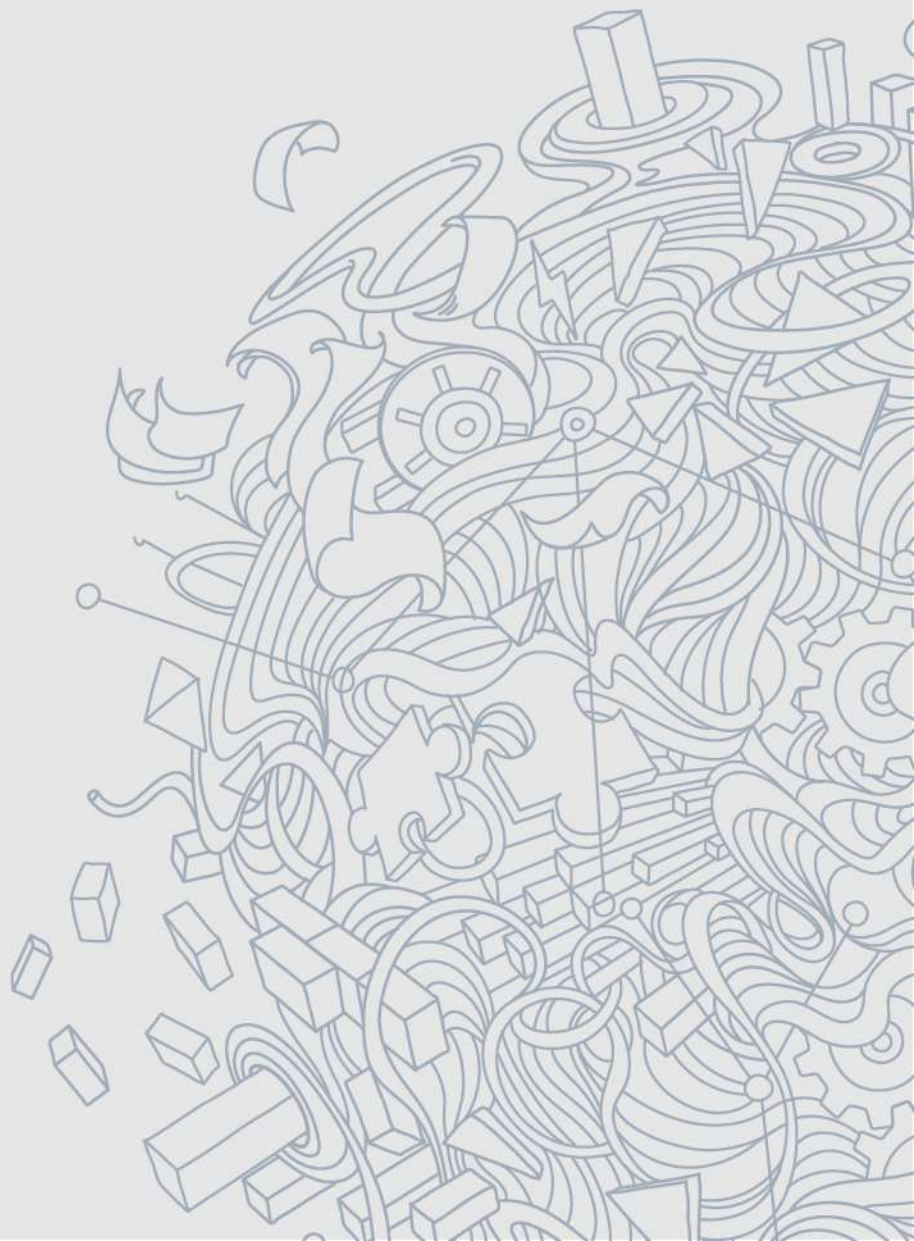


GUIDE FOR EMPLOYERS ON SHORT-TIME WORK DURING THE COVID-19 PANDEMIC

April 2021



This guide aims at giving employers up to date guidelines on implementation and procedural aspects of short-time work for the challenges during the ongoing pandemic in 2021.

After the implementation of new regulations at record speed during the initial weeks of the coronavirus outbreak in Germany, more and ever changing provisions keep coming into force in high frequency. This evolving set of regulations especially concerns employers. They not only have to deal with protecting their employees from infection, but especially need to cope with the economic challenges emerging from the coronavirus pandemic and secure their business for the future by e.g. cutting personnel costs.

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 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
 - "*Temporary*" means: the return to full working capacity (*Vollarbeit*) is expected after the expiry of short-time work initially applied for, at latest upon expiry of the maximum period of short-time work



In contrast, a termination for operational reasons requires the prognosis of a permanent loss of work (see below)

- "*Unavoidable*" means: all other reasonable measures must have been taken by the employer before entering into short-time work:
 - According to an information of the Federal Labour Agency (*Bundesagentur für Arbeit*) in 2020, holiday entitlements of 2020 were temporarily exempt from having to be used up before the implementation of short-time work in 2020. However, this exemption was not prolonged for 2021

In the beginning of 2021, the Federal Labour Agency issued further information as regards using up holidays before implementing short-time work in 2021:

- ▶ **2020:** Any remaining holiday entitlements from 2020 need to be used up
- ▶ **2021:** Whether or not holidays must be used up depends on whether there is already a holiday plan for 2021 (e.g. holiday list, holiday plan or company holidays) or not. If there is a holiday plan for 2021, the holidays must be taken at the planned times. If this planning is deviated from only because of short-time work, there is no "unavoidable work loss". If there is no holiday plan, holiday entitlements must be allocated by the employer towards the end of the holiday year 2021. However, this only applies if the holidays cannot be legally transferred into 2022 under existing regulations. If this leave is not taken, there is no "unavoidable work loss"
- No compulsory obligation to make use of negative work-time balances

- 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)
- The employee must be part of the operation or operational department which is affected by the temporary, unavoidable substantial work loss
- The employment relationship must not have been terminated (if a dismissal protection claim has been filed, the rules may deviate)
- Employee must not be on sick-leave at the time short-time work is implemented

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
- Side activities and marginal employment:
 - Employees were allowed to earn other salaries up to the difference amount between their former income and current one with short-time allowance without it being credited against their short-time allowance (regulation expired 31 December 2020)
 - Continuing opportunity for employees to earn up to 450 EUR (gross) within marginal employment without it being credited against their short-time allowance (regulation expiring 31 December 2021)

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; possibility to increase this reimbursement up to 100 % if the time during short-time work is used towards acknowledged qualification measures (regulation until 31 December 2021)
- Social security contributions on short-time allowances are calculated upon so-called "fictitious wage" on the basis of 80 % of the difference amount between the gross contractual and the gross actual income
- Taxation exemptions for social security contribution-free top-up payments (*Aufstockungsleistungen*) onto short-time allowances of up to 80 % of the difference amount between the contractual and actual remuneration until 31 December 2021

CO-DETERMINATION RIGHTS OF THE WORKS COUNCIL (IF ANY)

- 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 (*Betriebsvereinbarung*)

- Regularly this agreement includes
 - start date of short-time work
 - its duration
 - exact determination of the employees/parts of the operation affected by short-time work
 - regulations on the distribution of working hours
 - regulations on shortening of holiday entitlements
 - regulations on announcing period for calling back employees to work



Works council meetings and resolutions may be held online/via telephone- or video-conference, as long as it is secured that no third party has access of any kind. Recordings are not permitted (regulation expiring 30 June 2021)

TIMELINE FOR REPORTING SHORT-TIME WORK AND REFUND PROCEDURE FOR SHORT-TIME ALLOWANCE

- The employer must report the introduction of short-time work to the competent employment agency
 - without delay, latest on the last day of the month with substantial work loss for which short-time allowances are to be applied for (receipt at the employment agency relevant)
 - in writing or by using the online form and
 - if a works council exists, with the respective works agreement attached as well as its explicit consent to employer's statements in the application

and provide proof that there is substantial work loss and that the operational requirements for short-time allowances are met

- Employer pays short-time allowances to his employees and then gets reimbursed by the employment agency upon application to be filed within a limitation period of three months after the respective payroll cycle for short-time allowances

OTHER IMPORTANT LEGAL ASPECTS OF SHORT-TIME WORK / ALLOWANCE

INTERRUPTIONS OF SHORT-TIME WORK

- If short-time work is interrupted for more than three months and the conditions for short-time allowance are again fulfilled, a new application/information with the employment agency is required



Calling employees back to work due to operational demands (e.g. unexpectedly increased workload) is permissible under certain conditions (announcing period towards employees to be observed). However, this will forfeit any claims to short-time allowance in the amount of the increased working hours

SHORT-TIME WORK AND HOLIDAYS

- Ongoing so-called short-time work zero (*Kurzarbeit Null*, meaning no work to be performed) may lead to a reduction of holiday entitlements if it factually results in less weekly working days for the respective employee. This applies in particular where this was agreed upon within tariff or works agreements. It is in dispute whether such shortening of holiday entitlements is also possible if only framework clauses on the implementation of short-time work within individual employment contracts were agreed. However, there are strong arguments for an "automatic shortening" of holiday entitlements in cases of short-time work zero which would be in line with judicature of the European Court of Justice as well as recent decisions of German labour courts
- In case holidays are taken during short-time work, employees are entitled to holiday pay (*Urlaubsentgelt*) which corresponds to the employee's contractual remuneration; during this time, no short-time allowance is paid, i.e. the employer has to bear full remuneration costs (no reimbursement of e.g. social security contributions). Same applies for statutory holidays

SHORT-TIME ALLOWANCE VS. QUARANTINE COMPENSATION

- The employer pays out short-time allowances as well as compensation claims of employees against public authorities in case of imposed quarantine and corresponding loss of income. Depending on the extent of short-time work, the employer may apply for reimbursement for both types of payments

If employees receive short-time allowances and become subject to quarantine, compensation entitlements occur and are automatically transferred to the Federal Labour Agency as far as they amount to the income loss already covered by short-time allowance. The remaining entitlement to compensation due to quarantine can still be reimbursed upon application by the employer. For clarification, if an employee is in short-time work zero (i.e. no actual work to be performed), there is no compensation due to quarantine to be collected by the employer, since any compensation entitlement has already been transferred to the Federal Labour Agency

EXTENDING SHORT-TIME WORK AND THE GRANTING OF SHORT-TIME WORK ALLOWANCES

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 containing

- the initially allocated short-time allowance number (*Kurzarbeitergeld-Nummer*)
- the intended extension period
- indication of the total number of employees (how many subject to social security contributions and how many marginally employed)
- the (continuing) reasons for the extension of short-time work
- and, if a works council is in place, the respective works agreement on (prolonging) short-time work as well as its consent to employer's statements in the follow-up notification

If the initially affected operation or operational departments have changed, rules may deviate. In general, such follow-up notification will not suffice. In most cases, a new report for short-time work needs to be filed with the competent 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 (see below)

ONGOING SHORT-TIME WORK VS. TERMINATIONS FOR OPERATIONAL REASONS

- Ongoing short-time work (temporary work loss) and subsequent terminations for operational reasons (permanent work loss) do not necessarily rule each other out in general, but short-time work indicates that the work loss is only temporary. However, regulations within e.g. tariff or works agreements may prohibit terminations for operational reasons during ongoing short-time work
- Hence, employers have to take the hurdle to show in great detail that the former temporary loss of work actually transformed to permanent loss, e.g. by demonstrating an altered forecast of sales figures
- Short-time work in one operational department does not necessarily exclude terminations for operational reasons vis-à-vis employees of other operational departments without short-time work
- Employers have to keep in mind that as soon as the termination of employment is declared vis-à-vis the affected employee, this will stop this employee's entitlement for short-time allowance
- There is the risk that the Federal Labour Agency might retroactively claw back paid-out short-time allowances since the legal requirements of the application for short-time allowances were not fulfilled
- Other types of termination, i.e. due to behavioural or personal reasons (e.g. long-term sick absenteeism) or terminations for good cause (*außerordentliche Kündigung*) remain unaffected by (ongoing) short-time work



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