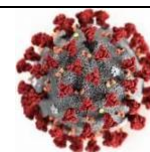


# National COVID-19 Science Task Force (NCS-TF)



**Type of document:** Policy brief

**Expert groups involved:** Ethical, legal, social issues

**Date of response:** 25/11/2020

**Contact person:** [samia.hurst@unige.ch](mailto:samia.hurst@unige.ch)

## What can the employee do if the employer does not comply with the protective measures (or plans)?

### Summary of request/problem:

The Independent Science Task Force received a question from a citizen. The Ethical, legal, and social group explored it. Importantly, labor law is with social security law one of the fields of law most affected by the pandemic of SARS-CoV-2. Numerous and important issues arise in connection with the duty to work or the right – or even the obligation – to stay at home, the right to remuneration, the right to vacations, etc. Not all of these questions will be discussed here, since a fairly large literature has already examined them (see the bibliography below).

We will focus only on the specific situation where an employer does not comply with safety measures regarding SARS-Cov2 contagion: what can the employee do if the employer does not respect the protective measures (or plans) imposed by the authorities?

### Zusammenfassung

Das Recht auf Leben und körperliche und geistige Gesundheit muss im gesamten Rechtssystem, einschliesslich des Arbeitsrechts, gewahrt werden. Aus arbeitsrechtlicher Sicht ist ein Arbeitgeber verpflichtet, behördlich angeordnete Schutzpläne aufzustellen, umzusetzen und für ihre Einhaltung zu sorgen; tut er dies nicht, verletzt er seine Verpflichtung zum Schutz der Persönlichkeit (und auch der Gesundheit) seiner Arbeitnehmer, die sich sowohl aus dem öffentlichen Arbeitsrecht als auch aus dem (privaten) Recht des Arbeitsvertrags ergibt.

Allerdings ist das Schweizer Arbeitsrecht im internationalen Vergleich nicht sehr weit entwickelt, was den Kündigungsschutz von Arbeitnehmern betrifft, insbesondere den Schutz vor ungerechtfertigter oder missbräuchlicher Kündigung. Eine solche Situation steht einer wirksamen Durchsetzung von Schutzmassnahmen im Wege und kann kurzfristig nicht gelöst werden.

Bestimmte Kategorien von Arbeitnehmern sind schwieriger zu schützen und erfordern besondere Aufmerksamkeit. Unter diesen Migranten ohne Papiere, einschliesslich Hausangestellte, bei denen ihre Situation und das häufige Fehlen eines formellen Arbeitsverhältnisses ihre Fähigkeit einschränkt, ihre Situation zu hinterfragen oder zu melden.

### Infolgedessen empfehlen wir, Folgendes zu verstärken oder zu implementieren:

1) Die Arbeitsinspektionen sollten umso proaktiver werden und häufiger und spontan in Arbeitsstätten Inspektionen zu führen; diese Behörden sollten über bessere Ressourcen verfügen,

um den Krisen zu begegnen (und dazu beitragen, Leben zu schützen und die Ausbreitung des Virus einzudämmen); sie sollten anonyme Informationen umso mehr akzeptieren.

2) Durchführung von gezielten Informationskampagnen, die sich sowohl an Arbeitnehmer als auch an Arbeitgeber richten und diese Verpflichtungen auch zu Hause oder an anderen Orten informeller Arbeit berücksichtigen.

3) Technische Hilfe und proaktive öffentliche Inspektionen zur Unterstützung der Umsetzung von Schutzplänen für kleinere Unternehmen, die möglicherweise grössere Schwierigkeiten haben, neue Anforderungen zu erfüllen.

4) Die Unterstützung von Hotlines, einschliesslich anonymer Hotlines, die durch NGOs und Gewerkschaften eingerichtet werden.

5) Ernsthafte Prüfung von Regularisierungsmassnahmen für undokumentierte Migranten auf dem informellen Arbeitsmarkt.

## **Résumé**

Le droit à la vie et à la santé physique et mentale doit être respecté dans tout le système juridique, y compris le droit du travail. Du point de vue du droit du travail, un employeur est tenu de mettre en place, d'appliquer et de faire respecter les plans de protection imposés par les autorités ; s'il ne le fait pas, il viole son obligation de protéger la personnalité (et aussi la santé) de ses employés, obligation qui découle à la fois du droit public du travail et du droit (privé) du contrat de travail.

Le droit suisse du travail n'est cependant pas très développé, en comparaison internationale, en matière de protection des employés contre les licenciements, notamment les licenciements abusifs ou injustifiés. Une telle situation fait obstacle à l'application efficace des mesures de protection et ne peut être résolue à court terme.

Des catégories spécifiques de travailleurs sont plus difficiles à protéger et nécessiteront une attention particulière. Parmi ceux-ci, les migrants sans papiers, y compris les travailleurs domestiques, pour lesquels leur situation et l'absence fréquente d'une relation de travail formelle limitent leur capacité à interroger ou à signaler leur situation.

### **En conséquence, nous recommandons de renforcer ou de mettre en œuvre les éléments suivants :**

1) Les inspections du travail devraient devenir d'autant plus proactives et inspecter plus fréquemment et spontanément les lieux de travail ; ces autorités devraient être mieux dotées en ressources pour faire face aux crises (et contribuer à protéger la vie et à contenir la propagation du virus) ; elles devraient d'autant plus accepter les informations anonymes.

2) La mise en œuvre de campagnes d'information ciblées à l'intention des employés et des employeurs concernant ces obligations, y compris au domicile ou sur d'autres lieux de travail informels.

3) Une assistance technique et des inspections publiques proactives pour aider à la mise en œuvre de plans de protection pour les petites entreprises qui peuvent avoir plus de difficultés à se conformer aux nouvelles exigences.

4) Le soutien de lignes d'assistance téléphonique, y compris anonymes, mises en place par des ONG et des syndicats.

5) Une réflexion sérieuse sur les mesures de régularisation des migrants sans papiers sur le marché du travail informel.

## Executive summary

The right to life and physical and mental health must be upheld *throughout the legal system*, including labour law. From the point of view of labour law, an employer is obligated to set up, implement, and ensure the respect of protection plans imposed by the authorities; if he fails to do so, he violates his obligation to protect the personality (and also the health) of his employees, an obligation that derives both from public labour law and from the (private) law of the employment contract.

Swiss labour law, however, is not very well developed, by international comparison, with regard to the protection of employees against dismissal, in particular against unfair or unjustified dismissal. Such a situation stands in the way of effective enforcement of protective measures and cannot be resolved in the short run.

Specific categories of workers are more difficult to protect and will require particular attention. Among these are undocumented migrants, including domestic workers, for whom their situation and the frequent absence of a formal work relation limits their capacity to question or report their situation.

### **In consequence, we recommend to strengthen or implement the following :**

- 1) Labour inspections should become all the more proactive, and more frequently and spontaneously inspect workplaces; these authorities should be better resourced to face the crisis (and contribute to protect life and contain the spread of the virus); they should accept all the more anonymous information.
- 2) The implementation of targeted information campaigns aimed at both employees and employers regarding these obligations, including within the home or other places of informal work.
- 3) Technical assistance and proactive public inspections to assist in the implementation of protection plans for smaller businesses which may face greater difficulty complying with new requirements.
- 4) The support of hotlines, including anonymous ones, implemented through NGOs and trade unions.
- 5) Serious consideration of regularization measures for undocumented migrants in the informal labor market.

## Main text

The "deconfinement" measures decided by the Federal Council – in several stages – were and are accompanied by an obligation to put in place **protection plans**, whether for the public with access to the company or facility (e.g. its customers), or for the people working in the company.(1)

From the point of view of labour law, as an employer, the person in charge of a company is obligated to set up, implement and ensure the respect of these protection plans; if he fails to do so, he violates

his obligation to protect the personality (and also the health) of his employees, an obligation that derives both from **public labour law** (2) and from the **(private) law of the employment contract**.(3)

Compliance with the rules of **public labour law** must be monitored ex officio by the authorities, those responsible for the application of the labour law, as is confirmed by Article 11 of the above-mentioned Ordinance COVID-19 Special Situation, which reads as follows: "In application of the provisions relating to health protection laid down in Art. 6 of the Labour Act of 13 March 1964, the enforcement of article 10 is the responsibility of the authorities responsible for enforcing the Labour Act and the Federal Accident Insurance Act of 20 March 1981". According to the doctrine, "[n]otice or lack of a protection plan may lead to the closure of the establishment or the prohibition of demonstrations (art. 6a para. 5 O-2-COVID-19 and art. 6d para. 5 new O-2-COVID-19). Supervision is carried out by the cantonal authorities (in particular the labour inspectorate, the commercial police and the cantonal doctor). The penalty of closure must be proportionate in its duration to the seriousness of the offence; it is pronounced in a context where the rules and principles of administrative procedure must be respected; in our opinion, there is nothing to prevent the authority from first issuing a warning, especially in cases of little seriousness".(4)

Again from the point of view of public law, in "the presence of defects that compromise the protection of health, which he cannot eliminate by himself, each employee must notify the employer without delay".(5) If the employer does not take the necessary measures, or refuses to do so, the employee may report the case – or complain – to the labour law enforcement authorities (6) (labour inspectorate, commercial police and/or cantonal doctor), who will then have to intervene. With regard to protection plans and other anti-crisis measures, it must be recognized that workers should also be able to report or denounce infringements anonymously. This is already the case today. However, it should be ensured that in the context of the crisis such denunciations are taken even more seriously and followed up. The limits of this possibility for small businesses with few employees should also be taken into account, since it could in such cases be too easy to find out the source of even an anonymous denunciation.

As far as the **(private) law of the employment contract** is concerned, the authorities do not automatically ensure that it is respected, but it is up to the employee to defend his or her rights himself or herself. An employer who does not take the necessary measures is not only criminally liable,(7,8) but also civilly liable towards his employee, who has various civil law actions at his disposal to defend himself (action for establishment, compensation, etc.) before the courts, but these are relatively little used and effective.(9) The doctrine admits that when the employer has been duly warned to take the necessary measures within the meaning of article 328 CO to protect the personality of his employee, but fails to do so, the employee is authorized, at least when the infringement is significant and manifest, to suspend his work while retaining the right to receive his salary, on the basis of articles 82 and 324 CO.(10) However, since Swiss law provides only limited protection against dismissal, this possibility must be approached with caution.(11,12) Indeed, if the employer reacts by serving notice of dismissal on an employee who refuses to work, the dismissal would certainly be unfair within the meaning of art. 336 CO, but would remain valid, with the employer risking at most having to pay compensation for unfair termination. Employees denouncing violations (internally or externally) are therefore forced to accept the risk of dismissal. And the protection against dismissal is also quite limited for whistleblowers.

Workers are likely to be most knowledgeable regarding the measures ensuring their protection in the workplace and mechanisms taking their experience and their views should be put in place. In addition, whistleblowing procedures should be encouraged and should include whistleblower protections. Empirical data should ideally be collected on the protection of workers in the workplace, as a contribution to occupational health knowledge.(13)

Specific categories of workers are more difficult to protect and will require particular attention, including as regards the protection of their human rights and of their right to life and physical and mental health. Among these, undocumented migrants, including domestic workers, for whom their situation and the frequent absence of a formal work relation limits their capacity to question or report their situation. Trade unions and Non Governmental Organizations have published positions in this regard.(14)

This situation reflects the coexistence of a strong legal principle and important difficulties in its implementation.

- **The right to life and physical and mental health must be upheld *throughout the legal system*** (Art. 35 para. 1 Federal Constitution), including labour law. These obligations are also entrenched in a number of international conventions of the International Labour Organisation signed by the Confederation. If the State is the employer (for instance in the education and health sector), it is fully and directly bound by the human rights duties of the Constitution and ILO conventions. If the employer is a private actor (i.e. a private company), the human rights obligations are indirect (they pass via State authorities). State authorities (including legislators, labour courts, labour inspectors) must ensure that fundamental rights apply to relationships among private persons (Art. 35 para. 3 Federal Constitution), i.e. they must ensure that private employers respect and protect the right to health of their employees.
- The obligations must be enforced by the State – that is why labour inspection offices must be in place and effective. **Swiss labour law, however, is not very well developed, by international comparison, with regard to the protection of employees against dismissal, in particular against unfair or unjustified dismissal.** Such a situation stands in the way of effective enforcement of protective measures. With regard to protection plans and other anti-crisis measures, it must therefore be recognized that workers should also, or even more so, be able to report or denounce breaches anonymously. The fact remains that employees denouncing violations (internally or externally) are forced to accept the risk of dismissal and that the protection against dismissal is also quite limited, even for whistleblowers. These issues will not be solved in the short run.

**In consequence, we recommend:**

- 1) Labour inspections should become all the more proactive, and more frequently and spontaneously inspect workplaces; these authorities should be better resourced to face the crises (and contribute to protect life and contain the spread of the virus); they should accept all the more anonymous information.
- 2) The implementation of targeted information campaigns aimed at both employees and employers regarding these obligations, including within the home or other places of informal work.
- 3) Technical assistance and proactive public inspections to assist in the implementation of protection plans for smaller businesses which may face greater difficulty complying with new requirements.
- 4) The support of hotlines, including anonymous ones, implemented through NGOs and trade unions.
- 5) Serious consideration of regularization measures for undocumented migrants in the informal labor market.

## References

1. Resp. art. 4 et 10-11 de l'ordonnance sur les mesures destinées à lutter contre l'épidémie de COVID-19 en situation particulière (Ordonnance COVID-19 situation particulière), du 19 juin 2020 (RS 818.101.26), avec en annexe une description détaillée de ces plans de protection. Ces dispositions remplacent en quelque sorte l'art. 6d de l'ordonnance 2 sur les mesures destinées à lutter contre le coronavirus (COVID-19) (Ordonnance 2 COVID-19), du 13 mars 2020, telle que modifiée le 27 mai 2020 (RO 2020 773 et 1815). Voir sur ces plans de protection, JEAN-PHILIPPE DUNAND – RÉMY WYLER, Coronavirus et droit suisse du travail : quelques questions en période de déconfinement, in : Newsletter DroitDuTravail.ch du 28 mai 2020 de l'Université de Neuchâtel, pp. 5-8.
2. La loi fédérale sur le travail dans l'industrie, l'artisanat et le commerce (Loi sur le travail, LTr), du 13 mars 1964 (RS 822.11), prévoit à son article 6 al. 1 que, « [p]our protéger la santé des travailleurs, l'employeur est tenu de prendre toutes les mesures dont l'expérience a démontré la nécessité, que l'état de la technique permet d'appliquer et qui sont adaptées aux conditions d'exploitation de l'entreprise. Il doit en outre prendre toutes les mesures nécessaires pour protéger l'intégrité personnelle des travailleurs ».
3. En droit (privé) du contrat de travail c'est l'article 328 du Code des obligations (RS 220) qui, sous le titre « Protection de la personnalité du travailleur », prévoit à son alinéa 2 que : « [L'employeur] prend, pour protéger la vie, la santé et l'intégrité personnelle du travailleur, les mesures commandées par l'expérience, applicables en l'état de la technique, et adaptées aux conditions de l'exploitation ou du ménage, dans la mesure où les rapports de travail et la nature du travail permettent équitablement de l'exiger de lui ».
4. JEAN-PHILIPPE DUNAND – RÉMY WYLER, Quelques implications du coronavirus en droit suisse du travail, in : Newsletter DroitDuTravail.ch de l'Université de Neuchâtel, numéro spécial du 9 avril 2020, <https://www.publications-droit.ch/files/uploads/quelques-implications-du-coronavirus-au-9-avril-2020-photos.pdf>, p. 8.
5. Art. 10 al. 2 de l'ordonnance 3 relative à la loi sur le travail (OLT 3) (Protection de la santé), du 18 août 1993 (RS 822.113) ; DUNAND/WYLER, précités, p. 20.
6. JEAN-PHILIPPE DUNAND, ad art. 328 in : Dunand J.-P. – Mahon P. (éd.), *Commentaire du contrat de travail*, Berne, 2013, pp. 268-309, spéc. N 71, p. 296 (avec d'autres références).
7. Sur la base des articles 82 et 83 de la loi sur les épidémies ; cf. THOMAS GEISER – ROLAND MÜLLER – KURT PÄRLI, Klärung arbeitsrechtlicher Fragen im Zusammenhang mit dem Corona-Virus, Jusletter 23 März 2020, N 84.
8. THOMAS GEISER – ROLAND MÜLLER – KURT PÄRLI, Klärung arbeitsrechtlicher Fragen im Zusammenhang mit dem Corona-Virus, Jusletter 23 März 2020.
9. DUNAND, précité, N 65, p. 293. Cf. aussi GEISER – MÜLLER – PÄRLI, précités, N 85 : « Neben der strafrechtlichen Verantwortlichkeit besteht durchaus auch noch das Risiko einer zivilrechtlichen Haftung gegenüber den Arbeitnehmern. Vorausgesetzt werden dazu wie bei allen Vertragsverletzungen ein Schaden des Arbeitnehmers, eine Widerrechtlichkeit, ein Verschulden in Form einer vorsätzlichen oder fahrlässigen Pflichtverletzung und schliesslich ein adäquater Zusammenhang zwischen dem Verschulden und dem Schaden. Beweispflichtig für diese Voraussetzungen ist der Arbeitnehmer selbst. Dabei dürfte der Nachweis des adäquaten Kausalzusammenhanges das grösste Problem darstellen, denn die Möglichkeiten einer Ansteckung durch das Corona-Virus sind vielfältig. Ist allerdings ein Arbeitnehmer besonders gefährdet, weil er zum Beispiel unter einer chronischen Atemwegserkrankung leidet und verbietet die Arbeitgeberin trotz entsprechender Möglichkeit eine Arbeitsverlagerung ins Homeoffice, so dürfte eine Schadenersatzklage gute Aussicht auf Erfolg haben ».
10. DUNAND, précité, N 68, p. 295 (avec d'autres références).
11. En effet, si l'employeur réagit en signifiant son licenciement au travailleur qui refuserait de travailler, ce licenciement serait certes abusif, au sens de l'art. 336 CO, mais resterait valable, l'employeur risquant tout au plus de devoir verser une indemnité pour résiliation abusive.
12. See on this point, in particular, JEAN-PHILIPPE DUNAND, PASCAL MAHON ET AL., *Étude sur la protection contre accordée aux représentants des travailleurs*, établie à la demande et sur mandat du Secrétariat d'État à l'économie (SECO) et de l'Office fédéral de la justice (OFJ), Berne 14 août 2015, pp. 137-154 ; JEAN-PHILIPPE DUNAND, PASCAL MAHON ET AL., *Étude sur la protection en cas de grève licite*, établie à la demande et sur mandat du Secrétariat d'État à l'économie (SECO) et de l'Office fédéral de la justice (OFJ), Berne, 11 avril 2016, pp. 82-106 ; for the comparison, see also INSTITUT SUISSE DE DROIT COMPARÉ (ISDC), *Legal opinion on the protection of workers representatives*, Lausanne 2013, and *Legal Opinion on the Protection of Workers and the Right to Strike*, Lausanne 2015.
13. CIANFERONI NICOLAS (2020), Saisir la pandémie pour repenser la santé au travail. In Gamba Fiorenza et al, *COVID-19, le regard des sciences sociales*. Zürich: Seismo (<https://www.seismoverlag.ch/de/daten/covid-19/>)
14. <https://ccsi.ch/2020/05/05/coronavirus-et-sans-papiers-appel-au-conseil-detat/>.