employee who has not been, or does not wish to be, vaccinated must not face any disadvantage compared to vaccinated employees.

Vaccination status

It follows that this balancing act also applies when it comes to the disclosure of employees' vaccination status. As long as the pandemic continues and in light of the employer's general duty of care, it may be permissible to ask particular employees about their vaccination status. However, active surveys by the employer about vaccination status could be considered as exerting pressure on the employees to undergo vaccination. It is therefore recommended to address this question in general terms by asking employees to inform Human Resources as soon as they have been vaccinated. Finally, when recruiting, prospective employers are allowed to request the vaccination status only if the status is important for the candidate's suitability for a specific job.

Data relating to vaccination – being considered sensitive personal data in accordance with data privacy laws – should be kept separate from the personnel file. Also, appropriate technical and organisational measures should be implemented to protect this data, such as strictly limited need-to-know access to such data. Finally, employees should be informed transparently about the purposes of collecting vaccination data, as well as the measures in place to protect it.

Testing

In principle, employers cannot introduce mandatory COVID-19 testing prior to allowing employees access to the office. Mandatory private testing as well as company controlled testing constitute an encroachment on the employees' personal rights. It could therefore only be justified and enforceable in special settings, such as for businesses working with particularly vulnerable people, e.g. in hospitals or nursing homes. In these cases, the interests of the parties concerned must be weighed up and the proportionality of the measure ensured. The employer has to pay for such systematic testing as long as the testing has not been ordered by the authorities. In addition, regarding the requirements for handling personal data, it is important to consider in the case of repeated testing that older test data must be deleted continuously.

Social distancing and contact tracing

Employee monitoring

The interest in using suitable monitoring systems to check compliance with social distancing measures is in conflict with the employer's legal duty to protect the health as well as the personality of its employees. Constant surveillance of the employees' behaviour in the workplace is forbidden by law because such monitoring is likely to harm the employees' psyche and thus their health. Hence, introducing monitoring systems might lead to the paradoxical situation whereby the employer introduces social distancing rules to protect employees’ health but simultaneously endangers the health of those employees through measures designed to monitor compliance. The use of Bluetooth trackers or constant video monitoring will often constitute prohibited behavioural monitoring and should therefore be discouraged. Nonetheless, video surveillance at highly frequented, central entrances and the mere recommendation of the SwissCovid app remain possible and acceptable.

Reservation systems and self-screening

In open-plan or shared offices, the introduction of reservation systems might be a suitable solution for the allocation of workplaces during times of limited occupancy due to social distancing and therefore, during pandemic periods, legally permissible. With regard to the permissibility of self-screening tools and electronic questionnaires that assist the employee in evaluating whether they are allowed to go to the office, corresponding entrance checks may be introduced. However, it should be ensured that no extensive medical questions are asked and that answers are not disclosed to the employer or third parties. Privacy-friendly tools are preferable, i.e. solutions that only send the final result of the questionnaire (recommendation to go to the office or not) to the employer and delete individual responses immediately after the survey is completed.

Further measures

Hygiene masks

Given the discontinuation of the federal order to wear masks in the workplace when more than one person is present in a room, the employer may decide in certain cases to continue the mask mandate, provided there is a need for protection of other employees and that the principle of proportionality is taken into account. In this case, it remains the employer's duty to finance these masks.

Screening of body temperature

Measuring employees' body temperature at entry through automated tools (and following appropriate information) remains currently permissible both under data protection and labour law. Due to the principle of proportionality, methods that do not save the measured temperatures are to be preferred over tools that store the measured data.

Introducing flexible working hours

Similarly, the introduction of flexible working hours and the temporary abolition of block times can contribute to the protection of employees, especially on their way to work.

Hygiene measures

Simple hygiene measures can contribute to a safe working environment during the pandemic. For example, an employer could ask employees to regularly air office space, wash their hands, and clean or disinfect surfaces.

Need for documentation

Besides issuing protective concepts and general behavioural guidelines for employees, any newly introduced technical means or records of vaccination data require appropriate data privacy guidelines. To allow for flexibility in the ever-changing pandemic environment, it seems appropriate to include all pandemic-related information in a separate ‘COVID data protection policy’ instead of adapting existing notices. This also assists employers in ensuring that ongoing collection and storage of data is discontinued after the end of the pandemic.

Authors: Sarah Drukarch (Senior Associate), Petra Spring (Senior Associate), Svenja Balla (Junior Associate)

No legal advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal 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.

© 2021 Pestalozzi Attorneys at Law Ltd. All rights reserved.

Michèle Burnier

Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Cours de Rive 13
1204 Geneva
Switzerland
T +41 22 999 96 00
michele.burnier@pestalozzilaw.com



Christian Roos

Partner
Attorney at law, lic. iur.
Co-head Life Sciences

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 00
christian.roos@pestalozzilaw.com



Sarah Drukarch



Partner
Attorney at Law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 93 23
sarah.drukarch@pestalozzilaw.com