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## EMPLOYMENT

### EMPLOYMENT LAW AND COVID-19 – WHAT YOU NEED TO KNOW

Coronavirus is fundamentally changing day-to-day business operations. There is uncertainty on the part of both employees and employers in view of the increasing number of quarantine cases (I.) and official company closures (II.), working from home (III.) and the closure of childcare facilities and schools (IV.). There is also a focus on short-time work (VI.), the deferral of social security contributions (VII.), extended working hours (IX.), exemption from tax and social security contributions for bonuses (X.) and health & safety (XI.) and the modus operandi of employee representative bodies (XII.). Recently, the question has also arisen as to what claims employees may have whose return to work after their holiday is delayed on account of the coronavirus pandemic (XIII.). Here are the most important facts in brief.

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### **I. Quarantine**

**Who pays the salary of employees who are in quarantine?**

In order to stem the spread of the coronavirus, the competent authorities can order quarantine for both people with an acute infection and those who are merely potentially infected. The form in which affected employees will continue to receive their salary depends on the category into which they fall:

- › Employees who are unable to work due to a coronavirus infection will continue to receive their salary in line with the usual regulations. It is widely acknowledged that this will not change due to the quarantine measure that has been ordered.
- › For employees who are not acutely ill but are quarantined because an infection is suspected, section 56 Infection Protection Act (Infektionsschutzgesetz) will apply, under which employees receive compensation in the amount of their net salary for the first six weeks of quarantine. The employer will pay the compensation, but will be reimbursed by the competent authorities upon application. As of the seventh week of quarantine, the competent authorities will pay compensation equivalent to the amount of sick pay directly to the employee. Some of the competent authorities are of the opinion that it is the employer that is primarily obliged to continue to pay employees' salary, by application of section 616 German Civil Code. We do not consider this to be correct in the current pandemic situation.

**Will quarantine days be deducted from annual vacation?**

Like all days where an employee is unable to work on health grounds, quarantine periods ordered due to illness are

not to be deducted from annual vacation. Where an employee is not acutely ill, but has been placed under quarantine due to a suspected infection, they are not unfit for work and will still be obliged to work. If they work from home or from the place where they are in quarantine, they will continue to receive their salary from the employer as normal. If they are not able to do so, they will receive compensation in the amount of their current net salary. The quarantine days will not be deducted from their annual vacation.

### **Do employees have to work while in quarantine?**

Where employees are quarantined at home and able to work from home, they have an obligation to do so. The same applies if they are quarantined elsewhere and able to work remotely from that location. The only case where they are no longer obliged to work is if they become unfit for work due to illness. The situation is of course different for employees who need to be physically present at their place of work in order to do their work, e.g. because they work on machines.

## **II. Company closures**

### **Will employees continue to receive their salary if the company is closed on the basis of an official decree?**

Generally speaking, company closures are a risk that must be borne by the employer and not the employee. Employees continue to receive their salary. Whether this also applies in the case of closures ordered by the authorities, in particular nationwide/region-wide official closures, is unclear. To minimise the economic risk, companies are well advised to put in an application for short-time work (see below for details).

## **III. Work from home**

### **Can an employer order employees to work from home?**

The following distinction must be made here:

- › Some courts have taken the view that, generally speaking, employers cannot unilaterally order employees to set up an office at home. In our opinion, however, this does not apply in scenarios where, as in a pandemic, working out of the company premises is not an option. However, the employer would then be responsible for ensuring compliance with health and safety at work rules at the employee's home office.
- › Asking employees to work remotely would seem to be the more appropriate solution in the current situation. For this, an employer provides its employees with the necessary equipment (usually a laptop with the necessary software installed on it) and instructs them to work remotely on a temporary basis. This could also involve employees using their own devices (bring your own device).

### **What precautions need to be taken by the employer and the employees?**

Cooperation between the employer and the employees is important when it comes to preventing or stemming infection within a business:

- › Employers have a duty of care towards their employees and must therefore protect their health. They must inform them about the risks around infection and the risks of contracting infection, in particular if they are aware of cases within the company or anywhere where work is carried out. As a preventive measure, they should keep up with developments as they unfold and inform employees on a regular basis. They should make suitable recommendations with regard to hygiene.
- › Instructions to employees to make business trips to risk areas should be avoided because they could go beyond the limits of an employer's reasonable discretion.
- › Where employees are able to carry out their work from home or otherwise remotely, employers should think about instructing them to do so as a precaution.
- › Where an employee has contracted an infection, the competent authorities will put them and all the people they have had contact with in quarantine. The employer is legally obliged to cooperate with the authority in the efforts to identify all the persons who had contact with the infected employee.
- › The other employees can continue to go about their work. If the employer decides to take the precaution of closing the company temporarily, it will be obliged to continue to pay salaries.
- › An employee who has been in a risk area may not decide autonomously to stay home from work as a

- › precaution. They should however inform the employer in order to protect their co-workers and comply with their duty of loyalty towards their employer. It is then up to the employer to decide whether to furlough the employee in question for the duration of the incubation period or ask them to work from home or otherwise remotely where possible.

#### **IV. Closure of childcare facilities and schools**

##### **Can employees stay home if childcare facilities/schools are closed?**

If an employee's own child is ill, they can stay at home temporarily to take care of the child and will continue to receive their salary in accordance with section 616 German Civil Code. However, if the child is healthy, but no suitable childcare is available, then the limits of this paid leave of absence will quickly be reached. It can also be excluded by the employment contract.

##### **Who makes up for the loss of earnings?**

Working parents who are reliant on childcare currently have a claim to compensation if the childcare facilities for their children have been officially closed to prevent the spread of infection and if they incur a loss of earnings as a result. They must however furnish proof to the authorities, as well as to the employer should it so request, that no other suitable childcare arrangements were available. The compensation amounts to 67% of the lost earnings, but no more than EUR 2,016 per month for a maximum period of 6 weeks. There is no entitlement to compensation during school holidays. The rule will remain in force until 31 December 2020.

#### **V. Parental allowance**

##### **What does the coronavirus crisis mean for parental allowance?**

Parents working in critical infrastructure occupations can postpone periods of entitlement to parental allowance. If they are not able to take off the months in which they can claim parental allowance between 1 March and 31 December 2020, they can do so after the pandemic end, by June 2021 at the latest.

Parents who have hitherto availed themselves of the 'partnership bonus' parental allowance model will not lose their claim if one parent works more or less than planned on account of the coronavirus pandemic. Where parents suffer a loss of income between 1 March and 31 December 2020 on account of the coronavirus pandemic, this will not be factored into the calculations of the parental allowance, nor will it have any negative impact on the amount of parental allowance granted for a further child.

#### **VI. Short-time work**

##### **Can an employer order short-time work?**

An employer can order short-time work if it is entitled to do so on the basis of an employment contract, a works agreement or a collective bargaining agreement. The introduction of short-time work is also subject to co-determination by the works council.

##### **What are the conditions for applying for the short-time allowance?**

For employees to receive short-time allowance, the employer must [report](#) short-time working to the Federal Employment Agency and [apply](#) for short-time allowance. Information about the application procedure can be found [here](#). Amendments to directives between 30 March 2020 and 31 December 2020 [here](#). Short-time allowance is granted if the requirements set out in sections 95 to 99 German Social Security Code, Book III are met, i.e.

- › there is a significant reduction in the volume of work to be done,
- › the operational requirements are met,
- › the personal requirements are met, and
- › the Federal Employment Agency has been informed of the reduction in the volume of work.

The reduction in the volume of work must be due to economic reasons or an unpreventable event, it must be temporary and unavoidable and exceed a materiality threshold in the month in question.

According to the Federal Employment Agency's current information leaflet "Short-time allowance (Kurzarbeitergeld / KUG) and coronavirus: information for businesses", employees can be paid short-time allowance if business falls away or contracts are cancelled due to the coronavirus or if materials cannot be obtained or work drops off due to protective measures ordered by the government.

The minimum requirements for the materiality of the reduction in the volume of work are set out in section 96(1), no. 4 German Social Security Code, Book III. Pursuant to section 1, no. 1 of the Short-Time Allowance Ordinance (Kurzarbeitergeldverordnung - KugV), which was enacted on 23 March, with retroactive effect as of 1 March 2020, a company may register for short-time work if at least 10% of its workforce are affected by the reduction in the volume of work. The threshold up to now was one-third of the workforce.

The requirements regarding the unavoidability of the reduction in work volume laid down in section 96(4) German Social Security Code, Book III have also been relaxed: Employees are no longer required to make up for any negative balance on their working time account ("minus hours") before short-time allowance is paid (section 1, no. 2 Short-Time Allowance Ordinance); based on the amended directives the Federal Employment Agency will refrain through to 31 December 2020 from requiring that employees use up their holiday from the current year to avoid short-time work.

Any business that employs at least one person meets the operational requirements.

Personally, an employee meets the requirements for short-time allowance pursuant to section 98(1) German Social Security Code, Book III if they are in an employment relationship, have not been given notice of termination and are subject to compulsory insurance. Persons in marginal part-time employment (geringfügig Beschäftigte) therefore do not qualify for short-time allowance unless they are subject to compulsory insurance. For persons drawing short-time allowance, however, who take up secondary, marginal part-time employment in critical infrastructure sectors while they are furloughed, their short-time allowance will not be reduced by the amount of the income they earn from such secondary employment.

Employers will be reimbursed in full and on a flat-rate basis by the Federal Employment Agency, upon application, for the social security contributions they have to pay on lost working hours, (section 2 Short-Time Allowance Ordinance).

Short-time allowance will also be granted for temporary agency workers pursuant to section 3 Short-Time Allowance Ordinance.

#### **How much is the short-time allowance?**

To date the Federal Employment Agency has paid 60% of the last net salary to employees on short-time work – or 67% for employees who have children. On the entry into force of Social Protection Package II, employees whose working hours have been reduced by at least 50% receive 70/77% of their lost net salary as from the fourth month of drawing short-time allowance and 80/87% as from the seventh month. The rule will remain in force until 31 December 2020.

#### **How long will short-time allowance be granted for?**

Pursuant to section 104(1) German Social Security Code, Book III, in the case of a reduction in the volume of work, short-time allowance is generally paid by the Employment Agency for a period of twelve months at maximum. In the course of the coronavirus pandemic, the Federal Government has enacted the Short-Time Allowance Payment Period Ordinance (*Kurzarbeitergeldbezugsdauerverordnung*) which temporarily extends this period. Those employees whose claim for short-time allowance arose on or before 31 December 2019 can lay claim to short-time allowance for up to 21 months, but at most up to 31 December 2019.

#### **What are the options for earning additional income?**

For employees on short-time work the options already available for earning additional income will be extended until 31 December 2020 for all occupations, with the additional income limit being the full amount of the current monthly income.

#### **Can employers lay off staff on operational grounds despite their being in short-time work?**

Some employers are also considering laying off staff as a way of dealing with the long-term consequences of the coronavirus crisis. Short-time work and terminations on operational grounds are not mutually exclusive because, while short-time work is intended to balance out a temporary reduction in the volume of work, terminations on operational grounds are a way of dealing with a long-term fall-off. The Federal Labour Court does however apply a particularly strong test when it comes to terminations on operational grounds after the introduction of short-time work: The employer must show that new circumstances have arisen that have led to a long-term reduction in the volume of work.

Where an employer decides to lay off employees who are on short-time, the prerequisites for the payment of short-time allowance generally cease to apply once a reconciliation-of-interests plan and a social plan have been concluded or, if there is no works council, once terminations on operational grounds have been pronounced.

## **VII. Deferral of social security contributions**

### **Can social security contributions be deferred?**

Notwithstanding section 76(2), sentence 2 German Social Security Code, Book IV, an interest- and collateral-free deferral of social security contributions by the statutory health insurance funds was possible for companies/employers that found themselves in serious financial difficulties ([National Association of Statutory Health Insurance Funds](#)). That was limited to the contributions for March, April and May 2020, however.

## **VIII. Unemployment benefit**

### **Is the period of entitlement to unemployment benefit extended during the coronavirus crisis?**

On the entry into force of Social Protection Package II, persons who were already seeking employment before the crisis and are drawing unemployment benefit pursuant to German Social Security Code, Book III ('unemployment benefit I') will continue to receive their unemployment benefit for an additional three months if their entitlement was otherwise due to end between 1 May and 31 December 2020.

## **IX. Working hours**

### **Are departures from the current provisions of the Working Hours Act (Arbeitszeitgesetz / ArbZG) on account of the pandemic permitted?**

The COVID-19 Working Hours Regulation (*COVID-19-Arbeitszeitverordnung*) permitted exemptions from the Working Hours Act for the period 10 April to 30 June 2020, but they no longer apply as the period has expired.

The text of the COVID-19 Working Hours Regulation and information published by the Federal Ministry of Labour and Social Affairs can be found [here](#).

## **X. Exemption from tax and contributions for special payments and non-cash benefits**

### **Are special payments and non-cash benefits fully or partly exempt from tax and social security contributions?**

Pursuant to section 3, no. 11a Income Tax Act, aid and support in the form of allowances and benefits in kind paid by an employer to employees on account of the coronavirus crisis during the period 1 March to 31 December 2020 in addition to the wages already owed is tax-free up to an amount of EUR 1,500 and hence also exempt from social security contributions.

## **XI. Health & safety**

### **What special requirements apply in this respect on account of the coronavirus crisis?**

On 16 April 2020 the Federal Ministry of Labour and Social Affairs presented the new COVID-19 health & safety

standards. Key points are:

- › Safety distance of at least 1.5 metres at work, whether in buildings, outdoors or in vehicles,
- › Use of safety screens or, where that is not possible, face masks,
- › Processes must be organised in such a way as to minimise contact – be it direct or through the intermediary of equipment – between staff,
- › Home-working where possible,
- › Persons suspected of being infected must leave work/stay at home until they have obtained a medical diagnosis,
- › Additional hygiene measures in the form of handwashing facilities, sanitiser dispensers, more frequent cleaning of premises, compulsory compliance with “sneeze/cough etiquette”,
- › Special protection for risk groups,
- › Active communication of “Health first!” principle.

The full text can be found [here](#).

On 10 August 2020 the Federal Ministry of Labour and Social Affairs issued the SARS-CoV-2 health and safety regulations. On the basis of the Occupational Safety Act (Arbeitsschutzgesetz / ArbSchG) and the ordinances on the Occupational Safety Act, these regulations clarify in part the above-mentioned health and safety standards presented by the Federal Ministry of Labour and Social Affairs on 16 April 2020. The main clarifications are the following:

- › If the safety distance of 1.5 metres cannot be maintained, partitions are to be installed, whereby the distance from the top edge of the partition to the floor must be 1.5 metres in the case of seated workstations and 2 metres in the case of standing workstations. Both sides of the partitions are to be cleaned on a daily basis;
- › In order to maintain hand hygiene, easily accessible handwashing facilities with running water, sufficiently gentle liquid soap and hygienic hand drying facilities (disposable towels made of paper or cloth) must be made available. Sanitary facilities are to be cleaned on a daily basis;
- › Distance markers, a restriction of the number of persons, staggered use, an adjustment of the seating arrangement or barrier tape, too, can help maintain the safety distance of 1.5 metres in sanitary facilities as well as in breakrooms and canteens.
- › Windows must be opened when beginning work in the rooms and then again at regular intervals, whereby increased ventilation intervals of 3 to 10 minutes are recommended.
- › Ventilation and air-conditioning systems are not to be switched off during operating- and working hours. The operation of such systems without appropriate filters is to be avoided.
- › Employees working from home are to be instructed with respect to working hours and breaks to be complied with, necessary documentation thereof, ergonomic workstation design and the use of work equipment.
- › Business trips and meetings must be limited to what is necessary and suitable alternatives are to be looked into. Work equipment must generally only be used by one person; should this not be possible, it must be cleaned.
- › When arranging shift schedules and working groups, where possible, the same persons should be assigned to the same shifts/working groups.
- › The company must also inform visitors from outside the company (unless such visits are only of a brief nature) with respect to special protective measures within the company.
- › Everyone employed within the company must be instructed on the infection risks and possibilities and participate in the implementation of the measures. In the case of temporary agency workers, the client company is directly responsible for the instruction. The relevant content of the instruction for employees whose work is governed by contracts for services and contracts for work is to be agreed on between the employer and the employers of the external companies.
- › Should they request, employees must be enabled to obtain regular occupational advice and check-ups (elective preventive care), including, in particular, in relation to psychosocial strain that is caused by working from home.

The full text and special features for construction sites, agriculture and forestry, field work and delivery services as well as accommodation at places of work can be found [here](#) (German).

## **XII. Employee representative bodies**

## What does the coronavirus crisis mean for work on employee representative bodies?

The Work of Tomorrow Act (*Arbeit-von-Morgen-Gesetz*) introduced a new section 129 into the Works Constitution Act stating that meetings of, and votes on resolutions by, works councils can be held by video or conference call instead of the persons concerned having to be physically present. This is on condition that it must not be possible for third parties to find out what is being discussed/decided, that nothing is recorded, and that the participants confirm their attendance to the chair in text form. The new section came into force with retroactive effect from 1 March 2020 and remains in force until 31 December 2020. Similar arrangements apply for conciliation boards, economic committees (section 129(2) Works Constitution Act, new version), works meetings (section 129(3) Works Constitution Act, new version), executive representative committees (section 39 Managerial Employees Committee Act, new version), European works councils (section 41b European Works Council Act, new version) and works councils of European companies (section 48 German Act on the Participation of Employees in European Companies, new version) and of European cooperative societies (section 50 German Act on the Participation of Employees in European Cooperative Societies).

### XIII. Returning to work after holiday

#### Can employers ask their employees where they've been on holiday?

To protect staff as a whole, employers have a legitimate interest in finding out whether employees plan to holiday/have holidayed in a risk area. We believe that employers are justified in putting the question to employees, provided they do not ask specifically which country/countries they plan to visit/have visited, but just whether it is/was a risk area.

#### Do employees have a claim for payment of their salary if they have to self-isolate after returning from a risk area?

According to ordinances enacted by the federal states, persons who travel to risk areas must immediately self-isolate for 14 days after returning to Germany. An up-to-date list of the international risk areas can be found on the [website of the Robert Koch Institute](#).

As regards the matter of the continued payment of salary during quarantine, there are two different scenarios:

- › If a holiday destination is only declared a risk area while the employee is on holiday there, then the principles outlined in '[1. Quarantine](#)' apply, meaning that if the employee is self-isolating and at the same time unfit for work because they have a coronavirus infection, then they will be possible to minimise the impact/continue to receive their salary in accordance with the customary rules; if they are self-isolating after returning from holiday but are not ill, then they have a claim for compensation pursuant to section 56 Infection Protection Act, which is paid through the intermediary of their employer.
- › If, on the other hand, the holiday destination in question was already classified as a risk area before the employee went there and it was therefore foreseeable that they would have to self-isolate on their return, they do not have these claims because they are personally responsible for the period of absence from work ('fault against oneself').

#### Do employees have a claim for payment of their salary if they are late returning to work after a holiday on account of the coronavirus pandemic?

Where an employee is late returning to work after a holiday, e.g. because they are unable to leave their holiday destination as scheduled due to coronavirus-related measures, or because flights to the country in question have been suspended, they do bear the 'journey-to-work' risk, but the employer may also have a duty under section 616 German Civil Code to continue paying the salary for a relatively short period of time if the travel restrictions were unforeseeable for the employee. However, where an employee travels to a risk area in full awareness of the (potential) risks, they forego their claim to payment of their salary under section 616 German Civil Code.

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## Employment

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