

Legal Compass Employment Law

September 2021



Two new Care Leaves

Two new care leaves have been introduced in Switzerland this year: A new short term leave for dependants care, which entered into force on January 1st, 2021, and a new childcare leave of up to 14 weeks that entered into force on July 1st, 2021. This Legal Compass presents these two new types of care leave.

Author



Dr. Michel Verde
Attorney-at-law,
Senior Associate

1. Two Types of Care Leave

In the past, employees only were entitled to up to three days of leave if this was necessary to take care of a child who has fallen ill or incurred an accident, provided that the child was not older than 15 and that the employee presented a medical certificate. This entitlement was based on Art. 36 of the Swiss Labour Act ("LA"). Case law granted additional care leave if this was necessary due to the circumstances of the individual case. However, in practice, not only a child may require particular care from the employee, but also adult family members may fall ill or incur an accident. A study of the Swiss Federal Statistical Office revealed that in 2016 about 56'000 individuals of the working population between the age of 15 and 64 lived with another person in the same household who needed care. Previously, Swiss employment law only granted a very limited entitlement to paid care leave – mainly based on Art. 324a of the Swiss Code of Obligations ("CO") – in order to take care of the dependant until an alternative care solution was found. With the new regulation, which basically consists of two elements, the legislator intends to better reconcile work and dependants care:

- On the one hand, the legislator introduced on January 1st, 2021, the new Art. 329h CO, which grants a care leave entitlement of up to 3 days per occurrence, capped at a maximum of 10 days per year.
- On the other hand, a new childcare leave for parents of seriously ill or injured children of up to 14 weeks has been introduced on July 1st, 2021, in the new Art. 329i CO. Alongside this new provision in the Swiss Code of Obligations, the legislator has introduced a childcare leave allowance in the Loss of Earnings Compensation Act ("LECA").

2. An Overview on the Dependant Care Leave

2.1. Who is entitled and what are the requirements?

The new Art. 329h CO grants a dependant care leave to employees if they need time to take care of a family member or a partner who suffered a health issue. The already existing Art. 36 LA, which previously governed the child care leave, has been adapted accordingly, for consistency in both legal provisions. Provided that the conditions mentioned below are fulfilled, every employee is entitled to a dependant care leave:

First of all, only a health issue suffered by a family member or by a partner can trigger the dependant care leave entitlement. A family member in terms of Art. 329h CO includes in particular the relatives of the employee in direct lineage – i.e. children, grandchildren, parents, grandparents, etc. – as well as the spouse or registered partner, the siblings, parents-in-law and stepchildren. If the concerned

individual is a non-registered partner of the employee, it is necessary for the employee to live together with the partner in the same household since at least five years.

The second condition is an impairment of his/her health suffered by the concerned person who therefore requires the employee's assistance at short notice. This is typically the case if the individual falls ill or incurs an accident. It is, however, also possible that the individual is handicapped and requires temporarily the employee's assistance, for example because the care professional who normally takes care of the individual is prevented from working and no replacement can be organised at short notice. Whether the employee is entitled to take a care leave also depends on the specific needs of the individuals. This mainly depends on the nature of the health impairment, the degree of independence and the availability of another person to take care of the individual at short notice.

Furthermore, as third condition, it must be reasonable for the concerned individual to be cared for by the alternative caregiver: especially in the case of small children it must be taken into account that in certain situations the child's parent cannot easily be replaced by another person. Similarly, in the case of an adult, an alternative caregiver may not be reasonable – for example if the sister, with whom only loose contact is maintained, shall take over the care instead of the spouse.

2.2. Does the employee have to provide a medical certificate?

The entitlement to dependant care leave under Art. 329h CO does not require the employee to submit a medical certificate. In practice, the employer may require the employee to provide information on the nature of the health impairment, the employee's relationship to the person concerned and the reasons as to why no other care is available and reasonable. In addition, the employer may request a medical certificate, which, however, usually only certifies that the person concerned has the health impairment that gives rise to the care leave, without any indication as to the availability and reasonableness of alternative care. If there are reasonable doubts as to whether the conditions for taking short-term care leave under Art. 329h CO are met, the employer may invoke the general rule of burden of proof (Art. 8 CC), according to which the employee must prove that the conditions for care leave are fulfilled. A medical certificate containing information on the health impairment may be a suitable means to achieve this, but other means of proof are also possible.

It should be noted in this context that the information on the health impairment of the concerned individual constitutes sensitive personal data. The employer has therefore to treat this information with the necessary confidentiality. Furthermore, whenever possible, the employee needs to inform the data subject (i.e. the concerned individual) that this information will be disclosed to the employer.

2.3. How many days of care leave is an employee entitled to?

The Entitlement to dependant care leave is limited to 3 days per occurrence. If the concerned person needs the employee's assistance for a shorter period of time, the entitlement to care leave is limited to the actual duration of the need for care.

If an employee wishes to take more than one leave per year to take care of the same individual, the entitlement depends on the specific health impairment: If the same illness or accident causes a repeated need for care of the same individual – for example, because recovery takes a long time or because the individual suffers a relapse –, the entitlement to care leave remains limited to 3 days. Conversely, a new illness or accident triggers an independent entitlement to care leave, subject to the total limit of 10 days per year as per Art. 329h CO. An employee can thus, for example, take care leave at different times during the year to look after his/her sick daughter for three days, his/her son who has had an accident for three days, his/her grandmother who has also had an accident for two days and his/her son who fell ill later on for another two days.

2.4. Is the employee entitled to salary payment during the care leave?

Yes, the employee is entitled to the full salary during the dependant care leave according to Art. 329h CO, as in the case of normal holiday pay. In addition to the basic salary, all variable remuneration components such as bonuses or commissions, if any, must be taken into account.

2.5. Can the employer give notice of termination during the care leave?

Yes, there is no legal protection against dismissal during the dependant care leave according to Art. 329h CO. Also, the notice period continues to run if care leave is taken during the notice period.

2.6. Can the care leave be deducted from the employee's holiday balance?

No, the entitlement to dependant care leave according to Art. 329h CO is in addition to the regular holiday entitlement according to the law, employment contract or a collective bargaining agreement. However, this does not affect the employer's general right to reduce the holiday balance if the conditions of Art. 329b para. 2 CO are satisfied.

2.7. Is there also a paid care leave entitlement based on Art. 324a CO?

The entitlement to dependant care leave based on Art. 329h CO exists independently of any entitlement to paid time off based on Art. 324a CO. If the requirements of Art. 329h CO and those of Art. 324a CO are fulfilled at the same time, the employee may choose whether to take the care leave based Art. 329h CO or to be absent from work with continued salary payment based on Art. 324a CO. It is also possible to assert both claims one after the other.

However, a claim to paid leave based Art. 324a CO is subject to stricter conditions than the care leave under Art. 329h CO: According to the legal doctrine and court practice, an employee is only entitled to such leave if he/she has to care for a person close to the employee for whose care he/she is legally responsible. This includes, in particular, children and spouses or registered partners. With regard to more distant relatives or the partner, the legal situation is unclear. In addition, the entitlement to continued salary payment under Art. 324a CO is subject to an annual limitation, which is three weeks in the first year of service and then increases proportionately to additional years of service. It is therefore possible that the annual entitlement to continued salary payment based on Art. 324a CO has already been exhausted due to other leaves, such as sick leave (of the employee). On the other hand, the entitlement to paid time off based on Art. 324a CO to care for a close relative is not limited to three days, but can also last longer if it is not possible to find a reasonable alternative solution earlier.

3. An Overview on the Childcare Leave of up to 14 Weeks

3.1. Who is entitled and what are the requirements?

Employees, whose child suffered a serious health impairment as a result of illness or accident and therefore has an increased need for care, are entitled to childcare leave of up to 14 weeks in accordance with the new Art. 329i CO. Only employees who have a parental relationship in terms of Art. 252 of the Civil Code with the concerned child are entitled to this leave. This is the case for the child's biological mother, the father whose paternity has been established by marriage, by recognition of the child or by court decision, and for the child's adoptive parents. Also foster parents and step-parents may claim such care leave. Furthermore, the employee is entitled to compensation for loss of earnings according to the LECA for the care of the child. Without entitlement to loss of earnings compensation, there is no entitlement to childcare leave under Art. 329i CO. [last sentence seems ambiguous]

The individual requirements for compensation – and thus also for the childcare leave – are set forth in the new Art. 16o LECA: Pursuant to this provision, a health impairment caused by illness or accident is considered to be serious if the progress or outcome of the impairment is difficult to predict or if it can be expected to worsen, to cause permanent damage or even be fatal. A minor accident or a trivial illness such as seasonal flu is not sufficient; it is rather necessary that the health impairment requires residential or ambulant medical treatment of the child for several weeks or even months. However, the legislator has not provided for a minimum duration of the medical treatment. A complex fracture of the leg could therefore qualify. Furthermore, the child should require more care than usual. Whether this is the case depends on the age of the child, on the one hand, and on the type and severity of the health impairment, on the other. Finally, it is necessary that at least one parent has to interrupt or reduce his/her gainful occupation to care for the child.

However, if the child is born with a serious illness, the entitlement to maternity allowance and maternity leave takes precedence (Art. 16g para. 1 lit. f LECA), so that childcare leave can only be taken afterwards, provided that the requirements are then still fulfilled.

3.2. Does the employee have to provide a medical certificate?

As in the case of leave for the dependant care leave (see 2.2 above), the employer may require a medical certificate attesting the existence of a health impairment of the child justifying the childcare leave. A medical certificate will also be required in order to obtain the loss of earnings compensation.

3.3. Is the employee entitled to salary payment during the childcare leave?

In principle, no. Instead, the employee is entitled to a loss of earnings compensation pursuant to Art. 16n ff. LECA, which is paid in the form of daily allowances. The amount covers 80% of the average income and is capped at CHF 196 per day. However, it is possible that in certain cases the daily allowance does not reach 80% of the employee's salary. In such a case, the employer must pay the difference between the loss of earnings compensation and 80% of the salary (Art. 324b para. 2 CO).

In total, parents are entitled to a maximum of 98 daily allowances (i.e. a maximum of CHF 19'208.-). If both parents are employed, this daily allowance credit is divided between both parents, whereby the parents are free to choose the split, i.e. it does not necessarily have to be 50:50.

In practice, the employer will often advance the amount of the loss of earnings compensation as part of the monthly payroll. In this case, the employer is entitled to the daily allowance. If the employee fails to claim the daily allowances from the competent social security carrier, the employer may do so on the employee's behalf.

3.4. How many weeks of childcare leave is an employee entitled to?

The employee is entitled to up to 14 weeks of childcare leave (Art. 329i para. 1 CO). This entitlement can be taken altogether, by the week or on a daily basis (Art. 329i para. 4 CO). However, the childcare leave must be taken within a period of 18 months from the day the first daily allowance is taken (Art. 329i para. 2 CO). If the other parent is also an employee (not necessarily of the same company), the total entitlement of 14 weeks' childcare leave shall be divided between the two parents, whereby the parents are free to choose whether they want a 50/50 split or a different split ratio (Art. 329i para. 3 CO).

The employee must inform the employer when and how he or she wishes to take the childcare leave and how the total childcare leave entitlement shall be divided between the parents; likewise, any changes must be announced as soon as possible (Art. 329i para. 5 CO).

The entitlement to daily allowances – and also to childcare leave – ends ahead of time as soon as the requirements are no longer fulfilled. However, the mere fact that the child reaches the age of majority during the 18-months period does not result in the loss of the remaining entitlement (Art. 16p para. 5 LECA); the employee can therefore claim the full entitlement to childcare leave within the 18-months period even if the child has reached the age of majority in the meantime.

3.5. Can the employer give notice of termination during the care leave?

This depends on the point in time: according to the new Art. 336c para. 1 lit. c^{bis} CO, as long as the employee is entitled to childcare leave according to Art. 329i CO, the employee is protected against a termination, the same as for example in the case of incapacity for work. This protection from dismissal is, however, limited to the first six months of the aforementioned 18-months period (see 3.4 above). A notice of termination given during such protection period is void and has therefore no legal effect. If the notice of termination was given before the beginning of the aforementioned protection period or to the first six months, the notice remains valid, but the notice period does not start to run or will be suspended as long as the employee is protected from dismissal. As soon as the protection period has expired, the employer may terminate the employment. The same applies if the

entitlement to care leave ends before that time for other reasons (for example, because the child no longer requires increased care by the parents).

3.6. Can the childcare leave be deducted from the employee's holiday balance?

No, the employee's regular holiday entitlement cannot be reduced as a result of the childcare leave based on Art. 329i CO (Art. 329b para. 3 let. d CO).

4. Is there any need for action for employers?

In principle, the new care leave rules apply by virtue of law; thus, it is not necessary to change existing employment contracts or policies. If a company has a policy dealing with care leaves, it is nevertheless advisable to check whether the policy is compliant with the new statutory provisions and, if necessary, to adapt the policy in order to avoid contradictions with the new legal framework. Employers are of course free to introduce a more generous regulation, for example by granting up to five days' dependant care leave instead of three or by rounding up the remuneration to 100% of the salary during the childcare leave.

Furthermore, HR managers should determine how the two new forms of care leave should be handled. It is advisable to request the following information from the employee when care leave is claimed:

- Person affected and type of kinship or relationship to him/her;
- Type and severity of health impairment (if necessary, have it certified by a medical certificate);
- Justification of the increased need for care (to what extent is there an increased need for care; availability and reasonableness of another care solution);
- Information on the presumed duration of the care leave (even a short-term need for care does not necessarily have to last three days);
- Additionally, in case of childcare leave of up to 14 weeks: information about the sharing of the entitlement between both parents as well as on the days or weeks on which the employee intends to take the childcare leave.

It is also advisable to keep records of employees taking care leave so that compliance with the maximum entitlement can be monitored. In case of leave to care for a child with serious health problems, it is also important to ensure that the entitlement to daily allowance is claimed in due time from the competent compensation office using the appropriate form.

Finally, employers should inform their employees proactively about the new care leave regulations.

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

Die in diesem Dokument enthaltenen Informationen sind ausschliesslich zu Informationszwecken gedacht und können keinesfalls eine angemessene Rechtsberatung ersetzen. Eversheds Sutherland AG, mit Sitz in Zürich (Schweiz), übernimmt keinerlei Verantwortung für Handlungen, die gestützt auf die in diesem Dokument enthaltenen Informationen getroffen werden.

© Eversheds Sutherland 2020. Alle Rechte vorbehalten. Eversheds Sutherland ist ein globaler Anbieter von juristischen Dienstleistungen, der seine Dienstleistungen über verschiedene, voneinander unabhängige Rechtsträger erbringt. Eversheds Sutherland ist der Name und die Marke, unter der die Mitglieder von Eversheds Sutherland Limited (Eversheds Sutherland (International) LLP und Eversheds Sutherland (US) LLP) sowie die von diesen kontrollierten oder verwalteten oder mit diesen verbundenen Unternehmen sowie die Mitglieder von Eversheds Sutherland (Europe) Limited (nachfolgend je einzeln als "Eversheds Sutherland Gesellschaft" und zusammen als "Eversheds Sutherland Gesellschaften" bezeichnet) juristische oder andere Dienstleistungen für Klienten auf der ganzen Welt erbringen. Die Eversheds Sutherland Gesellschaften bestehen und sind reguliert gemäss den jeweils auf sie anwendbaren behördlichen und gesetzlichen Bestimmungen und treten unter ihrer jeweiligen Firma auf. Die Verwendung des Namens Eversheds Sutherland dient nur der Beschreibung und bedeutet nicht, dass die Eversheds Sutherland Gesellschaften eine Gesellschaft bilden oder Teil einer globalen LLP sind. Die Mandatsvereinbarung zwischen dem Klienten und der beauftragten Kanzlei ist massgebend bezüglich der Verantwortung für die Erbringung der jeweiligen Dienstleistungen an einen Klienten. Eversheds Sutherland AG, mit Sitz in Zürich (Schweiz), ist Mitglied von Eversheds Sutherland (Europe) Ltd.