



Labour Law

Lockdown - Extensive closure of companies and (public) facilities - what are the consequences for the payment of remuneration and what are the claims for compensation and possibilities of relief for employers?

Current Situation

The German Federal Government and the governments of the federal states agreed on 16 March 2020 on joint guidelines for further action against the expanding Sars-CoV-2 pandemic and the associated disease (Covid-19) and significantly expanded these guidelines on 22 March 2020. In addition to the closure of schools and childcare facilities, the prohibition of (larger) gatherings and events, the closure of public and private leisure facilities and regulations for the retail, catering and hotel sectors, there is also a general "ban of social contacts", which is intended to prevent more than two people - apart from members of the core family - from gathering. The health authorities may also take individual measures within the framework of the Federal Infection Protection Act (*Infektionsschutzgesetz* - IfSG), which include in particular the imposition of quarantine and the ban on professional activity. Finally, the closure of the whole business operation may also be ordered. These measures, roughly described here, pose considerable challenges to employers. However, even in companies not directly affected by these measures, Sars-CoV-2 raises further questions in the employment relationship: What measures – apart from terminations for business reasons – can and need to be taken in order to react to the declining demand and lack of turnover? Also problems of employees who are basically able to work but have difficulties in caring for relatives and the problem with reaching the workplace have to be addressed.

With this paper we provide an up-to-date orientation on the distribution of risks and public reimbursement and support services for employers in this challenging situation. You will find further guidance and advice, also from other specialist areas than labour law, in our continuously updated Corona Information Centre (<https://www.beiten-burkhardt.com/de/corona-informationscenter>).

A. Distribution of Risk in the Event of Closures and Restrictions on Business Operations

I. Cases of immediately affected Employees

1. Incapacity to Work directly due to Illness

Employees who have become infected with Sars-CoV-2 will most likely also be considered unfit to work. Accordingly, the usual regulations of the Continued Remuneration Act (EFZG) apply to such cases. The continued payment of remuneration is therefore to be paid by the employer for up to six weeks. Cases of "culpable" incapacity to work, which lead to an exclusion of continued remuneration, are conceivable in principle (e.g. in the case of participation in "corona parties" or under certain circumstances in the case of willful entry into a designated "Corona Hotspot", possibly also in the case of violation of the new contact ban), but should not be present as a rule.

Possibilities of relief for employers: For smaller companies (with no more than 30 employees), the claims for reimbursement under the "U1" procedure pursuant to section 1 (1) of the Expenditure Compensation Act (AAG) are eligible according to general principles, so that 80% of the amounts spent on continued remuneration can be reimbursed.

2. Individual Measures under the IfSG

The IfSG provides the general basis for the authorities to take the protective measures necessary in individual cases to prevent the spread of infectious diseases. According to this, quarantine measures can be taken and occupational bans can be imposed. In both cases the work may no longer be performed.

Possibilities of relief for employers: In the event of loss of earnings, a claim for compensation against the authorities pursuant to the IfSG may exist. For the first six weeks, compensation is granted in the amount of the loss of earnings and is thereafter based on the amount of reduced sickness benefit. The employer has to pay the compensation during the first six weeks and is entitled to reimbursement from the competent authority. This claim for reimbursement must be submitted within three months of the cessation of the specific activity or the end of the quarantine measure ("isolation") and the authority must grant the employer an advance on the compensation payment upon request.

Expert's advice: The claim may fail if section 616 of the German Civil Code (BGB) applies to the employment relationship. This must be checked in each individual case. Nonetheless, the claim for reimbursement should be made as a precautionary meas-

ure, which must be made within three months after cessation of the concrete activity or end of the quarantine measure.

3. Coincidence of quarantine or ban on professional activity with incapacity to work

If incapacity for work due to illness already exists when an official measure is imposed on an individual employee by the authorities, there is no entitlement to compensation under the IfSG.

II Directly affected Business Operations

Companies are directly affected by official measures if the closure or restriction of business activities is ordered.

1. (Suspected) Sars-CoV-2 case in the Business Operation- Obligation to Continue to Pay Wages – Distribution of Operational Risk

The principle of "no wage without work" is not without exceptions. In particular, the principles of the Fair Distribution of Operational Risks apply. According to these principles, the employer must continue to pay the wage even without work performed by the employees if the reason for the closure or impairment of the business is attributable to the employer's sphere, irrespective of whether the employer is at fault for this impairment.

Expert's advice: It is not possible to make a general prediction as to whether a case of closure, ordered by the authorities due to Sars-CoV-2, is to be regarded as a case of operational risks to be borne by the employer, eventually. We currently assume that the distribution of risk tends to be at the expense of the employer, i.e. the employer is obliged to continue to pay the remuneration. However, this always requires detailed examination in each individual case.

Possibilities of relief for employers: Compensation claims under the IfSG do not apply to companies in the form of legal entities. The IfSG only provides for an independent claim for compensation for **self-employed persons**. In special cases where the closure affects the business in an exceptional manner, a claim based on the principle of extraordinary detriments to the public's benefits ("sacrifice") may be considered.

In general, we recommend that the possibilities of short-time work (see B. below) be examined.

2. Precautionary Closure or Restriction of Business Activities on the Basis of General Rulings / Ordinances Following the Agreement between the Federal Government and the Federal States of 16 March 2020 and its extension of 22 March 2020

In all federal states there are current regulations under state law, which measures are to be taken in individual sectors of the economy with public access. The companies affected must cease operations at short notice.

The closure of the businesses for public access has a massive impact on business activities. Due to the closure of business open to the public, the employer cannot offer work. As soon as the general flexibilisation instruments (in particular, the reduction of time accounts and, if necessary and if the employee agrees, the use of vacation days) are no longer effective, the employee will have to be released from work. However, this release must be paid. This is because the employer bears the general risk that he cannot provide his employees with actual work (economic risk).

Possibilities of relief for employers: Neither claims for compensation under the IfSG nor claims arising from extraordinary detriments ("sacrifice") come realistically into consideration here.

Ultimately, the use of short-time work will therefore be the means of choice in these constellations as well.

III. Indirect Consequences of Sars-CoV-2 Cases

Due to the widespread closure of schools and childcare facilities, many workers with younger children are experiencing considerable care problems. Some employees also have problems getting to work in the first place when transport connections are limited. And, of course, there is the fear that stoppages in the operations of customer companies will indirectly lead to a reduced order situation in their own operations. With regard to the indirect consequences of the Sars-CoV-2 pandemic, the following can be said:

1. Need for Care and Payment of Remuneration

If the employee does not come to work because the care of the children (or other family members) can no longer be covered by other persons or institutions, the principle of "no wage without work" basically applies. Section 616 BGB contains an exception to this rule (continued payment of wages) that only applies to cases where the absence from work is for a few days (a maximum of 5 days is generally accepted). If the absence lasts longer, the entitlement to remuneration is completely cancelled, i.e. also for the first up to 5 days of the prevention. Furthermore, the application of Section 616 BGB may be, and often is, excluded by way of an employment contract or collective bargaining agreement.

Expert's advice: The legislature will counter this issue by a new compensation claim to be set out in the IfSG. According to current official statements, the compensation shall amount to 67 percent of the net income. Parents of children up to the age of 12 years shall be eligible. And the benefits shall be paid for a maximum of six weeks. The maximum amount shall be EUR 2,016 per month.

In this light, the continued payment of compensation in such cases of prevention should be maintained for the time being. Please feel free to contact us, should you have any questions regarding the specific application and processing of the compensation claims.

2. Restrictions on the Way to Work

In general, the risk of reaching the place of employment lies with the employee. Problems in reaching the workplace (in time or at all) therefore generally lead to a loss of entitlement to remuneration. Should, in future, public transport in particular be affected by the Sars-CoV-2 pandemic or be suspended completely, the employer is entitled to reduce the remuneration accordingly.

3. Reduced Workload due to Declining Customer Orders

Declines in incoming orders are the indirect consequence of the Sars-CoV-2 pandemic. Under labour law, the employer must fulfil the employment contract regardless of the order situation, i.e. pay the agreed remuneration in any case (economic risk). Short-time work is available as a bulwark against mass layoffs.

B. Current Means of Choice: Introduction of Short-Time Work and other Forms of Public Support

Apart from the use of general flexibilisation instruments such as taking holidays, which is generally at the discretion of the individual employee, and using any working time credits - measures that can only provide short-term relief and are not a solution in view of the expected duration of the impairments - the introduction of short-time work is currently the means of choice. Even during the 2008 financial crisis, short-time work was an efficient means of reacting to a shortage of work at short notice without having to lay off large parts of the workforce. When the present crisis will be over, operations can be quickly "ramped up" again. Also, since highly qualified employees are an important asset for many companies, short-time work allows companies to retain their qualified workforce during the crisis.

The German legislature passed the reform of the short-time work allowance on 13 March 2020. The new regulations provide for an easier utilisation (already when only 10 percent of employees are affected; building up negative working time balances is no longer required), include a wider scope of application (temporary workers are also covered) and provide for considerably greater relief for employers (social security contributions are reimbursed at 100 percent). In addition, the first concrete packages of measures to provide liquid funds have been initiated, the use of which must be examined on a case-by-case basis.

Expert's advice: Please contact us so that we can work out the package that is most suitable for your company/your clients from the available resources and measures.

I. Short-Time Work

If a loss of work with loss of earnings occurs because the company has to close down or reduce hours of operations, short-time work (*Kurzarbeit*) is possible and the employees concerned are thus entitled to short-time compensation. Short-time work means the temporary reduction of regular working hours with a corresponding reduction in remuneration in a company due to a considerable loss of work. Short-time work may affect all or only some of

the employees of the enterprise. The affected employees work less or do not work at all during short-time work.

Expert's advice: In the following, we provide an overview of how short-time work can be introduced, how short-time work compensation is applied for and how much short-time work compensation is paid. Naturally, it remains necessary to verify the requirements in each individual case. We will be pleased to advise and support you in all matters concerning short-time work.

1. Introduction of Short-Time Working

The introduction of short-time working requires a legal basis, i.e.

- a collective bargaining agreement,
- a works agreement or
- a contractual employment provision.

If employees are not prepared to agree to an employment contract provision on short-time work, the final option is to terminate the employment contract with the option of altered conditions of employment (*Änderungskündigung*).

2. Prerequisites for Short-Time Work

With retroactive effect from 1 March 2020, considerable relief will apply to the granting of short-time working:

- Entitlement to short-time working compensation already exists if at least 10 percent of the employees (normal rule is: at least 1/3 of the employees with loss of earnings) have a loss of earnings of more than 10 percent.
- Social security contributions for lost working hours are reimbursed at 100 percent (normal rule is: no reimbursement).
- Temporary employees can also go on short-time work and are entitled to short-time work compensation (normal rule is: no compensation).
- There is no need to build up negative working time balances (if this is stipulated in the collective agreement) (the normal rule is to first build up negative working time balances and then receive short-time work compensation).

The loss of working time must be due to economic reasons or an unavoidable event. These include, in principle, the consequences of Sars-CoV-2, as already clarified by the Federal Employment Agency in its press release of 28 February 2020. An unavoidable event also exists if the absence from work is due to official measures for which the employer is not responsible. In addition, the minimum limit must be observed, according to which 10 percent of employees have a loss of earnings of more than 10 percent. Further operational and personal requirements must also be met.

3. Practical Implementation of Short-Time Work

The application is made in two steps:

- Notification of the loss of working hours to the Federal Employment Agency, whereby the fulfilment of the requirements must be demonstrated and made credible. The time of notification is decisive for the period of time for which the short-time working compensation is paid.
- In a second step, the employer must submit an application for benefits for each individual employee to the Employment Agency. The application is to be submitted for the respective month within a preclusive period of three months. The period begins at the end of the calendar month in which the days of short-time work fall. The short-time working allowance is paid to the employer, who passes the short-time working allowance on to the employee. This is done either with the payment of the remuneration reduced by the work that has been cancelled (if the work is not completely cancelled), or the employer waits for the short-time work compensation to be paid by the employment agency and only then pays it out to the employee. The advantage of this variant is that the employer does not have to make advance payments.

4. Scope of Benefits

Short-time work compensation can be granted for a period of up to twelve months. Short-time work compensation is paid in the same amount as unemployment benefits and regularly amounts to 67 or 60 percent (depending, in particular, on family support obligations of the respective employee) of the difference between the flat-rate net remuneration that would have been paid without short-time work and the flat-rate net remuneration based on the actual work remuneration received. The employer must continue to pay for the actual work performed.

New legislative initiative: On April 23, 2020, the leaders of the coalition partners of the German federal government have decided to increase the scope of the short-time work compensation to up to 87 percent of the difference in pay. This is to take place in a staggered procedure, with the state benefits being increased to 77 or 70 percent of the difference in pay from the 4th month of short-time work and to 87 or 80 percent from the 7th month. The increase in the scope of benefits is to apply to employment relationships in which the work is reduced by at least 50 percent. This decision still needs to be implemented, so that further details remain to be seen.

Expert's advice: Depending on the economic situation, the employer may grant additional top-up payments in order to further mitigate the impact caused by the loss of working hours of the employees. Collective agreements in particular, but also company agreements provide for such additional benefits. If short-time work is introduced by individual agreement, the parties to the employment contract are free to choose whether and to what extent top-up benefits are to be provided.

Against the background of the planned statutory increase in the scope of benefits for short-time work, employers should at any rate include a clause in any new works agreement or new individual contract to the effect that an increase in statutory benefits will be offset against the employer's top-up payments.

For short-time work benefits, only remuneration up to the income threshold for unemployment insurance is taken into account (West Germany: EUR 82,800 per year (EUR 6,900 per month); East Germany: EUR 77,400 per year (EUR 6,450 per month)). Hence, there is no entitlement to short-term work compensation for remuneration in excess of this limit. Before short-time work is introduced, it is therefore necessary to consider in detail the effects on the different salary groups in the company.

II. Further Relief Measures

In addition to the possibilities of obtaining grants and liquidity support under the recently expanded support instruments (facilitated loans, being publicly backed by the state-owned *Kreditanstalt für Wiederaufbau - KfW*) and tax deferrals, it is also possible to apply for a deferral of social security contributions. Here it is important to identify in each individual case the relevant relief measures that can be used in the company in a targeted manner. We are happy to assist, together with our colleagues from other service lines.

C. Conclusion

Companies and employers are facing considerable challenges in these difficult times. The measures taken in summary proceedings can provide relief in the area of labour law. As an advantage in international comparison, the existing and now expanded structures, especially in short-time work, can be used. We are at your disposal with words and deeds in order to find and implement the solution tailored to your company - of course also in cooperation with our experts from the other legal fields.

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