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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.). Here are the most important facts in brief.

#### [I. Quarantine](#)

[Who pays the salary of employees who are in quarantine?](#)

[Will quarantine days be deducted from annual vacation?](#)

[Do employees have to work while in quarantine?](#)

#### [II. Company closures](#)

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

#### [III. Work from home](#)

[Can an employer order employees to work from home?](#)

[What precautions need to be taken by the employer and the employees?](#)

#### [IV. Closure of childcare facilities and schools](#)

[Can employees stay home if childcare facilities or school are closed?](#)

[Who makes up for the loss of earnings?](#)

#### [V. Parental allowance](#)

[What does the coronavirus crisis mean for parental allowance?](#)

#### [VI. Short-time work](#)

[Can an employer order short-time work?](#)

[What are the conditions for applying for the short-time allowance?](#)

[How much is the short-time allowance?](#)

[How long will short-time allowance be granted for?](#)

[What are the options for earning additional income?](#)

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

**Can social security contributions be deferred?**

## **VIII. Unemployment benefit**

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

## **IX. Working hours**

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

## **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?**

## **XI. Health & safety**

**What special requirements apply here on account of the coronavirus crisis?**

## **XII. Employee representative bodies**

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

## **XIII. Conclusion**

### **I. Quarantine**

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

In order to stem the spread of the coronavirus, the competent authorities are ordering 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 official closures like the current one, 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 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?**

As from 30 March 2020, all working parents who are reliant on childcare 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?**

On the entry into force of the "Law on Amendments to Parental Allowance on Account of the COVID-19 Pandemic", 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 arrangements are only temporary and will end on 31 December 2020 at the latest.

#### **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 (*Kurzarbeitergeldbezugsdauerordnung*) 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.

### **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 may be possible for companies/employers that find themselves in serious financial difficulties ([National Association of Statutory Health Insurance Funds](#)). This has been limited, for the time being, to the contributions for March, April and May 2020.

## 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*) permits exemptions from the Working Hours Act for the period 10 April to 30 June 2020. For certain critical infrastructure workers the following applies:

- › Where unavoidable, the number of working hours per day can be increased to up to twelve. Working hours must be reduced subsequently so that they average out at 8 hours per day (48 hours per week) over six months.
- › Rest times may be reduced by up to two hours per day, whereby a minimum rest time of nine hours applies. Employers must make up for reduced rest times within four weeks, either in the form of days off or by extending other rest periods to at least 13 hours.
- › Workers may also be asked to work on Sundays and public holidays if the work cannot be done on work days. Rest days in lieu, to make up for working on Sundays, can be granted within eight weeks, but must have been granted by 31 July 2020 at the latest.
- › Where employers avail themselves of the permitted departures, working hours may not exceed 60 per week, except in urgent, unavoidable and exceptional cases.

Moreover, the regulatory authorities in most of the federal states have issued authorisations exempting companies from the provisions of the Working Hours Act. They will continue to apply insofar as they permit extended working hours or apply to matters other than the COVID-19 Working Hours Regulation.

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?

By [letter of 9 April 2020](#), the Federal Ministry of Finance ordered that special payments and non-cash benefits that employees receive between 1 March and 31 December 2020 in addition to their normal remuneration will be tax-free and exempt from social security contributions up to an amount of EUR 1,500. In recognition of the special and indispensable contribution made by employees in the coronavirus crisis.

## 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](#).

## **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 and economic committees (section 129(2) Works Constitution Act, new version), and works meetings (section 129(3) Works Constitution Act, new version), as well as for 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. Conclusion**

### **Conclusion**

If employers and employees work hand in hand, it will be possible to minimise the impact of the coronavirus pandemic on businesses. Openness and information are key to preventing infection among staff. It is important for employers to be familiar with and comply with the applicable legislation, should employees become infected despite thorough preventive measures.

## EXPERTISE

### **Corona Pandemic Employment**

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