

Loosening of Covid restrictions – consequences for employers

On February 16, 2022, the Swiss Federal Council announced an end to most Covid restrictions, with effect as from February 17, 2022. Following this announcement, we have received a number of inquiries regarding the consequences for employers, in particular with regard to worksite Covid protection measures. Please find below more information concerning the practical implications of the Federal Council's decision.

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1. Covid Certificate and vaccination

a) Covid Certificate

The Federal Council's decision repealed the Ordinance on Measures during the Special Situation to combat the COVID-19 Pandemic, including provisions in that ordinance permitting employers to verify whether employees have a Covid certificate (a certificate showing whether its holder had: (i) received an approved Covid vaccine; (ii) recovered from Covid; or (iii) tested negative for Covid in the past 72 hours [PCR test] or 24 hours [antigen test]).

Consequently, there is no longer a legal basis for employers to verify whether employees have Covid certificates. As a result, employers may no longer have Covid protection measures in place that require the verification of Covid certificates.

b) Vaccination

Also, as was already the case, in general, employers may not ask employees whether they are vaccinated and/or have recovered from Covid. The State Secretariat for Economic Affairs ("SECO") has stated that such a question may only be posed under very specific circumstances (i.e. due to the particular risks associated with the employment activity).

Moreover, the SECO has stated that an employer may not impose a general vaccination obligation. Such an obligation may only be imposed in rare cases where there is an elevated risk of contamination that cannot be mitigated via other protection measures.

2. Other measures

a) Home office

The Federal Council's decision also repealed the recommendation that employees work from home when possible (the home office obligation was repealed as from February 3, 2022). However, employers may still require that employees work from home as part of their general health and safety measures (see section III below).

b) Masks

In addition, the Federal Council's decision repealed the obligation for employees to wear masks in all shared spaces. However, employers may still require that employees wear masks as part of their general health and safety measures (see section III below).

Further, employers must allow employees who wish to wear masks to do so, unless the nature of their work renders it impossible.

3. Application of ordinary employment law provisions

As from February 17, 2022, only ordinary employment law provisions are applicable with regard to Covid protection measures.

In particular, in accordance with Article 6 of the Swiss Employment Act ("EmpA"), employers are required to take the necessary steps to protect the health and safety of their employees. The SECO has stated that this should be interpreted as requiring employers to take all measures that are appropriate for the business, meaning that they are reasonable both technically and economically.

The employer is responsible to decide which measures to implement and how to implement them. The SECO recommends to base these measures on the STOP principle (Substitution [e.g. work from home], Technical measures [e.g. aeration, physical barriers], Organisational measures [e.g. keeping 1.5 metres between employees, providing employees with handwashing stations], Personal safety equipment [e.g. masks]).

4. Verification

The cantonal authorities are responsible for verifying that employers respect the health and safety of their employees. The Swiss National Accident Insurance Fund ("SUVA") is no longer responsible for carrying out any verifications.

Thus, the implementation of workplace verifications will vary somewhat from canton to canton. That said, it is important that employers implement health and safety measures that are

proportional and based on objective criteria (i.e. whether employees are working in shared office spaces) and take into account the SECO's recommendations (i.e. the STOP principle). However, the exact nature of the safety measures that cantonal health inspectors will require will vary based on the nature of the business.

5. Employees at high risk

Following the Federal Council's decision, special measures still remain in place for employees at high risk (Article 27a of Ordinance 3 on Measures to Combat the Coronavirus).

The following employees are considered at high risk:

- pregnant individuals who have not been vaccinated or already had Covid (recovered); and
- individuals who cannot be vaccinated against Covid for medical reasons and have certain chronic medical conditions; employees are responsible for disclosing this to their employer, who may require a medical certificate.

In particular, employers must permit employees at high risk to work from home. When this is not possible, employers shall, in derogation of the employment agreement, and for the same pay, assign the affected employees equivalent duties that can be performed from home.

Further, when, for operational reasons, the physical presence of employees at high risk is essential, employers must take additional measures to protect their health and safety, such as providing separate work areas. If this is not possible, the employer must permit the employee to work from home, performing other tasks, for the same pay.

Prior to taking any measures, the employer shall consult affected employees, record in writing the measures to be taken and notify the employees of these measures.

When the aforementioned measures cannot be implemented, or if an employee considers the personal risk of infection too high despite the measures implemented by the employer, affected employees may refuse to carry out their work; the employer may request a medical certificate. In this case, the employer shall furlough the employee, while continuing to pay their salary.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Update is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.



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