EVERSHEDS SUTHERLAND

Legal Compass
Employment Law

February 2022

Long Covid

Author

Dr. Michel Verde
Attorney-at-law

Some people who got Covid-19 suffer from long-term effects of the Coronavirus, which in some cases may affect their capacity to work. What are the legal implications from a Swiss employment law perspective if an employee is partially or completely unable to work for a long period of time? This Legal Compass explains various important aspects that employers should be aware of.

1. Long-term illness – well then?

In principle, the same rules apply to cases in which the capacity to work is partially or completely lost due to the long-term consequences of Covid-19 as to any other illness-related full or partial incapacity to work. A peculiarity of long covid is that it is a new and multifaceted disease pattern for which there is still little empirical data and practical experience. However, it can be assumed that in the majority of cases full capacity to work can be recovered, even if the recovery process sometimes takes a long time and progresses gradually.

As with other health impairments, where recovery takes a long time and cannot be planned exactly, there is also uncertainty in the case of Long Covid as to when and in what kind of recovery steps the employee will regain 100% of their ability to work, even as to whether they will be able to return to the former job at all or whether a change of job will be necessary. This is a challenging situation for both sides: for the employer, who wants planning reliability and cannot require the other employees to fill in the vacancy during a long time; for the employee, who does not know whether they may need an occupational re-training for a different job. The employee sometimes even does not know whether the employer wants him/her back at all or whether the vacancy will be filled with someone else.

In such situation, various employment law related questions arise, such as of how long the employee continues to be entitled to salary payment and whether the employer can terminate the employment relationship. An also very important aspect is the reintegration of the employee into everyday working life. On the one hand, the loss of an employee – as well as the prolonged absence – often means not only a loss of work capacity for the company, but also a loss of expertise and experience. It is uncertain whether a new employee can compensate the same and whether their integration in the existing team will be successful. It is therefore in the employer's interest to support the absent employee in returning to work. Likewise, it is in the company’s interest to enable an employee to work part time if the employee is not completely unfit for work. First of all, this enables the employee to remain up-to-date with regard to his/her profession and to preserve practical experience. Secondly, the employee remains better integrated in the team. In addition, an employee who has been recovering for a long time will normally not be immediately 100% fit for work again, but in many cases regain the ability to work only gradually. Waiting until the employee is 100% fit for work again before resuming work means unnecessarily high costs for the employer; not only because of the obligation to pay salary, but also because the absence of an employee usually needs to be compensated either by overtime worked by colleagues or by the temporary engagement of a substitute. Furthermore, it may be beneficial for recovery if the employee does not just sit at home all the time and is occupied with

the illness and its treatment, but can continue to exercise his/her profession part-time.

2. Is the employee entitled to continued salary payment?

If the employment relationship has lasted more than three months or is agreed to last more than three months, the employee is entitled to sick pay in the event of incapacity for work due to illness, provided that the incapacity for work is not self-inflicted. This also applies in the case of a long covid based sick leave. In this context, it is important to note that the sick pay includes, in addition to the base salary, other components of the total remuneration that the employee would have been entitled to in case of work, such as commissions, bonuses or allowances.

In the first year of service, the entitlement to sick pay is three weeks in accordance with Art. 324a para. 2 Swiss Code of Obligations ("**CO**"). The duration of this entitlement increases with the number of years of service, whereby courts use different scales depending on the canton. The most frequently used one is the so-called Bern scale, according to which the entitlement to sick pay lasts one month in the second year of service, two months in the third and fourth year, three months in the fifth to ninth and afterwards one additional month for each additional five years of service. The other two scales used in practice – the Zurich scale and the Basel scale – have similar sick pay durations.

The entitlement to sick pay is an annual balance per year of service and is renewed accordingly in each year of service. According to the prevailing opinion in the legal doctrine, this entitlement is not a time credit but a monetary credit, which means that the duration of the sick pay entitlement is extended proportionally if the employee is only partially unfit for work. For example: if the employee is 50% unfit for work, the sick pay entitlement in the first year of service lasts six weeks. Also, the sick pay entitlement is a total entitlement for all cases of incapacity for work during the respective year of service and can therefore be used up by different cases of incapacity to work that are independent of each other.

In practice, this sick pay obligation of the employer is often supplemented or replaced by a daily sickness allowances insurance. Typically, such insurance covers 80% of wages for a maximum period of 720 or 730 days, with a waiting period of up to 90 days before the insurance starts to pay the benefits.

3. What can or shall the employer do to support an employee during a long-term illness?

With a coordinated approach, employees can be supported in gradually increasing their ability to work and, ideally, regaining their full ability to work in the original position. The employer can offer assistance by inviting the employee to discuss together which measures can be implemented to gradually reintegrate the employee into the workplace. Measures for the reintegration of an employee who incurred a long-term illness require first of all a cooperation between the employee and the employer; secondly, it is necessary to assess the employee's remaining capacity to work from a medical point of view as well as the conditions under which the remaining capacity to work can be used without putting the employee's recovery at risk. It is therefore normally advisable to involve the employee's physician – with the employee's consent, of course. It is not about a discussion of the medical diagnosis, which is protected health data that an employer is normally not allowed to access. The purpose is rather to discuss together what resources the employee currently has from a medical point of view, how they are likely to improve in the course of the recovery process and how the employee can use them optimally in the company.

A resource-oriented integration profile is a suitable tool for this purpose. This is a form that the employer and the employee fill out together, in which they determine the general conditions at the workplace and the physical and psychological requirements of the work activity. Based on this, the employee's physician can specifically assess the extent to which the employee is able to perform his/her work activity, taking into account physical and mental resources. Based on that, it can be discussed together how the work activity and the environment can be optimally designed, what measures or adaptations at the workplace are useful and what development can be expected with regard to the recovery process. For example, it may be necessary to grant more time for certain tasks because the employee is

slower in certain matters due to the illness, or it may be necessary to work only half days at a time because the employee gets tired more quickly. Under certain circumstances, it may also make sense to temporary change the employee's tasks. In some cases, professional case management may be helpful. If the employer has a daily sickness allowance insurance, it may offer such service.

Another measure to support the reintegration and to prevent a long-term disability is an early notification of the case to the public disability insurance. The purpose of such early involvement of the public disability insurance is to assist the employee with the reintegration into the current job or the integration into a new job, if possible with the current employer. This usually requires the involvement of the employer.

Based on Art. 3b para. 2 lit. c of the Swiss Invalidity Insurance Act ("InvIA"), the employer is entitled to report an employee who is unfit for work to the public disability insurance if there is a risk that the employee will not be able to continue his/her employment due to health reasons. A notification form is available for this purpose. It makes sense to notify the public disability insurance if no reintegration measures have been agreed between the employer and the employee or if it is uncertain whether reintegration will be successful. The employer has to inform the employee in advance of the intended notification (Art. 3b para. 3 InvIA). However, the employee's consent is not necessary.

Once the notification has been made, the public disability insurance clarifies whether measures for early intervention are indicated. To this end, it may invite the employee as well as the employer to a consultation and request them to provide the information and documents required for the case assessment. If it was the employer who reported the case to the public disability insurance, the insurance will inform the employer whether early intervention measures are indicated.

The Swiss Code of Obligations, which governs the contractual employment relationship between the employer and the employee, does not stipulate an explicit legal obligation of the employer to intervene. However, based on the duty of care (Art. 328 CO), the employer may have to make use of the possibility of an early intervention by the public disability insurance in order to try to prevent a long-term disability of the employee.

In any case, it is important that the reintegration measures do not compromise the employee's recovery. Sometimes, it may even be necessary to ask an employee who is too eager to work to slow down.

4. Is the employee obliged to cooperate?

Reintegration measures require the employee's cooperation. What happens if the employee refuses to cooperate or to work to the extent of the remaining capacity to work?

In principle, an employee is obliged to make efforts to regain his/her ability to work and to continue working if he/she is only partially unfit for work. On the one hand, this results from the duty of loyalty under the employment contract, on the other hand, in the event of only partial incapacity for work, the employer is only obliged to sick pay with regard to the percentage of the employee's disability to work. If the employee is able to work to a greater extent in another function than the one he/she normally has, the employer may (temporarily) assign him/her alternative tasks. The employer is entitled to reduce the salary accordingly if an employee refuses without valid reason. The employee's obligation to cooperate is limited by the fact that the work efforts as well as any alternative task must be reasonable for him/her. Furthermore, the employee's recovery must not be compromised.

With regard to an early intervention by the public disability insurance, Art. 7 para. 2 InvIA provides that the employee must actively participate in all reasonable measures that serve to preserve his/her existing job or to reintegrate him/her otherwise. If the employee refuses to cooperate, this may cause a reduction of the disability insurance benefits or even a denial of the benefits (Art. 7b InvIA).

If a daily sickness allowance insurance company pays daily allowances for the employee, it should be noted that the insured person has a duty to mitigate damages. Accordingly, the employee must undertake reasonable efforts to regain the ability to work and make use of the remaining capacity to work for the employer. From an insurance law perspective, a change of occupation may constitute a

reasonable measure, but this an aspect that will not be discussed further in this Legal Compass. The limit here is also the principle of proportionality; in particular, the measure must be reasonable for the employee, taking into account the personal circumstances and health situation. A breach of the duty to mitigate damages could be sanctioned by the insurance by reducing the daily sickness allowances; in serious cases, it is even possible that the insurance refuses payment at all.

5. Can the employer terminate the employment contract?

During a (non-self-inflicted) long Covid illness, the employee enjoys the same protection against dismissal as in other cases of sick leave. The prerequisite for the protection is that the employee is partially or entirely unfit for work. In addition, the probationary period must have expired, if any.

If these requirements are fulfilled, the protection period lasts 30 calendar days in the first year of service, 90 days in the second up to the fifth year of service and 180 days as from the sixth year of service (Art. 336c para. 1 lit. b CO). If the employee begins a year of service with a longer protection period whilst a protection period is running – for example changes from the first to the second year of service – the longer protection period applies. It does not make any difference with regard to the protection whether the employee is entirely or only partially unfit for work; the number of days during which the employee is protected against dismissal remains the same. Also, important to know: the protection period applies regardless of whether the employee is entitled to sick pay or not.

If the notice of termination is received by the employee during the protection period, it is void and has to be renewed after the employee has fully regained the capacity to work or after the protection period has expired. If, on the other hand, the employee receives the notice of termination before the start of the protection period, the notice remains valid, but the notice period is suspended during the protection period.

In principle, the protection against termination also applies if the employee fails to notify the employer about the incapacity for work or if the employee continues to work despite being on medical leave. However, in some cases it may be abusive for the employee to invoke the protection period.

Your contacts for employment law:

Peter Haas
Partner

T: +41 31 328 75 75
peter.haas@eversheds-sutherland.ch

Olivier Dunant
Partner

T: +41 22 818 45 00
olivier.dunant@eversheds-sutherland.ch

Dr. Michel Verde
Senior Associate

T: +41 44 204 90 90
michel.verde@eversheds-sutherland.ch

eversheds-sutherland.ch