

Legal Compass

Interface between employment, tax and social security law

October 2020



Reimbursement of expenses for employees – What changes due to the COVID-19 pandemic with regard to tax and social security laws?

In the context of the COVID-19 pandemic, the number of employees working from home increased significantly in the short term. This raises questions about the employer's obligation to contribute to the costs of the employees. In addition, employers should assess whether their previous internal practice relating the reimbursement of expenses is still appropriate, and accordingly whether the social security contributions are accounted for correctly. The changed circumstances may also have tax implications for employees.

1. Compensation obligation of the employer in general

From the point of view of employment law pursuant to articles 327 et seq. CO, the employer must indemnify the employee for all expenses incurred in the performance of the work, whereby it may also be agreed that the employee shall bear all or part of the costs for equipment and materials. From an employment law perspective in order to simplify the procedure it would be possible to make a monthly lump-sum payment which exceeds the actual costs normally incurred. However, social security and tax laws set stringent limits to such practice (see below, sect. 6).

With the increasing spread of remote work, the question of the employer's contribution to the home office expenses is becoming more important.

In its decision 4A_533/2018 of 23 April 2019, the Federal Court ruled that the employer is obliged to share the burden of home office expenses, including the rental costs in the amount of CHF 150 per month. The underlying reason was that in the matter at hand, the employer had unilaterally ordered work from home and did not provide the employee with a workplace in the business premises. As a result, the employer was able to save costs that are usually incurred in making available a workstation.

2. Applicability in the context of the COVID-19 pandemic?

In the course of the COVID-19 pandemic and the associated lockdown as of 16 March 2020 (gradual relaxation as of 27 April 2020), the order to work from home was issued further to the urgent recommendation of the Federal Council. Employees were encouraged to work from home whenever possible. With regard to particularly vulnerable employees, the Federal Council's emergency ordinances even obliged employers to allow telecommuting.

In this situation, the employer implicitly continued to provide a workplace, while, in return, the employees (arguably) rented no additional space to work from home. In addition, the arrangement to work from home was made in the interest of the health and safety of the employees rather than in the sole interest of the employer.

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As a result of changed circumstances, it is still unclear to what extent the aforementioned case law on the employer's duty to contribute to the costs can be applied to cases relating to the COVID-19 outbreak.

A potential legal dispute can be avoided, at least partially, contractually. While some companies intend to maintain the home office arrangement in the medium to longer term, the implications from a social security and tax perspective should always be considered with foresight.

3. Declaration in the payslip and the annual salary statement

If the employer compensates the employee's home office expenses and declares the respective amount in the payslip and the annual salary statement as reimbursed expenses, no social security contributions are due on this amount and the compensation is not considered taxable income for the employee.

From a tax perspective, as a matter of principle, compensation should be made against actual costs. Otherwise, the payment must be properly qualified as salary in the payslip and the annual salary statement.

However, if the employer shows such compensation as a salary component in the payslip, the compensation will be subject to social security deductions and income tax. In order to avoid inaccuracies in the payslip and the annual salary statement, many employers have their internal expense regulations reviewed and approved in advance by the responsible tax authorities.

In the context of the COVID-19 pandemic, employers should revisit and, if necessary, adapt their current practice regarding compensation of expenses to the changed circumstances in order to ensure proper completion of the employees' payslips as well as the annual salary statement. Changes in declaration practice will affect the information provided by the employees in their tax declarations.

4. Declaration in the tax declaration

Private persons who regularly carry out a significant part of their work from home can, in principle, claim a deduction for the use of their private office in their tax declaration as part of their professional expenses. In order to calculate the amount of the tax deduction, different calculation methods are used at the federal and cantonal levels. For example, according to the tax practice of the Canton of Thurgau, the following conditions must be met cumulatively for a corresponding deduction to be granted:

- The employee must carry out a substantial part of his or her professional work at home as a result of the employer's failure to provide necessary or suitable workroom or the impossibility or unreasonableness of its use.
- The employee must have designated premises used exclusively or at least predominantly for this purpose which cannot be used for private purposes.
- The existing room conditions must allow the assignment of a room for professional use.

As regards the substantiality test, certain cantons apply a threshold of at least two full working days out of five of telecommuting (e.g. the Canton of Basel-Stadt). Most cantonal tax authorities apply similar criteria in their assessment practice.

Certain cantons have already confirmed that these criteria will continue to apply without any changes under the COVID-19 regime. However, if the employer now compensates the employee for part of the home office costs, the amount of the compensation is excluded from the respective tax deduction. This has already been confirmed for the Canton of Berne. In case of declaration as salary, the deduction for the home office is - subject to the further requirements - in principle still applicable.

Even if the tax authorities' practice of home office deductions during the COVID-19 pandemic is not yet known for all cantons, they are unlikely to accept the existing deduction (in full) concurrently with a tax-free compensation of the home office expenses by the employer.

If an employee has already benefited from the employer's participation in potential home office costs within the scope of the expense regulations or, for example, if

he/she has been provided with a laptop, this amount would also have to be credited against such compensation.

5. Further impacts on tax deductions for regular home office work

Several cantons - in particular Zurich, Lucerne, Basel-Land and Solothurn - have so far indicated that a pragmatic approach will be taken for the 2020 tax declaration and that private persons will be able to claim the general deductions without any changes, at least for the period of the lockdown. For example, in the Canton of Berne employees who had to drive to work during the lockdown period can also claim the actual car costs. In other cantons, appropriate notifications are still pending.

The situation is not yet clear for employees working remotely and extending the home office situation beyond the lockdown period. In particular, however, for subsequent tax declarations, if the home office situation is maintained and the employee no longer performs his or her work in the employer's company, effects on the tax deductions are to be expected. Various deductions in the employee's private tax declaration could be reduced or even completely struck off by tax authorities.

The following items are examples of such currently accepted deductions:

- Flat-rate deduction for travel expenses,
- Flat-rate deduction for additional costs of external catering,
- Deduction of allowable clothing expenses.

With a lump sum compensation of around CHF 150 for the expenses for the premises, a possible discontinuation of the previously customary flat-rate deductions may have adverse tax consequences for the employees.

The question of the extent to which these deductions are still justified also arises in case of approved short-time work in the company.

6. Special case: lump-sum expenses

For the compensation of cell phone costs and expenses in connection with customer contacts, the payment of lump-sum expenses is common. As far as the lump-sum expenses are effective expenses within the scope of the performance of the work, they are not considered as salary. Consequently, they are not subject to social security contributions and are not considered taxable income for the employee.

Any lump-sum expenses exceeding the actual expenses must be legally qualified as salary payments. Accordingly, income tax and social security contributions will be due on the difference.

In the context of the COVID-19 pandemic, it is conceivable that certain actual expenses falling within the category of lump-sum expenses have been eliminated, at least partially. In particular costs for business lunches have been completely eliminated during the period of remote work, and travel costs for external meetings are also likely to have been considerably reduced for the time being. If provided with a company car, the employee may have used it exclusively for private purposes during the lockdown. On the other hand, the employee may have to bear additional costs, such as for electricity, a faster Internet connection, postage and printing.

Accordingly, a case-by-case assessment is necessary to determine whether lump-sum expense payments and the company car regime remain acceptable for the tax authorities considering the COVID-19 pandemic measures and the associated home office.

7. Conclusion

In view of the above, the previous handling of expenses within the company must be reassessed when the workplace is moved to the home office, and even more so if it is planned to maintain this situation in the medium to long term.

This is recommended from the perspective of both employers and employees. From the employers' perspective, the avoidance of errors in the accounting of

social security contributions in payslips and the annual salary statement is of primary importance, not to mention possible cost savings. For employees, it is important to keep an eye on the tax consequences resulting from the changed expenses in connection with the performance of work - through cancelled as well as newly added expense positions.

For employees who only worked in their home office during the lockdown period, most cantons are unlikely to make any changes to the deductions for professional expenses in the 2020 tax declaration, unless additional compensation is paid by the employer. Beyond the period of the lockdown, a case-by-case assessment in the canton of residence is required.

The above-mentioned factors should also be taken into account if the parties agree on a new expense regulation regarding home office.

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