GERMANY

COVID-19: LABOUR & EMPLOYMENT GUIDE FOR EMPLOYERS

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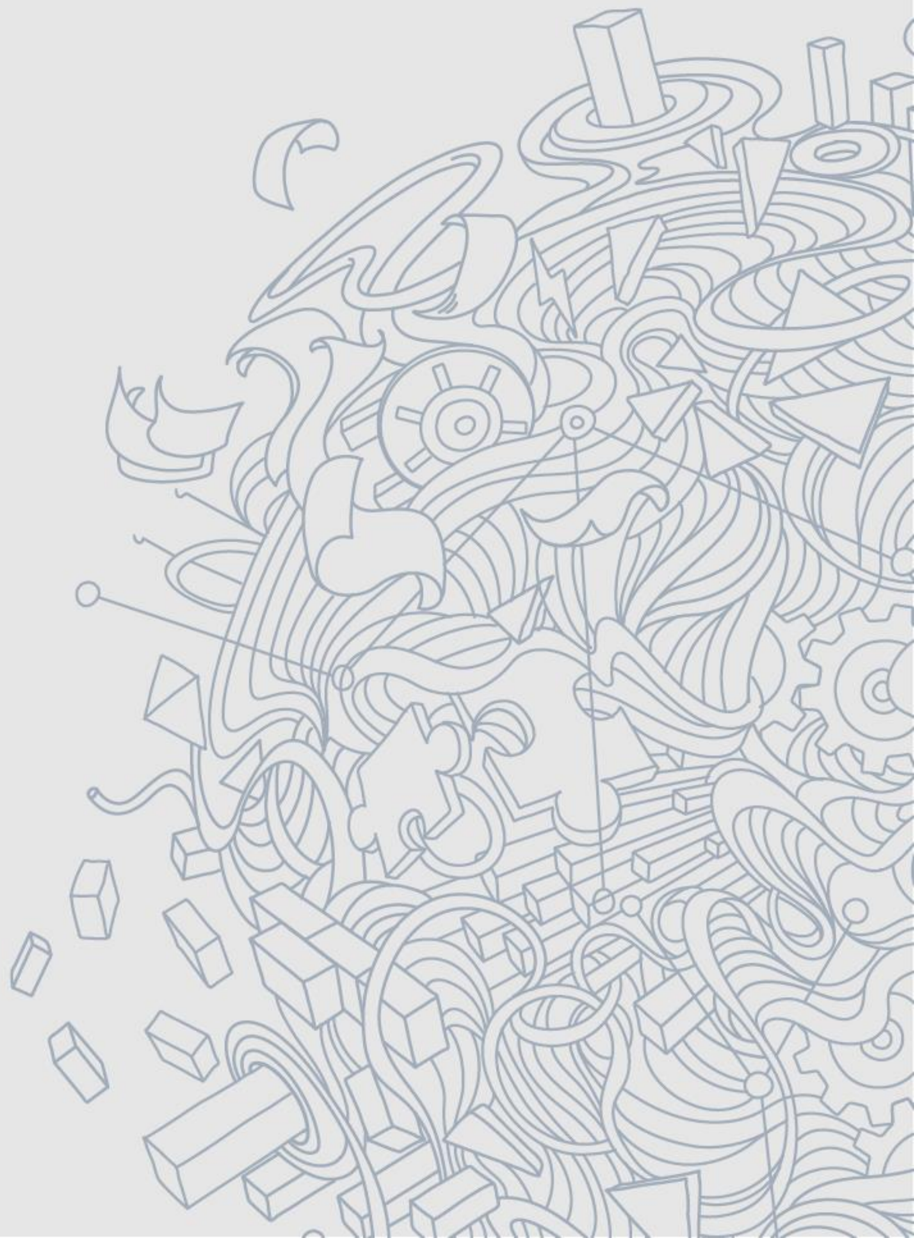

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Following the implementation of new regulations at record speed during the initial weeks of the coronavirus outbreak in Germany in 2020, the flood of COVID-19 related labour and employment regulations does not cease. Rather, more and more new provisions (e.g. recent test offer obligations) keep coming into force constantly and existing regulations are amended frequently.

This guide provides employers and their in-house counsel/HR departments with up-to-date guidelines on all practically relevant labour and employment topics and on how to handle the operational and economic challenges arising from the ongoing COVID-19 Pandemic in their day-to-day business.

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COST CUTTING MEASURES

- Termination of employment contracts during probationary period
- No prolongation of fixed-term employment contracts
- Ending engagement of temporary agency workers
- Advising employees to take their remaining holiday and/or reduce overtime. There is no general right to force employees to take their holiday; however, ordering company holidays (*Betriebsferien*) is possible under certain conditions
- Partial remuneration waiver while parallelly committing to re-pay upon reaching certain economic relief, e.g. financial benchmarks (*Gehaltsverzicht gegen Besserungsschein*)
- Saving potential by way of reducing voluntary special payments (*freiwillige Sonderzahlungen*)
- Examination of the possibility of receiving vocational apprenticeship premiums (*Ausbildungsprämien*), subsidies to the apprenticeship remuneration to avoid short-time work or takeover premiums (*Übernahmeprämien*) in case of taking over apprentices who lost their apprenticeship due to the Coronavirus Pandemic (e.g. due to their company becoming insolvent due to the Coronavirus Pandemic)
- Old-age part-time (*Altersteilzeit*) models
- Restructuring by way of implementing transfer companies (*Transfergesellschaften*)
- Arrangement of short-time work (*Kurzarbeit*)

OPERATIONAL CHALLENGES

MANDATORY COVID-19 TESTING AT THE OPERATION

- Presently, there is no general nationwide obligation for employers to test their employees and no corresponding obligation for employees to get tested for COVID-19 infections at the operation. However, depending on the specific federal state's regulations and/or the respective sector of the employer (e.g. health, nursing, social or child care sector) and/or the specific activities of the employee (e.g. employee with direct contact to customers), exceptions apply

- Where no statutory obligation to test employees for COVID-19 exists, employers may, in exceptional cases and by observing strict legal boundaries, still implement mandatory COVID-19 testing by way of using their right to give instructions (*Direktionsrecht*). However, testing employees for a COVID-19 infection affects the employees' right of privacy and physical integrity. Therefore, to legally implement mandatory COVID-19 testing at the operation, the employer's interests in providing a safe and healthy work environment for its staff as well as maintaining his business must outweigh the employees' aforementioned interests

As a result, whether such testing obligation can be legally implemented will depend on the specific work environment (production or assembly or personal contact with customers vs. office work in single offices) as well as on the type of test used (invasive test requiring throat/nasal swabs vs. (self-)test only using swabs of the front nose area or spit samples)

- As temperature measuring also affects the employees' right of privacy, temperature measurements (e.g. by using contactless clinical thermometers) are also only permissible in exceptional cases if the employer can show outweighing interest in testing its employees, e.g. where there is justified suspicion of an infection and if such measurements are appropriate to protect staff from infections. Less strict rules apply for persons from outside the operation (e.g. clients) when entering the premises as long as such measurements are conducted without discrimination of certain groups

MANDATORY OFFER OF VOLUNTARY COVID-19 TESTING AT THE OPERATION

- Employers must offer employees, unless they work exclusively in their home office, tests for direct detection of the SARS-CoV-2 coronavirus at least twice per calendar week

In general, there is no corresponding obligation for employees to make use of these testing offers (regulations of federal states may deviate)

- Employers need to order, organise and cover costs for these tests for direct detection of the SARS-CoV-2 coronavirus

- Permitted test types are PCR tests or rapid antigen test for professional or self-use (so-called "self-tests")

- Employers need to keep evidence of the procurement until 30 June 2021

  For further information inter alia on mandatory test offers please see our "Guide for Employers on the COVID-19 Occupational Health and Safety Regulation (Home Office, Testing & Masking Obligations)" here.

SUSPECTED COVID-19 INFECTION OF EMPLOYEES

- Employees developing typical COVID-19 symptoms (i.e. cold-like) should either be immediately sent home by the employer (by way of release from duty to work/home office, where possible) or should expressly be asked to stay at home and encouraged to clarify their state of health; if the employees refuse to clarify the matter, they should stay away from the

workplace at least for the quarantine duration of 14 calendar days recommended by the Robert-Koch-Institute (by way of release from duty to work/home office, where possible)

In case of justified suspicion, employers are permitted to ask their employees whether they have COVID-19 like symptoms (e.g. coughing, fever, loss of ability to smell/taste). The employees' health data gathered from this question may only be used within means of infection protection and preventing COVID-19 spreads throughout the operation (see below)

- If the employees decide to clarify their state of health:
    - *Alternative 1:* Negative test. To be on the safe side, it is recommended that the employee should remain away from the workplace until symptoms pass
    - *Alternative 2:* Positive test. The doctor reports the positive test result to the competent health authority, which then contacts the employer and initiates further measures, e.g. handing over lists and data of the employee's contact persons to be identified by the employer (rules on correctly identifying relevant contact persons are provided by the Robert-Koch-Institute on their website) or disinfecting the workplace

In case employees report their COVID-19 infection to the employer directly, the measures described above have to be initiated by the employer (with exception of governmentally imposed quarantine, which can initially be replaced by release from duty to work or home office, where possible)

- Agreement between the public health department and the employer on the next steps, e.g. the public health department informs the contact persons or – to speed up the process – the employer gets instructed by the health department to inform the relevant persons. In addition to contact persons being sent to quarantine by the health department, the employer should decide on taking measures for other potentially affected persons such as release from duty to work or home office, where possible
- The disclosure of names of infected employees is only admissible within very narrow limits and must be averted as long as other measures can be taken (e.g. interview with the infected employees as to their potential contact persons, see below)

EMPLOYEES' HOLIDAYS & RETURN FROM (HIGH)RISK AND VIRUS VARIANT AREAS

- Holiday entitlements are not affected by the COVID-19 Pandemic. Any holiday entitlements generally must be taken during the calendar year. Otherwise, as a rule, they lapse. However, statutory holiday entitlements can only lapse if the employers asked their employees to take their holiday and informed them on their number of holidays as well as the lapse. As an exception, remaining holidays may be transferred by law until 31 March of the following year under certain conditions (personal and operational reasons) or by mutual agreement e.g. due to the pandemic situation. For specifics for holiday entitlements in context of short-time work to be observed, see our detailed "Guide for Employers on Short-Time Work during the COVID-19 Pandemic" here)
- Employers are not entitled to forbid their employees to travel to designated (high)risk areas ((*Hoch-*)*Risikogebiete*) or virus variant areas (*Virusvariantengebiete*) for their holiday but employees have to inform their employer of such travels
- Conversely, employers are allowed to ask their employees about their holiday and if they are planning to visit a designated (high)risk or virus variant area (detailed lists of designated (high)risk areas and virus variant areas are provided by the Robert-Koch-Institute on their website). Asking for the concrete destination puts employers at risk of being sued for damages due to violating the employee's right of privacy. In practice, such lawsuits are rare

Employees will usually disclose their destination anyway if asked if travelling to a designated (high)risk area or virus variant area

- Persons who visited either designated (high)risk areas or virus variant areas or even non-risk areas prior to their arrival in Germany must provide negative Corona-tests upon their arrival and might have to quarantine for a certain period of time, each prerequisite depending on the regulation of the respective federal state they arrive in. This potential quarantine obligation predominantly lasts 10 days, but may be abbreviated by a negative COVID-19 test (acceptable test date depending on respective federal state's regulation). Negative test result to be supplied to the public health authorities. Depending on the respective federal states' regulation and on whether persons return from (high)risk or virus variant areas, exceptions may apply for e.g. cross-border commuters, business travel and certain groups of employees, e.g. logistics, public transport or employees in the health care sector
- Employees must not perform work at the employer's site during quarantine

It is in dispute whether employees are entitled to claim back holidays if they are subjected to quarantine during that time (without being sick). It can be well argued that claiming so-called post-granting (*Nachgewährung*) of holiday is not possible. Post-granting of holidays is only regulated by law in case employees fall sick during their holidays for the sole reason that they are unable to recover during sickness in light of the recreational idea (*Erholungsgedanke*) of holiday. In contrast, quarantine does not preclude such recreation

COVID-19 VACCINATION AT THE WORKPLACE

The following provides an overview of the key aspects of COVID-19 vaccinations from the employer's point of view. Our comprehensive "Guide for Employers on COVID-19 Vaccinations at the Workplace" can be found here.

NO COVID-19 VACCINATION OBLIGATION IN THE EMPLOYMENT CONTEXT

- There is currently no statutory duty to get vaccinated against COVID-19 in Germany
- Employees may not demand vaccinations against COVID-19 from their employers based on the employers' obligation to provide a safe and healthy work place
- In general, employers may not order their employees to get vaccinated. Exceptions may apply for employees with jobs at very high exposure for a COVID-19 infection, e.g. employees of hospitals

Employers are generally not liable for "vaccination damages" incurred by the employees vaccinated at the work place, in practice usually performed by an external company doctor (*Betriebsarzt*)

VACCINATION INCENTIVES FOR EMPLOYEES & CO-DETERMINATION RIGHTS OF WORKS COUNCILS

- Employers may decide to incentivise vaccinations by, e.g. offering (free) vaccinations at the employer's premises (organised for and performed by the company doctor) or paying "vaccination premiums" (which is already being done in other countries, e.g. in the US)
- Any such offers are employer benefits and as such need to be measured under the employment principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*)

Offering vaccination incentives is generally subject to co-determination rights of the works council (if any)

LEGAL IMPACTS OF EMPLOYEES REFUSING COVID-19 VACCINATION

- It is not permitted to disadvantage employees refusing vaccination or sanction their refusal with employment law measures
- Where staff of e.g. hospitals refuses to be vaccinated and, as a consequence, the employer cannot comply with its statutory obligations to prevent infectious diseases under the Infection Protection Act (*Infektionsschutzgesetz*) in any other way and is not able to deploy them to other vacant positions, terminations for personal reasons (*personenbedingte Kündigung*) may become possible under high prerequisites

EMPLOYERS' QUESTION ON VACCINATION STATUS & DATA PROTECTION

Employee health data such as their vaccination status are considered special personal data and therefore subject to stricter data protection rules. Against this background, it is in dispute whether the employer may ask such questions. Explicit exceptions apply for employers within medical services (e.g. hospitals, doctors' practices), see below.

TEMPORARY LEASE OF EMPLOYEES DURING COVID-19

- Colleague Assistance (*Kollegenhilfe*) is one of few exceptions from the applicability of the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*). It allows leasing of employees without having to observe compulsory obligations set forth by the Temporary Employment Act, such as obtaining a temporary employment permit (*Arbeitnehmerüberlassungserlaubnis*)
- Colleague Assistance is permitted if
    - Employers ("**Lesser**") lease their employees only occasionally (occasional lease always requires that it is not made by the Lesser with the intention of repetition and the lease is not plannable and unpredictable as well as necessary on short notice)
    - Leased employees were not initially hired for the purpose of being leased to work elsewhere
    - Lease is limited in time and
    - Leased employees gave their explicit consent to the lease

  Colleague Assistance is generally excluded within the construction industry
- According to an official communication, the German Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*) considers a situation where, due to imposed infection protection measures against COVID-19, employers cannot employ their employees (e.g. closure of restaurants) and employers of other branches have staff shortage (e.g. in retail), as a constellation where it is quite conceivable that the abovementioned conditions are met

- Please note that the terms of the existing employment contracts of leased employees generally stay valid throughout the exceptional lease to the user company ("**Lessee**"). However, the German Federal Ministry of Labour and Social Affairs recommends to observe the principles of Equal Treatment and Equal Pay for leased employees and the permanent workforce at the Lessee

The legal view of the German Federal Ministry of Labour and Social Affairs does not bind German labour courts and other public authorities. Thus, a close examination of the legal prerequisites needs to be performed in each individual case in order to avoid the illegality of the lease and, as a result, legal consequences such as fines

MEDICAL CERTIFICATE VIA PHONE

Possibility for employees with cold symptoms to get a medical certificate of the incapacity to work (*Arbeitsunfähigkeitsbescheinigung*) from their doctor by way of a telephone diagnosis; one prolongation of medical certificate possible for seven more calendar days (regulation expiring 30 June 2021).

OCCUPATIONAL HEALTH & SAFETY

HOME OFFICE

TEMPORARY OBLIGATION TO OFFER HOME OFFICE

The following provides an overview of the key aspects of the temporary obligation to offer home office. Our comprehensive guide on "Guide for Employers on the COVID-19 Occupational Health and Safety Regulation (Home Office, Testing & Masking Obligations)" can be found here.

- According to the "SARS-CoV-2 Occupational Health and Safety Regulation" (*Corona-Arbeitsschutzverordnung,* "**OHS-Regulation 2021**") in force since 27 January 2021, but recently moved to the German Infection Protection Act and currently limited until 30 June 2021, employers must offer employees "in the case of office work or comparable activities" (*Büroarbeit oder vergleichbare Tätigkeiten*) to carry out these activities at home if there are no opposing "compelling operational reasons" (*zwingende betriebsbedingte Gründe*) against it

  - "Comparable activities" are activities suitable to be carried out from home using e.g. IT equipment

  - "Compelling operational reasons" may preclude the obligatory offer of home office if without the activity, which is in principle suitable for home office but which cannot be relocated there for provable and comprehensible operational reasons, the remaining operations can only be maintained to a limited extent or not at all

- Employees are obligated to accept this offer to work in the home office unless there are reasons on their part to the contrary (various reasons are possible, e.g. interference by third parties in the home office or a lack of an adequate home office environment)

IMPLEMENTATION OF HOME OFFICE

- Beyond the aforementioned new and time-limited obligation for employers to offer their employees to perform work in the home office, there is no unilateral right of the employer to request employees or entitlement for the employee to work from home

- Executing home office is possible by way of individual amendments to the employees' employment contracts or by way of agreement with the works council (if any, compulsory co-determination rights to be observed)

  - Main topics to regulate within such agreements are:

    - Duration
    - Extent (e.g. fixed week days)
    - Costs
    - Working hours and reachability
    - Occupational health and safety
    - Securing compliance with data protection rules

  - The respective home office agreements should be structured with clear reference to the COVID-19 Pandemic, and should be limited in time to avoid the possible occurrence of a company practice (*betriebliche Übung*)

For 2021, the legislator will also introduce tax relief for employers. Certain "digital assets" such as computers, software and other IT infrastructure shall be fully depreciable with immediate effect retroactively from 1 January 2021.

Furthermore, a lump-sum amount of 5 EUR per day at the home office (maximum of 120 days and 600 EUR per year) became tax-deductible for the employee for the tax-years 2020 and 2021

OCCUPATIONAL HEALTH AND SAFETY MEASURES

- In general, employers have to prevent their employees from any danger arising in correlation with the workplace, in particular by observing statutory regulations for occupational health and safety, e.g. the Occupational Health and Safety Act (*Arbeitsschutzgesetz*) and its corresponding ordinances (e.g. *Arbeitsstättenverordnung*)

- During the COVID-19 Pandemic, the federal government quickly adopted a framework of prerequisites for employers on how to effectively prevent coronavirus infections at the workplace ("SARS-CoV-2 Occupational Health and Safety Standard" (*Arbeitsschutzstandard*) in April 2020, "SARS-CoV-2 Occupational Health and Safety Rule" (*Arbeitsschutzregel*) in August 2020 (with updates on state of the art ventilation procedures in February 2021) and, most recently, the OHS-Regulation 2021 which is limited in time (for the OHS-Regulation 2021, please also see our comprehensive "Guide for Employers on the COVID-19 Occupational Health and Safety Regulation (Home Office, Testing & Masking Obligations)" here)

The following overview provides the key aspects of these occupational health and safety provisions to be observed by employers:

RISK ASSESSMENTS / HYGIENE CONCEPTS

- Regular review and update of risk assessments (*Gefährdungsbeurteilungen*) particularly taking into account the "SARS-CoV-2 Occupational Health and Safety Rule". During this process, the employer is obliged to involve the occupational safety specialist, company doctor and employee representatives (if any, or otherwise employees)

- If not already in place, establishment and review of occupational hygiene concepts (*betriebliche Hygienekonzepte*) on the basis of risk assessments as well as definition and implementation of necessary measures for occupational infection protection. Sector-related action aids of the accident insurance institutions (*Unfallversicherungsträger*) can be used as a guide for suitable measures. Employers especially need to adhere to the aforementioned when re-opening their businesses and lifting of prohibition and restrictions under infection protection law

These occupational hygiene concepts need to be made accessible to the employees (e.g. by posting it on the intranet, putting a notice on the establishment's black board)

INFECTION PROTECTION MEASURES AT THE WORKPLACE

Mandatory COVID-19 testing offers

Employers must offer employees, unless they work exclusively in their home office, weekly voluntary COVID-19 testing opportunities at the operation. Employers need to provide at least two testing opportunities per week. However, employees are, in general, not obligated to make use of these testing opportunities (see above).

Masking obligations

- Compliance with mandatory masking amongst staff throughout the operation's communal areas such as elevators, hallways and canteens and where a minimum distance of 1.5 metres could not be ensured (details depending on respective federal state's specific regulations)

  Currently, due to the OHS-Regulation 2021, stricter rules apply and employers are required to provide medical masks if

  - Compliance with the minimum space requirement cannot be ensured
  - The minimum distance of 1.5 metres between persons cannot be maintained or
  - Moving from and to the individual workplaces inside the operation's buildings

  Where the risk assessments determine that medical facemasks (e.g. surgical facemasks) are not sufficient for infection protection of employees and masks with the function of self-protection are necessary, employers are required to provide respirator masks (e.g. FFP2 or FFP3, N95 or P2). This particularly applies where

  - Activities carried out are likely to involve a risk of increased aerosol emission or
  - Operational activities involve contact with other persons and a person present does not have to wear a mask (e.g. due to a medical certificate exempting the person from masking obligations)

  Wherever employers are required to provide any kind of masks, employees are obliged to wear these masks or masks with at least equal protection value

  Employers may deviate and are allowed to implement other protection measures as long as they are equally effective and protective for its employees (deviation potential in practice to be considered as very limited and associated with risks)

Employees refusing to wear masks without any sufficient reason (e.g. medical indication) may be subject to warnings or even terminations due to behavioural reasons (depending on the individual case at hand)

Minimum space requirements

- The OHS-Regulation 2021 requires that a minimum space per employee of no less than 10 square metres must be ensured if the simultaneous use of the room by several persons is required and the activities to be performed permit this minimum space

- If compliance with this minimum space per employee is not possible due to "compelling operational reasons" (especially adhering to the requirements of the activities, e.g. in assembly or production, or due to structural conditions), the employer must protect its employees by other equivalent measures, e.g. by ventilation measures, installing partitions between employees present, mandatory masking obligations for all employees present or other measures lined out in the occupational hygiene concepts

Work shifts, flexible work times & small working groups

- Staggering of shifts and working hours to reduce the formation of crowds of employees

- The OHS-Regulation 2021 requires employers with more than 10 employees to divide their workforce into working groups that are as small as possible, avoiding changes in composition wherever operationally possible

Business trips, meetings & access of third parties

- Employers must take all appropriate technical and organisational measures to reduce business-related personal contacts. In particular, business trips, business-related gatherings of several people (e.g. meetings) shall be reduced to the minimum necessary for the business and, where possible, replaced by the use of IT infrastructure or other equivalent protective measures (e.g. ventilation, partitioning or other measures lined out in the occupational hygiene concepts). Same applies to break areas

- As regards access to workplaces and occupational premises by third parties the following needs to be observed whereby rules may slightly deviate depending on the respective federal state's regulations:

  - Use of electronic devices to avoid personal contact, if possible
  - Limit number of visitors
  - The third party has to be instructed on applicable health and safety measures implemented by the employer

Other measures

- Implementation of hygienic measures at the workplace, especially in commonly used locations such as lavatories, kitchens, canteens etc. (e.g. provision of hand soap, disinfectants)
- Guidelines on ventilating of office spaces
- Implementation of protective measures against increased psychological stress caused by the COVID-19 Pandemic, such as social isolation during working from home
- Compliance with provisions on occupational health care (*arbeitsmedizinische Vorsorge*)

PANDEMIC PLAN

Employers also need to establish a pandemic plan in order to be able to react promptly and effectively in case of COVID-19 infections and spreads within the operation. This plan is (also) meant to demonstrate that the measures set forth in the coronavirus related occupational health and safety regulations mentioned above are being implemented and observed

RISKS OF NON-COMPLIANCE

- If employers' measures are compliant with the above occupational health and safety requirements, employers are deemed to have sufficiently provided protection for their employees to prevent them from danger arising from the workplace. Employers may deviate from the measures regulated if an equal level of protection is secured. However, it is recommended to limit these deviations to the extent necessary as the burden of proof of their equal level of protection lies with the employer (rules may deviate depending on the respective federal state's regulations)

- Non-compliance with statutory occupational health and safety regulations, especially with regard to corona-specific legislation, may result in

  - Employees rejecting coming to work due to unreasonable exposure to health danger, especially with respect to an infection with COVID-19
  - Fines of up to EUR 30,000 or even bans of operations imposed on the employer
  - Criminal liability

SHORT-TIME WORK

The following provides an overview of the key aspects of implementing short-time work within operations in Germany. Our comprehensive "Guide for Employers on Short-Time Work during the COVID-19 Pandemic" can be found here.

REQUIREMENTS FOR IMPLEMENTING SHORT-TIME WORK

Explicit consent of affected employee on implementing short-time work required, either by

- pre-consent within the initial employment contract
- explicit consent by way of amending employment contract
- works agreement (*Betriebsvereinbarung*) with competent works council (if any)
- collective bargaining agreement with competent trade union (if any)

In practice, generally most employees will consent to short-time work to show solidarity with their employer and to support the business

REQUIREMENTS FOR SHORT-TIME ALLOWANCE (*KURZARBEITERGELD*)

Due to COVID-19, several existing operational requirements have been lowered until 31 December 2021 for all operations having implemented short-time work before 31 March 2021

Temporary agencies (*Leiharbeitsunternehmen*) may also apply for short-time work allowance for their employees if they implemented short-time work before 31 March 2021 (regulation expiring 31 December 2021)

OPERATIONAL REQUIREMENTS

Threshold of affected employees: Only 10 % (instead of usually one third) of staff either relating to the entire operation or an operational department (*Betriebsabteilung*) have to

- suffer from substantial work loss causing income loss
- which has to be temporary and unavoidable

and due to economic circumstances or force majeure.

PERSONAL REQUIREMENTS OF EMPLOYEES

- Eligible persons: Employees subject to social security contributions, apprentices (under certain conditions)

- Excluded persons: Marginally employed employees (*geringfügig Beschäftigte*), student workers, employees after reaching the statutory retirement age, persons receiving a pension due to incapacity to work (*Erwerbsunfähigkeitsrente*), self-employed persons/freelancers, managing directors (in general, individual cases may deviate)

DURATION

Up to 24 months if the employee's claim to short-time allowance arose prior to 31 December 2020, to end at latest 31 December 2021. Months including March 2020 to be taken into account for calculating the maximum period. A discontinuance of short-time work under three months will not interrupt counting (regulation expiring 31 December 2021)

SHORT-TIME ALLOWANCE PAID

- Short-time allowances amount to

  - 60 % of net income loss (67 % if employee has children)

  - In case of more than 50 % income loss and the employee's claim to short-time allowance arose before 31 March 2021 (regulation expiring 31 December 2021, respective months to be counted as of March 2020):

    - 60/67 % months 1 to 3
    - 70/77 % months 4 to 6
    - 80/87 % from month 7

SOCIAL SECURITY CONTRIBUTIONS & TAX

- Reimbursement of 100 % of the social security contributions for short-time allowance to be borne by employers until 30 June 2021 (upon application no later than three months after the respective pay-roll cycle)
- Reimbursement of 50 % of social security contributions between 1 July 2021 and 31 December 2021, if short-time work was implemented before 30 June 2021 (regulation until 31 December 2021)
- Taxation exemptions for social security contribution-free top-up payments (*Aufstockungsleistungen*) until 31 December 2021

CO-DETERMINATION RIGHTS OF THE WORKS COUNCIL

If a works council exists, it has a co-determination right with respect to the implementation of short-time work, i.e. by concluding a works agreement.

TIMELINE FOR REPORTING SHORT-TIME WORK

The employer must report the introduction of short-time work to the competent employment agency without delay and provide proof that there is substantial work loss and that the operational requirements for short-time allowances are met and apply for reimbursement of short-time allowances within three months.

EXTENDING SHORT-TIME WORK

If the initially notified period for short-time work expires shortly and the legal requirements remain in place, a follow-up notification of short-time work must be sent to the responsible employment agency.

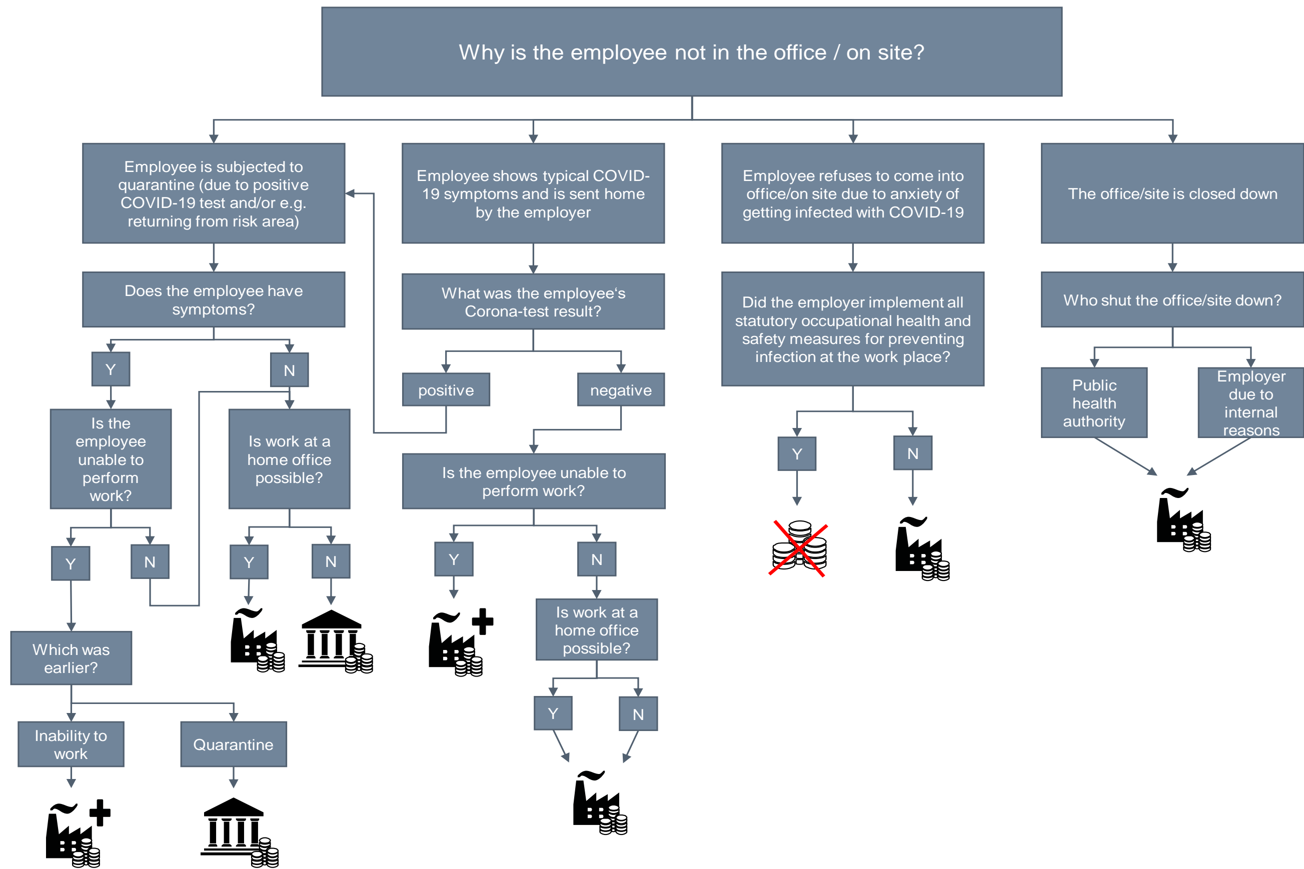
A close examination of the continuous existence of “temporary work loss” has to be made as to the possibility of the work loss on certain positions having become permanent in the meantime. The latter would legally hinder the extension of short-time work/allowance, simultaneously "opening the door" for terminations for operational reasons

REMUNERATION & COMPENSATION

EMPLOYEES' REMUNERATION ENTITLEMENTS IN CONTEXT WITH COVID-19

Basically, employees only earn their salaries if they perform work. During the COVID-19 Pandemic, various situations arise in which employees cannot perform work not only due to being sick (with COVID-19) but also due to measures imposed by the public health authorities and the (federal) government but are still entitled to (parts of) remuneration or compensation from their employer or other institutions.

- The following provides an overview of the most common scenarios and guidance on how to handle employees' remuneration entitlements:



Continued (full) remuneration pursuant to sec. 3 of the Continued Remuneration Act (*Entgeltfortzahlungsgesetz*) of up to six weeks by the employer; if the employer employs less than 30 employees, reimbursement from the statutory health insurance (*gesetzliche Krankenversicherung*) is possible (*Umlageverfahren U1*)

Compensation benefits pursuant to sec. 56 of the Infection Protection Act in the full remuneration amount from the public authority due to quarantine continue for a maximum of six weeks (paid out by the employer, reimbursement upon application within 12 months after the end of quarantine to the competent authority)

Once employee falls sick during an already imposed quarantine, compensation entitlements are paid out continuously by the employer. Any entitlements of the employee pursuant to the Continued Remuneration Act are transferred to the public authority, effectively reducing the amount of the reimbursable compensation

Regular contractual remuneration to be paid. Employer bears economic risk of sending employees home pre-emptively without the possibility of working in home office or employees reasonably refusing to work with no safety measures in place as well as the risk of a shutdown of the business (for the latter case employers should explore the option of implementing short-time work)

No continued remuneration or other benefits due to employees behaviour being generally unreasonable (exceptions e.g. for high risk persons with medical issues)

Any entitlements to continued remuneration or compensation benefits will lapse if the employees were responsible for their sickness or imposed quarantine, e.g. holidays in known (high)risk areas

- Pregnant women getting banned from work due to increased health risks for mother and the unborn child receive continued remuneration (*Mutterschutzlohn*) in the full amount of gross income loss paid out by the employer who gets reimbursed upon application by the employee's statutory health insurance

- Employees having to take care of their under 12-year old children or disabled children in need of assistance due to schools being closed by the authorities or classes being subjected to quarantine and cannot provide any other means of care can receive compensation benefits from the public authorities:

  - 67 % of the lost income, limited up to EUR 2,016 per month to be paid out by the employer for the first six weeks (reimbursement by the competent authority upon application within 12 months after the end of absent) and from week 7 directly by the competent authority upon application by the employee

  - Maximum duration:

    - For joint parents: 10 weeks per parent
    - For single parents: 20 weeks

CORONA-BONUS

Introduction of tax-exempt and social security contribution free "Corona Bonus" (regulation expiring 30 June 2021)

- Employers may pay their employees subsidies and/or benefits in kind (*Sachbezug*) of up to EUR 1.500 tax and social security contribution free ("gross = net")

- Such Corona Bonus must be an extra payment by the employer (irrespective of the already existing remuneration entitlements) due to the COVID-19 Pandemic; financial benefits agreed upon before 1 March 2020 may not be re-declared as Corona Bonus

Compulsory bonuses for hospital staff taking immediate care of COVID-19 patients were regulated for 2021 (similar regulation expected for nursing staff and staff in geriatric nursing homes). Depending on the number of COVID-19 patients cared for, employers in the hospital sector are obliged to pay their staff tax-exempt and social security contribution free bonuses of up to EUR 1.500 (selection of premium recipients and assessment of the individual premium amount subject to determination by the employers and employee representative bodies such as works councils, if any). The current idea is that employers shall pay out these bonuses which will be financed by the Federal Republic of Germany. It is intended that the bonuses shall be paid out at latest with the pay-roll cycle in June 2021

SICK PAY FOR CHILDCARE

- Employees insured with the statutory health insurance may take an absence from work and receive so-called sick pay for childcare (*Kinderkrankengeld*) in the event of

  - the child falling sick (medical certificate to be provided by the employee)
  - kindergartens or schools are shut due to the COVID-19 Pandemic or
  - compulsory presence at school is being vacated and parents are urged to home-school their child and do so

  and if the employees cannot provide for care of their under 12-year old or disabled child otherwise

- Employees receive sick pay for childcare from their statutory health insurance. It amounts to 90 % of the employee's net income, limited to 70 % of the income threshold in the statutory health insurance (*Beitragsbemessungsgrenze*, 4,837.50 EUR per month; EUR 112.88 per calendar day in 2021)

- During the period of receiving sick pay for childcare, entitlements to compensation benefits for income loss due to schools being closed by the authorities or classes being subjected to quarantine are dormant (see above)

- Duration:

  - For joint parents: 10 working days per child, but no more than 25 working days per calendar year. Increased to 30 working days per child in 2021, but no more than 65 working days (regulation expiring 31 December 2021). Joint parents who are both working are allowed to decide on who takes care of their children. Consequently, they are permitted to transfer their respective entitlement to sick pay for childcare to their partner

  - For single parents: 20 working days per child, but no more than 50 working days per calendar year. Increased to 60 working days per child in 2021, but no more than 130 working days (regulation expiring 31 December 2021)

NURSING CARE ALLOWANCE

Employees having to take care of/nurse close relatives may take up to 10 days of absence from work and will receive 10 days of nursing care allowance (*Pflegeunterstützungsgeld*) from their statutory health insurance amounting to 90 % of the employee's net income loss, limited to 70 % of the income threshold in the statutory health insurance (see above). Increase by 10 additional days of absence from work while receiving nursing care allowance if the reason for care is caused by the coronavirus pandemic (regulation expiring 30 June 2021).

INVOLVEMENT OF WORKS COUNCILS (IF ANY)

(VIRTUAL) MEETINGS

- Works councils and other employee representative bodies (e.g. representatives of severely disables employees, representatives of apprentices) as well as reconciliation boards (*Einigungsstellen*) can hold their meetings and reach their resolutions via video or telephone conference (regulation expiring 30 June 2021). During these video or telephone conferences it must be secured that no unauthorised third parties have access

- Employers may not prohibit works councils from holding their meetings in person, though. The works councils may gather in person as long as hygiene and infection protection measures are sufficiently provided for. Employers will have to bear respective costs

CO-DETERMINATION RIGHTS

Co-determination rights remain in place during the COVID-19 Pandemic. Employers' measures will often require information and/or consultation with the works council and/or even the conclusion of works agreements.

The following measures of employers regularly trigger co-determination rights of the works council:

- Implementation of short-time work
- Granting vaccinations and vaccination premiums at the workplace
- Implementation of home office
- Measures for occupational health and safety as well as infection protection (e.g. mandatory/voluntary COVID-19 testing at the operation, temperature measuring before entering the employer's premises, setting and scheduling of working time and working hours, setting up fixed working groups, implementation of mask wearing obligations and wearing other protective gear or securing minimum distance between the employees)

DATA PROTECTION IMPLICATIONS

Employers' actions must also be compliant with data protection rules in place (i.e. General Data Protection Regulation and the Federal Data Protection Act (*Bundesdatenschutzgesetz*)). Wherever personal or health data of data subjects (e.g. employees or clients) is processed, employers need to observe the statutory limits.

PROTECTION OF EMPLOYEES' PERSONAL DATA

TEMPERATURE MEASURING, COVID-19 TESTING & VACCINATION STATUS

- Employees' health data (e.g. temperature, COVID-19 infection or vaccination status) is considered sensitive personal data and is protected by strict data protection rules. Processing employees' health data is only permissible in exceptional cases such as where processing said data is essential for the employer to comply with his (care) duties vis-à-vis his employees

- Contactless temperature measuring or compulsory testing employees for an infection with COVID-19 (in exceptional cases only) is only permissible where reasonable suspicion of a COVID-19 infection at the workplace is given and only to the extent absolutely necessary (e.g. not towards all employees irrespective of their encounters with a potentially infected employee)

- It is in dispute, whether employers may legally ask their employees to disclose their vaccination status for COVID-19. As the permissibility of such question depends on its necessity for the concrete employment relationship and the employer's corresponding (care) duties, an examination on a case-by-case basis remains necessary (e.g. increased infection risks due to the nature of the jobs to be performed may lead to permissibility of asking such questions). Explicit exceptions apply for employers within medical services (e.g. hospitals, doctors' practices)

The data processing principles continue to apply. In particular, employers need to observe the principle of data storage limitation whereby they need to monitor their obligations to delete data as soon as the purpose for processing has ended

EMPLOYEES' COVID-19 POSITIVE TEST RESULTS

- Employers need to avoid naming an infected employee as far as possible. Employers are therefore obliged to first take other effective measures, e.g. by first conducting an interview with the affected employee (if possible) on whom he had met and worked with at the operation during the days before his positive COVID-19 test. The employer then may inform these contact persons of their possible exposure, send them home (where possible, work from home office) and ask them to get tested for a COVID-19 infection

- Only where the affected employee theoretically encountered an infinite number of persons on the premises, employers may be permitted to disclose the name of the affected employee to effectively prevent further infections amongst staff. However, this will only be the case in exceptional circumstances

EMPLOYEES' HOLIDAY DESTINATIONS

- Employers are permitted to ask their employees whether they are planning to take their holidays in a designated (high)risk area or virus variant area since the employers need to know when potential quarantine obligations apply and when they are not permitted to employ their employees on their premises

- However, asking for the exact destination of the employee's holiday is not permitted since there is no legitimate interest of the employer to know more than the fact that the destination in located in a designated (high)risk area/virus mutant area

HOME OFFICE & DATA PROTECTION

- When implementing home office, employers need to observe that an equal level of protection for data processed by the employees during their activity is ensured. The respective agreements e.g. need to reflect that the room where the home office is situated can be locked or at least that there is a lockable cabinet to secure physical files containing personal data of e.g. clients or other employees

- Where laptops and mobile phones are used (for business purposes only), sufficient password protection and data encryption must be ensured; ideally, cloud-based solutions should be implemented which are only accessible through a VPN-client

RISKS OF NON-COMPLIANCE

- In general, it is sufficient for data protection violations to be attributed to a company if an employee of the company or an external representative acting on behalf of the company has acted

- Sanctions for data protection violations can include fines of up to EUR 20 Million or 4 % of the company's annual global turnover as well as – in a worst case scenario – imprisonment (depending on the nature of respective violation)

- Data subjects (i.e. employees or clients) have claims for damages if they have suffered damage as a result of data protection violations

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Asia, Europe, the Middle East and the UK

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