

German Labor Law Consequences of COVID-19

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Employment and Employee Benefits and Executive Compensation

Questions on the coronavirus and a pandemic from a German labor law perspective:

A. Duty to work and remuneration

I. Duty to work

A healthy employee who does not show any symptoms of illness is obliged to perform the work he/she is obliged to do under the employment contract. In principle, there is no right to withhold work performance because he/she fears that he/she will be infected on the way to work or at work. Only if there is a concrete and demonstrable risk that an employee could be infected with an illness on the way to work or at the workplace an employee can withhold his or her work performance and demand payment of the agreed salary from the employer. These conditions are usually not met. If an employer fulfils his obligations under occupational health and safety law to send employees with symptoms of illness to a doctor or home, the conditions for a right to withhold work performance are usually not met and there exists an obligation to work.

II. Exemptions from the obligation to work and remuneration issues

Under certain conditions, the employer may release some or all employees from the obligation to work.

1. Closure of the business

a. Voluntary closure of the business

Voluntary closure of the business is only lawful if the employer's interest in suspending the obligation to work outweighs the employee's interest in employment. This depends on the circumstances of the individual case and is only justified in rare cases. A legal closure of the entire business is conceivable, for example, if a large number of employees is infected with the coronavirus or have fallen ill with COVID-19 and the maintenance of the company's activities with the remaining (healthy) workforce is no longer guaranteed.

If the employer offers his employees the opportunity to work from their home office, the employer can instruct that this option be used.

The employer's obligation to continue to pay the contractually agreed remuneration to the employees concerned remains in full force in the event of a voluntary closure of the business. The remuneration to be paid is that which the employees in question would have earned if they had appeared for work and been properly employed.

b. Officially imposed closure of the business

In the event of an officially imposed closure of the business or an officially imposed prohibition of the business activity, such as a restaurant, café, sales shop, travel agency, etc., the employer's interest in suspending the employees from the duty to work regularly prevails. Also in this case, the employer can send the employees concerned to the home office, provided that work in the home office can reasonably be done by the employees.

Also in this case, the employer's obligation to continue to pay the employees concerned the contractually agreed remuneration which they would have earned if they had appeared for work and been duly employed remains in force. However, the employer still has the option of applying for short-time work compensation in accordance with the new regulations passed by the Bundestag and Bundesrat (short-time work zero, see below). Under certain conditions, the employer is entitled to compensation from the competent authorities, which he is obliged to pay to the employees under the Infection Protection Act (see below).

2. Release of individual employees from the obligation to work/home office

If the employer has reasonable grounds to suspect that one or more employees are ill or infected with COVID-19, the employer's interest in suspension regularly outweighs the employee's interest in employment. For this purpose, it is regularly sufficient if the employee returns from an area for which there is a travel warning from the Federal Foreign Office or has stayed in a particularly endangered area or risk region or has been in close contact with a person infected with the corona virus (see also "Notification obligations" below).

The employees affected in this respect can also be sent by the employer to the home office for the quarantine period of 14 days recommended by the Robert Koch Institute, provided that work in the home office can be performed by the employees.

In this case, the remuneration entitlement of an infected but healthy employee also remains in principle in full and the employer is obliged to continue to pay to the affected employees the contractually agreed remuneration that they would have earned if they had appeared for work and been properly employed. In this case, however, it must be examined whether Section 616 Civil Code (BGB) has been waived or excluded in the employment contract. According to Section 616 BGB, the employee receives the salary entitlement if he/she is prevented from performing the work for a relatively short period of time through no fault of his/her own. If the employment contract stipulates that Section 616 BGB does not apply, the employee's salary claim is void for the period during which he/she was sent into quarantine. If Section 616 BGB has not been waived in the employment contract, the question arises whether the employee concerned has been put in this situation through no fault of his own. The answer to this question depends on whether the employee disregarded travel warnings from the Foreign Office, for example, and travelled to areas classified as risk areas by the Robert Koch Institute. There is currently no case law on this question. There is also inconsistent assessment of what constitutes a "relatively short period of time" in case law. The Federal Labour Court tends to

recognise five days as a relatively short time. In some cases, legal literature calls for a period of six weeks to be recognised on the basis of continued remuneration in the event of illness.

3. Notification obligations of the employee/legal consequences

If an employee returns to the workplace from an area for which there is a travel warning from the Foreign Office or which is considered a particularly endangered or risk area, the employee must inform the employer of this in order to give the employer the opportunity to decide on appropriate measures. The same applies to employees who have been in close contact with a person infected with the coronavirus. According to the Robert Koch Institute, close contact means either (i) having spoken to a sick person who has been diagnosed with COVID-19, or having been coughed on or sneezed on by such a person, or having otherwise had close contact with such a person within the last 14 days, (ii) having been in a particularly affected area/risk zone within the last 14 days, or (iii) having been ordered to be quarantined by the health authorities. The employer has the right to ask the employee whether he/she meets these conditions.

Violation of this duty of notification may have consequences under employment law, such as a warning or – in extreme cases – dismissal for conduct.

4. Instruction to take leave

The employer can in principle instruct the employee to take leave at a certain time. However, the employee is not obliged to comply with this instruction. If the employee expresses different holiday wishes, the employer must take these into account, unless holiday wishes of other employees conflict with such wishes. The employee may state any reason why he/she does not wish to take leave at the time instructed to take leave.

During the holiday leave, the employer is obliged to pay the employee holiday pay, which is calculated according to the statutory provisions.

5. Absence of childcare

The employee may be entitled to continued payment of remuneration if childcare is not or no longer available, for example due to the closure of a kindergarten or the school on which the employee depends. This only applies, however, if Section 616 Civil Code (BGB) has not been waived or excluded in the employment contract with the employee concerned. This must be checked and assessed on the basis of the respective employment contract. According to Section 616 BGB, the employee is entitled to a salary payment if the employee is prevented from performing work for a relatively short period of time through no fault of his/her own.

If Section 616 BGB applies in the employment relationship concerned, the question of whether an employee has a claim for payment against the employer in the event of the absence of childcare depends on whether the employee cannot reasonably be expected to provide the service expected of him/her as a result of the absence of childcare. The employee retains the remuneration claim if supervision or care of the child is necessary and other suitable persons are not available for this purpose. The employee is therefore obliged to examine the possibility of alternative care and to do everything reasonable to organise alternative care for his/her child. Only if these efforts fail the employee can stay away from work to care for his/her child. Continued payment of childcare allowance will therefore normally only be considered for infants.

Case law regularly grants a right to continued payment of remuneration under these provisions only for a period of five working days. In rare individual cases, case law has deemed a longer period of continued remuneration up to a maximum of six weeks to be justified. This is, however, only under very narrow conditions and therefore regularly not the case.

6. Illness of children

If a child becomes ill, the employee has a claim against the statutory health insurance fund for payment of sickness benefits in accordance with Section 45 Social Code Book V. The prerequisite for such a claim is that, according to a medical certificate, the supervision, care or nursing of a child under the age of twelve or a handicapped child who is dependent on care is required and another person living in the household cannot supervise, care or nurse the child. Sickness benefit is paid per calendar year for a period of 10 days on application, and for single parents for a period of 20 days. If an employee has a claim against the employer for continued payment of the remuneration in accordance with Section 616 BGB, the entitlement to sickness benefit does not apply. In these cases, too, it is therefore decisive whether Section 616 BGB has been waived in the employment contract or not.

7. Illness of the employee

There are no special provisions for employees who are unable to work. In the case of existing incapacity to work, there is a right to continued remuneration of six weeks against the employer. After six weeks, the employee concerned is entitled to sickness benefits from the health insurance fund.

There are special provisions in the German Protection against Infection Act (*Infektionsschutzgesetz*), which provide for continued remuneration in the event of illness and grants employers a right to compensation from the competent authorities under certain conditions. The competent authorities are determined by the state governments by statutory order and vary from state to state. Compensation in accordance with the Protection against Infection Act is paid to anyone who, as a dropout, infection suspect, disease suspect or other carrier of pathogens, is or will be subject to a ban on employment and thereby suffers a loss of earnings. This also applies to persons who are in quarantine. Currently, this regulation applies to persons infected with the coronavirus.

The right to compensation exists for six weeks in the amount of the loss of earnings, i.e. the earnings achieved by the employee before the employment ban, and is paid by the employer. The employer has a claim for reimbursement against the competent authority if he is not obliged to pay the remuneration to the employee under Section 616 BGB. If the application of Section 616 BGB is excluded in the employment contract, the employer is entitled to full reimbursement of the compensation paid to employees under the Protection against Infection Act. In cases where the applicability of Section 616 BGB is not excluded in the employment contract, it is not yet possible to say at this stage, with regard to claims for compensation due to the coronavirus, what periods the competent authorities will regard as a relatively short period within the meaning of Section 616 BGB. It is possible that, in the course of the comprehensive assistance for companies promised by the Federal Government, it will be completely refrained from taking into account in the compensation payment claims of employees against their employers under Section 616 BGB. It is also possible that only a claim to continued remuneration of five working days will be taken into account. It is unlikely that a period of six weeks would be taken into account and that a claim for compensation against the authorities would thus be completely

eliminated. From the beginning of the seventh week, the compensation is paid to the employee in the amount of the sick pay that the employee would receive from the statutory health insurance. This compensation amounts to 70 percent of the regular pay, that is, the pay received with the last payroll run, and is paid by the relevant health insurance.

B. Short-time work and short-time allowance

I. General

Short-time work means that the employee temporarily works less than the normal working hours and receives a correspondingly reduced remuneration. In principle, the employee has a right to employment based on the employment contract. The unilateral instruction of short-time work by the employer is invalid. Short-time work can only be achieved by agreement, e.g. by a valid contractual provision or by a separate agreement between employer and employee or employer and works council.

II. Conditions for granting short-time working allowance

In order for the Federal Employment Agency to grant short-time working allowance, there must be a substantial loss of working hours for economic reasons, i.e. a change in company structures caused by the general economic development, which represents an unavoidable event for the employer concerned. This is regularly the case with plant closures due to the coronavirus or a decline in orders (flights, rail and bus companies, hotels, catering, export industry etc.).

It can be assumed that the employment agencies will apply generous standards when examining whether the loss of work is temporary and whether it can therefore be expected that full capacity utilisation can be expected again in the foreseeable future.

It is also necessary that the loss of working hours is unavoidable. Unavoidability exists if the loss of working hours could not be averted or limited despite taking all reasonable and possible precautions. The employer must make every effort to send the employees concerned on paid leave. The employer may attempt to instruct unilateral leave. However, employees are not obliged to comply with this order (see above). If employees have already applied for and been granted holiday leave for the calendar year 2020, this does not prevent them from receiving short-time work allowance. However, if the leave is granted for a period of time during which short-time work is in effect, short-time work is avoidable for this period and there is no entitlement to short-time work allowance for this period. However, during this period, the employer must pay the employees concerned usual leave remuneration.

It should be noted that, following the recent changes to the short-time working allowance recently adopted by the Federal Government, there is no longer any requirement for the employer to demand that employees' working time balances be written off before applying for short-time working allowance. Details of this are not yet known. Before applying for short-time working allowance, it is recommended that the employer concerned contact the relevant employment agency to find out how they will proceed in this regard.

As a result of the new regulations recently passed by the Bundestag, short-time working allowance can already be applied for if 10% of the employees in the company are already affected by the loss of work.

A so-called short-time work to zero, i.e. a complete cessation of business operations, also entitles employees to receive short-time work allowance. However, it should be noted that the aim of short-time working allowance is to return to full employment. No short-time working allowance is granted if a company is closed down completely without any prospect of reopening.

The loss of work must be reported in writing to the employment agency. A form can be found at: https://www.arbeitsagentur.de/datei/anzeige-kug101_ba013134.pdf The application must be submitted to the Employment Agency in whose district the company is located. If a works council exists, its opinion must be attached to the application. Short-time work allowance will be paid at the earliest from the calendar month in which the application is received by the responsible Employment Agency. Short-time allowance based on the regulations recently amended by the Bundestag can already be applied for now, irrespective of their entry into force, and will be granted retroactively from 1 March 2020 if necessary. The application must be submitted to the responsible Employment Agency within a cut-off period of 3 months. The period begins at the end of the calendar month for which the short-time allowance is applied for. The receipt of the application at the relevant Employment Agency is decisive.

Short-time allowance is granted for a period of up to 12 months, starting from the first month for which the employer applies for short-time allowance. The duration can be extended by the government to up to 24 months. It can be assumed that this will be made use of depending on the course of the coronavirus crisis.

The short-time working allowance is 67% of the difference between the flat-rate net remuneration from what the employee would have earned without loss of work and without earnings for overtime work and the net remuneration actually earned (net remuneration difference in the entitlement period) for employees who meet the requirements for the increased rate of benefit (in principle those with at least one child), and 60% for other employees. According to the new regulations passed by the Bundestag, employers are to be reimbursed in full for the social security contributions paid on the short-time working allowance.

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