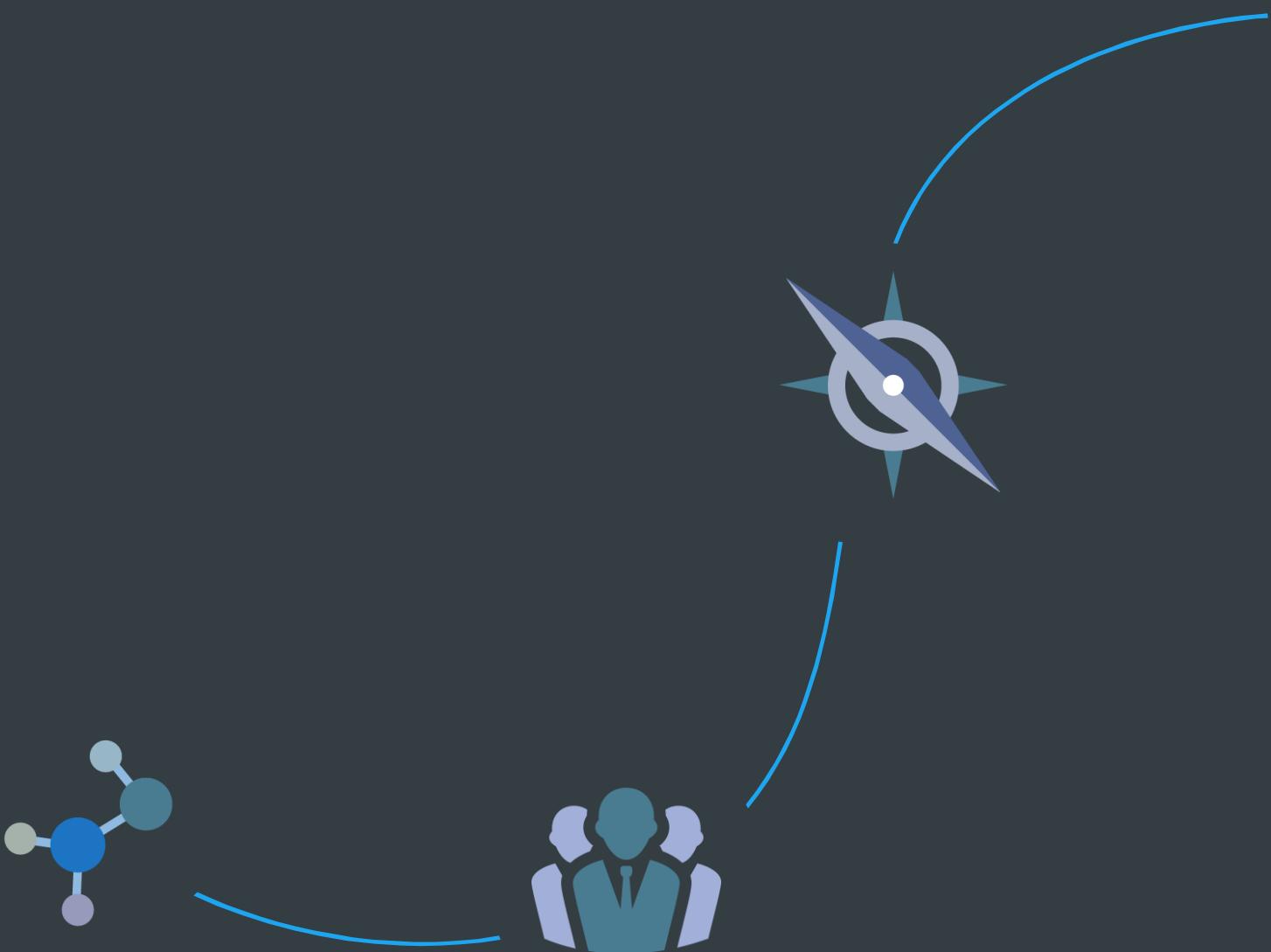


Bird & Bird

Dealing with the Corona-virus

What do employers need to consider?



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Dealing with the Corona-virus

Executive Summary

1. Dealing with suspected cases in the company

Employees may in principle be questioned about Corona-specific symptoms.

The staff is to be informed about suspected cases, avoiding mentioning the name of the employee being concerned if possible.

2. Continued payment of remuneration for official measures in accordance with the German Infection Protection Act

Employees keep their entitlement to remuneration if the employer closes the business temporarily due to staff shortages or supply shortages.

Employers themselves generally have a claim for compensation against the state in the event of ordered quarantine measures and employment bans.

3. Deviations from the German Working Hours Act

The German Working Hours Act (ArbZG) has been temporarily liberalized until 31 July 2020 regarding the maximum daily working hours, weekly working hours, rest periods and prohibitions of working on Sundays and public holidays for certain sectors and activities.

4. Works council meetings without personal attendance

Works councils are to be able to pass resolutions by telephone with retroactive effect from 1 March 2020 due to an amendment to the law. Conciliation committees should also be able to make decisions by video conference. However, the amendment to the law has not yet been adopted.

5. Co-determination rights of the works council

In principle, the works council must agree on regulations which are passed in connection with protective measures against the Coronavirus. In the case of urgent measures, unilateral actions by the employer can be justified.

6. Short-time work

A collective or individual agreement with the employees is required for an order for short-time work.

The short-time work compensation is to be increased to 70% or 77% from the 4th month of receiving the short-time work compensation and to 80% or 87% from the 7th month, provided that regular working hours are reduced by at least 50%.

7. Company holidays

In our opinion, the short-term arrangement of company holidays is in principle only permissible for holidays granted exceeding of the legal requirements.

8. Employment without social security contributions/deferral of contributions

The possibility of short-term employment will be extended so that employees may be employed for up to five months or 115 working days without social security contributions. This applies retroactively from 23 March 2020 and up to 31 October 2020.

Additionally, social security contributions can be deferred to the relevant health insurance before the end of each month.

9. Temporary employment

In the event of an urgent shortage of labor during the pandemic, temporary employment may also be provided without permission on the basis of § 1

para. 3 no. 2a of the Temporary Employment Act (*AÜG*).

10. Corona bonus payments

Special payments for employees up to an amount of EUR 1,500 in the period until 31 December 2020 are exempt from tax and social security contributions.

FAQs

A. Individual employment law topics

I. Operational handling of the pandemic

1. Are employers allowed to ask their employees about symptoms of illness?

Yes, in the current crisis, employers may exceptionally ask their employees questions about Corona-specific symptoms.

The data may only be processed in the context of Corona control.

You can find details in our article "[COVID-19: Data protection in Germany - FAQ & our view](#)".

2. How can/must employers deal with health-related data of their employees in relation to third parties in consideration of the GDPR?

Employers must identify cases of infection and suspected cases within their staff, but generally may not pass on the resulting data to third parties. However, third parties, such as business partners, have a right to protection against the risk of infection.

It is therefore recommended to request a generalized statement from the business partner as to whether cases of infection or suspicion (anonymized) are known within the company. In addition, it should be required that the relevant business partner submits a statement on the operational protective measures they have taken.

3. Are employers obliged to inform the rest of the staff about (suspected) Corona cases?

Yes, but the employee concerned must be protected from stigmatization. Therefore, mentioning the name is only justified if protection of the remaining employees cannot be guaranteed in any other way.

It is therefore advisable to first release contact persons of the (potentially) infected person. This measure can be carried out on a team or depart-

ment basis without necessarily disclosing information about the person concerned.

4. Can employers order to take the temperature of their employees or external persons?

Employers may order to take the temperature of persons outside the company as long as the temperature is taken without discrimination.

As regards employees, it is now widely accepted that even for them, temperature may exceptionally be taken if this is used for protective measures (e.g. no access to the office, but home office) and the data collected is not used and stored for other purposes.

5. Can employers prohibit employees from wearing protective masks in the workplace?

No, unless urgent operational reasons require it.

6. Are employees allowed to refuse to come to work for fear of infection with the Coronavirus?

In general, no. If an employee refuses the commencement of work, he can be warned, receive a formal warning or, if particularly serious, dismissed, depending on the severity of the consequences for the employer.

An exception only applies in the event of an increased risk situation within the company (e.g. if several cases of infection become known), if the employer does not adequately protect their employees. As a protective measure, it may be necessary to offer paid leave to the entire staff.

7. What protective measures should employers take?

In addition to the known measures such as checking the hygienic conditions within the company and

moving the place of work to the home office, a company agreement "pandemic" should be negotiated in which certain behavior patterns (e.g. wearing protective masks, observing distance rules or regularly disinfecting the hands) are formulated as commandments or prohibitions, the violation of which may lead to the issuing of a formal warning to the employee. This makes it easier to discipline the staff.

Employers should in any case observe the SARS-COV-2 occupational safety standards of the Federal Ministry of Labor and Social Affairs dated 16 April 2020:

<https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Schwerpunkte/sars-cov-2-arbeitsschutzstandard.pdf;jsessionid=A0774ECE8FAB4A8732AC698836B4F4F2?blob=publicationFile&v=2>

8. How can employers react to absences of their staff due to infection?

Employees who are able to work may, for example, be obliged to work paid overtime if production declines due to supply shortage.

They may also be assigned work which is not contractually owed.

9. What happens if an employee's child is not ill but the child's daycare/school is closed and there is no other possibility of care for the child? Does the employee have to take time off work?

If the necessary childcare cannot be guaranteed when the daycare center/school is closed, employees should generally be released from their obligation to provide services. They do not have to take time off work when the daycare center/school closes.

However, employers may encourage employees to take overtime, remaining holiday and holiday exceeding the statutory requirements in accordance with their personal interests.

The right to remuneration shall lapse for this period. However, parents of children up to the age of 12 are entitled to compensation from the state for lost wages.

10. What happens if employees cannot reach their workplace, for example due to public transportation being suspended?

Employees bear the risk of reaching company as a contractually agreed place of work. In this case, therefore, their compensation entitlement is basically not applicable.

11. Can employees take sick leave via telephone?

Yes, employees with mild upper respiratory tract diseases may obtain a certificate of incapacity to work for up to 7 days after consulting their doctor by telephone. However, this does not apply to serious illnesses and not to cases of suspected Corona. The certificate of incapacity for work must still be sent to the employer.

II. Continued remuneration

1. From whom do employees receive their salary in the event of quarantine measures or employment bans?

- a) In this respect, the legal situation is not clear and cannot be assessed conclusively.

Employees have a claim for compensation from the state (§ 56 German Infection Protection Act (IFSG)). Employers must pay the compensation to their employees but may subsequently be reimbursed for it by the competent authority.

However, in a ruling from 1978 (III ZR 43/77), the German Federal Court of Justice (BGH) assessed the legal situation differently. According to this ruling, the employer must primarily bear the salary costs (§ 616 German Civil Code (BGB)).

It cannot be ruled out that the BGH would decide differently today. In addition, in view of the intensity of the crisis, the German government has promised extensive financial support to the economy.

We therefore recommend applying for a refund to the competent authority.

- b) Freelancers and self-employed persons receive compensation payments for their loss of earnings according to the IFSG in the amount of the

- last annual income reported to the tax authority.
- c) Different authorities are responsible for compensation under the IfSG in the respective federal states. The [search engine of the Robert Koch Institute](#) is helpful in determining the competent authority.

2. Are employees entitled to continued payment of their salary in the event of a temporary interruption or closure of the business?

Yes, this applies insofar as the employees are able and willing to work but cannot work for reasons which are within the employer's operational sphere.

However, individual or collective agreements may regulate otherwise.

III. Vacation regulation

1. To what extent must employees inform their employers of their whereabouts after traveling?

We currently strongly advise against any kind of travel.

For the time being, the German government has issued a worldwide travel warning until 14 June 2020 for tourist travel. It warns against travel across still open borders.

Furthermore, the following applies:

Employees are obliged to inform their employer whether they have stayed in areas with increased incidence of illness or have had intensive contact with such persons. If there is an acute suspicion of an infection due to a stay abroad or a stay in a Corona risk area, employers can generally require the employee to be examined by a doctor and stay at home for two weeks.

2. Can the expiry date for remaining vacation from 2019 be deferred?

Employers who want to postpone the expiry date of vacation entitlements from the previous year should limit this arrangement, for example to the end of the pandemic or to a fixed date. In addition, a note should be included stating that the order is only being issued due to the current pandemic. This should prevent the occurrence of operational exercises.

3. May employers ask their employees whether they have spent their vacation in risk areas?

Yes, this applies to areas in which, according to information from the Robert Koch Institute or the health authorities, there is a high risk of infection, or to travel abroad.

4. What happens to the employee's vacation time if he is quarantined during the vacation period?

This is the risk of the employee. He is not entitled to additional leave in such cases.

IV. Home office

1. Who bears the costs of equipping employees in their home office?

If employees work from their home office during the Corona crisis and there is no possibility to work in the office, employers may be obliged to contribute to the costs arising from this (use of own technical equipment) according to § 670 BGB. The same may also apply during the Corona crisis if mobile work is agreed in general, as this can in fact often only be carried out from home.

We recommend concluding a company agreement for pandemics in the future.

2. Is there an obligation to work for employees in quarantine if employers allow mobile working?

Yes, provided that the employees are actually fit for work and have the necessary equipment (e.g. laptop).

V. Termination

1. Can an employer dismiss an employee during the probationary period if the employee refuses to agree to a later commencement of employment because of the Coronavirus?

Yes. During the so-called six-month "probationary period" a dismissal is only invalid if it is abusive. This is generally not the case with dismissals in connection with the economic threat to the employer from the consequences of the Corona crisis.

However, a notice of termination subject to change which involves postponing the start of work to a later date would be equally permissible and less drastic for the employee.

We recommend the following procedure:

- a) First, an amicable solution should be sought with the employer concerned
- b) If an amicable solution cannot be reached, the employee concerned should be given a notice of termination subject to change and, as a precaution, a termination notice.

2. Can dismissals also be made during periods of short-time work?

Yes, this is generally possible. However, notices of termination should not be based on the same reasons that are used to justify the order for short-time work. The introduction of short-time work is intended to preserve jobs.

VI. Working hours

Is it true that deviations from the Working Hours Act are permitted?

Yes.

- a) Nationwide the following applies until 31 July 2020:
 - Extension of the daily working time to up to 12 hours for currently particularly important activities and sectors (§ 1 paras. 1 and 2 Regulation on the deviation from the German Working Time Act due to COVID-19 epidemic (VO)).
 - In urgent exceptional cases, the weekly working time may be extended beyond 60 hours (§ 1 para. 3 VO).
 - The rest period may also be reduced to up to 9 hours for regular work (§ 2 VO).
 - The exceptions to prohibitions of employment on Sundays and public holidays have been extended (§ 3 VO).
- b) There are further regional variations. We have appropriate overviews here, which can be provided.

B. Co-determination

I. Committee work

1. Can employers instruct works councils and their members to refrain from holding meetings etc. in order to contain the Coronavirus?

Generally not. The works council decides at its own discretion, independent of instructions, how it conducts its business and when meetings are necessary.

The situation is different only if there is an urgent need to close the business for specific operational reasons, for example, due to an official order.

2. Can works councils pass resolutions by telephone?

- a) The German government is currently striving to amend the law in this respect. This amendment is intended to give works councils (and spokespersons' committees) the opportunity to make decisions via video and telephone conference retroactively from 1 March 2020 until 31 December 2020. Conciliation committees should also be able to make virtual decisions.
- b) In preparation for the planned change in the law, we recommend creating the framework conditions for decisions of the works council by telephone:
 - Works councils should be equipped with the necessary IT infrastructure.
 - The prerequisite for effectiveness is still the exclusion of the public. It must therefore be ensured that all video conferences can be carried out in encrypted form.

3. What applies to supervisory board meetings?

Supervisory board meetings may be held by telephone or by video conference - subject to a more detailed regulation in the articles of association or the bylaws of the supervisory board (§ 108 para. 4 German Stock Corporation Act (*AktG*)).

You will find further information in our article "[COVID-19: Management without supervision?](#)".

4. How is the capacity of staff representatives to act guaranteed?

On May 7, 2020, the German Bundestag passed an amendment to the law, according to which:

- Staff councils may pass resolutions via video and telephone conference with retroactive effect from 1 March 2020. Recordings of the meeting are prohibited.
- Existing staff representatives should remain in office until the end of the elections and look after the interests of the employees during this period.
- Consultation hours of the staff council may optionally be carried out as video consultation hours without recording the consultation hours.
- The state governments have already partially implemented corresponding changes in the law.

5. May works meetings be held in view of the increased risk of infection?

No. A violation would generally entitle the employer to apply to the labor court to exclude a member from the works council or to dissolve the works council (§ 23 German Industrial Relations Act (*BetrVG*))).

If the workforce requires information, we recommend that a "general" employee meeting (outside the works constitution) is held by telephone.

6. What applies if works council members fall ill with the Coronavirus or are in quarantine as a precaution?

In these cases, an alternate member must be invited. If the number of works council members stipulated by law can no longer participate due to numerous impediments caused by Corona, the body remains quorate as long as the majority of its elected members can attend a meeting.

II. Co-determination rights

1. Which co-determination rights of the works council exist/should be observed regarding current decisions?

- a) Subject to approval are the following regulations on
- hygiene behavior in the company;
 - the introduction of short-time or overtime work;
 - working from home;
 - working hours;
 - protection against infections in general.
- b) In our opinion, an employer may take independent action in urgent cases when urgent health protection measures are required, if it is impossible to obtain the works council's approval in good time. The works council must then be informed immediately.

2. What should be made mandatory within a pandemic company agreement?

We recommend the following content:

- a) specific rules of conduct to reduce the risk of infection, e.g.
 - wearing protective clothing or masks;
 - keeping distancing;
 - regularly disinfecting the hands,
 - changing clothes when entering the establishment.
- b) An authorization to allocate activities which are not contractually owed.
- c) Additional authorization to order home or teleworking and short-time working.



C. Short-time work

1. Can employers unilaterally order short-time work?

No. A collective or individual legal agreement is required.

2. What must generally be observed regarding the requirements and the procedure?

A concise overview is provided by [the information sheet for companies of the German Federal Employment Agency](#).

3. What facilitations for access to short-time work compensation apply in view of the Corona crisis?

The following applies until 31 December 2020:

- a) Entitlement to short-time work compensation exists if at least 10% of the employees have a loss of earnings of more than 10%.
- b) Social security contributions for lost working hours are reimbursed at 100%.
- c) Short-time work compensation may be obtained for up to 12 months.
- d) Temporary workers can also change to short-time work and are entitled to short-time work compensation.
- e) In companies in which agreements on working time fluctuations are used, no negative working time accounts should be accrued.
- f) When taking up a sideline job in a system-relevant area, the additional income in the period from 01 April 2020 to 31 October 2020 will not be taken into account, provided that the remuneration from the additional income and the remaining actual remuneration do not exceed the target remuneration. The government is currently planning to increase the additional income limits for all secondary occupations. This is intended to apply retroactively from 1 May 2020.
- g) The maximum period for which short-time work compensation can be paid has been extended from 12 months to up to 21 months for

companies which have already gone on short-time work in 2019 and cannot end short-time work within the one-year period due to the Corona crisis.

- h) The other conditions for the use of short-time work compensation remain valid.

4. Where must short-time work be reported if it is to be arranged in several subsidiaries?

If an employer has several subsidiaries, a separate application must be submitted for each subsidiary. However, in the case of companies operating trans-regional or nationwide, the German Federal Employment Agency can provide a "key customer consultant" upon request to coordinate short-time working issues between the employment agencies involved and the subsidiaries concerned.

5. Is a deadline required for announcing short-time work to the staff?

In this respect, the legal situation is unclear. We recommend a notice period of approximately two to five calendar days.

6. What is the relationship between the claim for compensation under § 56 IfSG and a claim for short-time work compensation?

The claim for compensation takes precedence over a claim to short-time work compensation.

If short-time work has already been ordered and short-time work compensation has been received, the compensation claim is increased by the amount of short-time work compensation to which employees would be entitled if they were not prevented from performing their work.

7. What is the consequence if short-time work is ordered without a valid agreement?

Employees are still entitled to full pay. Against their employer.

8. Can short-time work also be ordered in respect of individual employees?

No. Short-time work must be displayed either in relation to the entire company or to individual operating departments or divisions.

Nor is it permissible to impose different short-time working arrangements on employees who perform the same work at the same location.

9. How is the amount of the short-time work compensation calculated?

The short-time work compensation is basically 60% - or 67% for employees with at least one child - of the difference between the lump-sum net remuneration that would have been paid without loss of working hours and the lump-sum net remuneration based on the remuneration actually received.

For employees whose working hours have been reduced by at least 50%, the German government intends to increase the short-time work compensation in stages. Starting in the 4th month of receiving short-time work compensation, it is to be increased to 70% or 77%, starting in the 7th month of receiving short-time work compensation, it is to be increased to 80% or 87%.

A [table for calculating the short-time work compensation](#) is provided by the German Federal Employment Agency.

10. What is to be considered in terms of criminal law?

If short-time work compensation is wrongly provided and this is due to intentional/grossly negligent provision of incorrect/incomplete information, this may lead to prosecution (fraud/subsidy fraud).

We recommend drafting an exact time documentation or time recording before displaying the work loss. It should also be documented in which cases the loss of working hours can be compensated or prevented by paid leave.

11. What happens if an employee falls ill before short-time work begins?

In addition to the reduced entitlement to continued remuneration, the employees who fall ill are then

entitled to sick pay in the amount of the respective short-time work compensation.

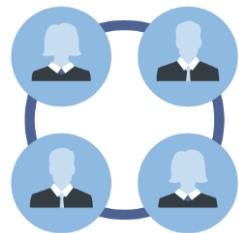
The employer must calculate and pay the sick pay. The amount can then be claimed from the competent health insurance.

12. What happens if an employee falls ill during short-time work?

In the first six weeks, short-time workers will continue to receive short-time work compensation in addition to their continued remuneration. After that period they receive sick pay instead of short-time work compensation.

13. Can short-time work also vary so that, for example, 40% is worked in one month and 20% in the following month?

Yes, this is possible. Short-time work can even be interrupted for up to three months, with the result that the entire period of entitlement is extended by this period.



D. Restructuring considerations

1. Which restructuring measures are conceivable?

- a) Reduction of overtime and working time credits as well as remaining vacation.
- b) Accrual of negative working hours.
- c) Encourage employees to take leave voluntarily.
- d) Order company leave/forced leave, see section D. 2.
- e) Order of short-time work.
- f) Implement flexible working time models and fulfilment of (age) part-time work requests
- g) Hiring freeze.
- h) Reduction of the staff to core staff through the expiry of fixed-term contracts, termination of contracts with external staff, probationary period terminations, etc.
- i) Reduction of personnel surpluses with transfer companies.
- j) Salary waiver, review of bonuses, discontinuation of voluntary special payments, see section 5.5, review and discontinuation of revocable remuneration components, crediting of benefits above the general pay scale, restructuring of the company pension scheme.
- k) Reduction of the staff through termination agreements.
- l) Reduction of the staff through layoffs.
- m) Withdrawal from tariff structures.
- n) Individual agreements and social plans.
- o) Plant closures.

2. Is it possible to order company vacation?

Company vacation are only permitted to a limited extent.

In a pandemic situation, the remaining vacation of employees from the previous year must first be reduced.

When ordering additional vacation, a distinction must be made between employees' statutory and non-statutory vacation entitlement.

While ordering vacation exceeding the statutory requirements for urgent operational reasons is generally permissible, ordering any statutory vacation by the employer is usually unsuccessful because the employer must always observe a sufficiently long notice period. At present, however, it is conceivable that part of the statutory vacation could also be ordered unilaterally with a short notice period.

According to the BAG's case law, a maximum of 60% of the annual vacation may be used for company vacation.

The works council's right of co-determination pursuant to § 87, para. 1, No. 5, BetrVG must be observed.

3. What other options exist for reducing personnel costs?

Employers may submit an application for deferral of social security contributions to the competent health insurance with reference to the emergency situation caused by the Corona crisis and § 76 German Social Security Act IV (SGB IV).

It is also interesting to note that the German government's social protection package has extended the possibility for short-term employment. Instead of the previous 70 days, employees can now be employed for up to five months or 115 working days without social security contributions.

This applies retroactively from 23 March 2020 and will cease to apply on 31 October 2020.

4. Can bonuses be waived or reduced?

- a) If the payment of a bonus is linked to company objectives, variable remuneration is likely to be reduced automatically in many cases due to the Corona crisis.
- b) If payment of the variable remuneration is dependent on an employee achieving his personal targets, both waiving payment and reducing the variable remuneration is generally not easily possible or is subject to very strict conditions.

The economic risk is generally borne by the employer. This applies in particular if the personal performance of the employee is on an equal footing with the company's objectives.

In the past, the German Federal Labor Court has recognized a complete waiver of a partial performance-related bonus in the event of particularly exceptional circumstances that make state liquidity assistance absolutely necessary. Ultimately, however, the decisive factor here is

always the specific provision in the employment contract, which should always be reviewed before waiving or reducing variable remuneration components.

- c) **Important:** Special payments for employees up to an amount of EUR 1,500.00 can be made tax- and social security-free in the period between 1 March 2020 and 31 December 2020. The payment can also be spread over several months. However, these cannot replace employee benefits based on contractual obligations, commitments or company practice.

5. Can employers cancel special payments during short-time work?

Generally not, because the employer bears the economic risk in this respect.

It is different if the voluntary nature of the special payment was agreed.



E. Resuming business activities

1. Is a temporary change in the working time structure reasonable?

During the phase of resuming business activities in case of existing Coronavirus threat, the following measure might be useful:

Shift model: In order to minimize the risk of an infected employee infecting the entire staff, while at the same time ensuring the highest possible capacity utilization, a six-day week could be introduced where permissible. The workforce would be divided into two groups, each working three days a week.

giene concept. In doing so, they should seek advice from a company doctor and the occupational safety specialist.

You can find details in our article "[COVID-19: Dynamic requirements for occupational safety and hygiene measures of employers](#)".

[The BMAS has published specific recommendations for the design of occupational safety and hygiene measures.](#)

2. What should be considered when introducing work on Saturday?

- a) If a works council exists, it must be involved in accordance with § 87 para 1 No. 4 BetrVG.
- b) Saturday work must be compatible with the relevant employment contract. This also applies to part-time employees.
- c) An increase in vacation time is generally not required for voluntary and occasional work on Saturday. The situation is different if the working week is increased from a five-day week to a six-day week and Saturday is considered a regular working day. In this case, the vacation days must be increased proportionately.
- d) In terms of labor law, Saturday is considered a normal working day, so that the general rules, such as the observance of rest periods, must be observed.

3. Are there any legal requirements as to which occupational safety and hygiene measures employers must observe when resuming business activities?

Yes, on 16 April 2020, the German Federal Ministry of Labor and Social Affairs (*BMAS*) adopted an "Occupational Health and Safety Standard COVID-19" which regulates binding requirements for the implementation of occupational health and safety in companies. Among other things, employers must immediately draft and implement an internal hy-

F. Miscellaneous

1. Can temporary employment during the acute Corona crisis also be carried out without permission for temporary employment?

Yes, in the event of acute labor shortages in companies (e.g. in agricultural production and processing, food logistics or health care), employers can exceptionally provide their own employees with their consent even without a permit during the crisis period.

2. How can the functioning of the labor and social courts be guaranteed?

The German government is planning a law to ensure the functioning of the labor and social courts, which will include the following major changes:

- a) Honorary judges may attend the hearing by means of audio-visual transmission from elsewhere in the court. It is up to the court to decide on this.

The Court shall permit the parties, their representatives and counsels, as well as witnesses and experts, to be present at a place other than the place of the hearing and to conduct proceedings there by means of simultaneous video and audio transmission.

- b) Decisions of the German Federal Labor Court and the German Federal Social Court may also be made by written procedure without the consent of the parties if the appeal has been dismissed.

3. What are the changes in the law regarding insolvency applications?

The obligation to file for insolvency for companies affected by the Corona pandemic was suspended until 30 September 2020.

For the afternoon of 30 April 2020 a new cabinet decision is expected. According to a draft resolution of the German government especially playgrounds, museums, memorials, zoos and botanical gardens may be reopened under conditions and hygiene regulations. The individual German federal states decide when these relaxations of regulations are to be implemented in practice. The federal govern-

ment and the federal states do not intend to decide on further major relaxation until 6 May 2020. The contact restrictions are expected to be extended until 10 May 2020.

Contact

Thomas Hey
Partner, Employment Law

Phone: +49 (0) 211 / 2005 6314
Thomas.Hey@twobirds.com



Dr. Ralph Panzer
Partner, Employment Law

Phone: +49 (0) 89 / 3581 6123
Ralph.Panzer@twobirds.com



Sandy Gerlach
Counsel, Employment Law

Phone: +49 (0) 89 / 3581 6124
Sandy.Gerlach@twobirds.com



Leonie Pfeufer
Associate, Employment Law

Phone: +49 (0) 211 / 2005 6314
Leonie.Pfeufer@twobirds.com



Christian Wirtz, LL.M.
Associate, Employment Law

Phone: +49 (0) 211 / 2005 6314
Christian.Wirtz@twobirds.com



Timo Seyffer
Associate, Employment Law

Phone: +49 (0) 211 / 2005 6314
Timo.Seyffer@twobirds.com



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