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WHITE PAPER

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Coronavirus in Germany—What Employers Must Keep in Mind

The coronavirus (COVID-19) pandemic is a challenge for employers and employees. Companies must protect their employees' health and at the same time try to keep the business running. Not all companies can organize home-office work and many simply have to shut down for some time. As we are starting the return-to-work phase, employers have to establish new health and safety protocols for the workplace. German law provides for paid leave in various scenarios, and the Government has introduced new options of subsidies to facilitate the situation for both sides.

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PRECAUTIONARY MEASURES

An employer's primary consideration in assessing appropriate precautionary measures against COVID-19 should be to comply with their duty to ensure health and safety at work, as laid down in the occupational health and safety legislation. This includes protecting employees from infectious diseases. However, the employer's measures and directives can be limited by the employee's constitutional rights, such as personality/privacy rights. It is important to note that there is no one-size-fits-all solution to the threat posed by COVID-19. Rather, it is necessary to examine and decide on a case-by-case basis which measures are necessary and sufficient for each employer, depending on the type of company and work involved.

What can or must the employer do if employees appear to be sick?

- An employer may request that its employees provide notice of their symptoms or diagnosis of a certain disease. However, this is permitted only if the employer's or third parties' (e.g. colleagues) interest outweighs the individual's privacy rights. This is likely to be the case if a contagious disease, such as the coronavirus, is suspected. The data protection authorities recommend that surveys are not carried out by means of employee questionnaires. Instead, employers should provide information on the coronavirus to their employees and request that they report on relevant indicators (for example, symptoms of the illness, presence in the risk areas, or contact with infected persons or persons from risk areas), in order for the employer to be able to take appropriate precautionary measures once notified.

- An employer's request for employees to report when symptoms of an illness are present in a coworker encroaches the individual privacy rights of both the "informer" employee and those of the coworker who is ill. Justification for employees reporting on their coworker's symptoms is therefore conceivable only in exceptional circumstances. This may be the case in the context of a pandemic situation, as the ill coworker has a duty not to harm his or her employer and colleagues, and to protect healthy colleagues from infection as much as possible.

- The right of an employer to issue instructions does not generally go so far as to enable them to force an employee to undergo medical examinations or temperature tests, even in the context of a pandemic (except in special sectors such as health care), although the State Data Authorities are beginning to take different views on this issue. An examination by the company doctor can certainly be offered or recommended; however, an obligation to undertake such an examination cannot usually be imposed on the employee.

- In any case, the employer should advise a symptomatic employee to leave work immediately and either call in sick or go to the doctor to be examined. In order to protect the rest of the workforce, this measure will often be compulsory for the employer if there is no possibility of letting the employee work in isolation on the employer's premises.

- An employer may also ask a symptomatic employee to continue to perform his or her work by using a home-office solution, provided that the employee is not incapacitated by illness. However, this would require that either: (i) the government has already implemented a regulation ordering employees to work from home (where possible); or (ii) that the employee has agreed to work from home. A short agreement on the home-office arrangement between the employer and the relevant employee is advisable in these circumstances, as a unilateral instruction to work from home given by an employer is probably not permissible to enforce this arrangement, even in the event of a pandemic.

- If an employer becomes aware that an employee is COVID-19 positive, they must react as quickly as possible and should inform coworkers who are believed to have been in close contact with the infected employee. The name of the infected employee may only be mentioned in exceptional cases (*see* "Can the employer disclose the names of infected persons," below). A risk analysis is necessary to determine where the employee has been on the premises or on business trips, and to establish which persons must be informed that they were in close contact with an employee who is COVID-19 positive. The risk analysis should also look at any further offers of protective measures the company should be undertaking (e.g., company medical examination, etc.).

Can the employer order general examinations of all employees and visitors to the company premises?

The employer cannot order mass examinations of all employees or visitors, nor can they request compulsory vaccinations against an imminent infection, but exceptions to this rule may be possible in certain sectors (e.g., the health care sector).

Can the employer disclose the names of infected persons or suspected cases to the workforce so that individuals can assess their risk and have a medical examination if necessary?

Health data is one of the most sensitive and protected types of personal data. Employers must exercise particular caution when disclosing such personal information about an employee. In principle, the identity of the infected employee(s) should not be disclosed. However, if the potentially infected employee(s) cannot be identified in any other way, naming them may be considered an appropriate measure to avert the risk of infection of the entire workforce and to comply with the relevant duty of care under employment laws. However, before employers undertake such action, they should consult with data protection experts. In addition, a determinative factor in making such a decision may be the assessment of the responsible health authority as to whether such a measure is necessary for health reasons.

ARE THE RIGHTS OF THE WORKS COUNCIL TO BE OBSERVED IN TAKING THE ABOVE-REFERENCED MEASURES?

The works council has participation rights relating to:

- All collective measures of order and behavior in the organization;
- The determination of daily working time and its temporary extension or reduction; and
- In particular, health protection.

Therefore, measures such as the following are also subject to a prior agreement with the works council:

- A collective release from work;
- "Compulsory leave" that is not based on administrative measures;
- Home-office arrangements; and
- The ordering of reduced working time (short-time work) at reduced pay (*see* "Remuneration," question 1, below). The implementation of short-time work by works council agreement has the substantial advantage of constituting a direct and binding regulation that does not require negotiation with individual employees. Employers cannot unilaterally introduce reductions to working hours and remuneration.

According to case law, the employer also must obtain the works council's approval for the "social matters" mentioned above in urgent and emergency cases. However, there is no precedent on how the courts would interpret a case where, for example, the works council were to be de facto incapacitated from a certain point in time due to comprehensive domestic quarantine of all works council members. The law provides that the works council members can conclude resolutions only if a certain quorum is "physically present." The Government has implemented, however, a new law allowing works councils, under the current circumstances, to adopt their resolutions by video conference or conference call. This rule retroactively sanctions resolutions taken since March 1, 2020, and will apply until the end of 2020.

IS THERE AN OBLIGATION FOR EMPLOYERS TO REPORT SUSPECTED OR PROVEN CASES OF INFECTION TO THE PUBLIC HEALTH DEPARTMENT?

Employers are not subject to any reporting obligations. They should, however, urge the employees concerned to report to the health authorities themselves.

REMUNERATION

Does the employer have to pay salaries for employees who have clearly contracted the coronavirus?

Yes. The general rules on sick pay apply here.

Does the employer need to pay salaries for employees who are sent home on suspicion of having contracted the coronavirus?

Yes, this applies to both a temporary transfer to working from home and to a release from work duties.

Does the employer have to pay the employee's salary if quarantine is ordered by the authorities?

Yes. The employee may be entitled to special compensation in the amount of the loss of earnings (§ 56 Protection against Infections Act–IfSG), but only if the health authority has ordered a prohibition to work to one or more specified employees. The employer is required to pay the compensation for up to six weeks and can have the monies reimbursed by the competent authority. The application for reimbursement should be submitted to the competent authority as early as possible.

When school or daycare facilities have been closed, does the employer have to pay the salary of parents of children who cannot attend and therefore have to be looked after at home?

If children in need of care have to stay at home because schools or daycare centers have been closed, one parent may stay at home to provide care. The employer does not have to continue the salary, but the employee can claim a new governmental subsidy in this situation for up to six weeks (administered and paid out by the employer). However, employees must first try to arrange for someone else to care for their child or children (e.g., friends, neighbors, or relatives but not grandparents, in the current circumstances). The child/children must be younger than 12 years and all other means of paid leave must have been used up, such as paid leave for accrued overtime or vacation. The subsidies are available only outside the regular school holidays and amount to 60% of the lost net wage or 67% for employees with children (same amount as short-time work allowance).

Can the employer refuse to pay the salary of employees who have fallen ill with the virus because they have travelled to a risk area despite travel warnings?

Possibly. There is no entitlement to continued payment of remuneration if the incapacity to work is through the employee's own fault. Fault can be considered if an employee has made a private trip to an infected area despite a travel warning from the Federal Foreign Office. However, mere safety instructions regarding travel to an infected area are not sufficient for the assumption of fault on the part of the employee.

Does the employer have to pay salaries for employees who cannot perform their duties because of supply chain interruptions?

Not being able to operate due to supply chain interruptions is a business risk assumed by employers and not their employees. The fact that an employer has no work to provide to available employees does not relieve it of its obligation to pay those employees' wages. Therefore, employees in this situation are entitled to regularly claim their remuneration. However, the situation is different if short-time work has been implemented (see below).

Does the employer have to pay salaries for employees in the event that the authorities order a quarantine/ shutdown of the company's facilities?

If a company is closed down due to an official order because of the coronavirus (a specific order, not a governmental order that, for example, bars and restaurants must close), the employer must continue to compensate employees in advance for six weeks of wages in full and can have the monies reimbursed by the relevant health authority (§ 56 Protection against Infections Act–IfSG). The application for reimbursement should be submitted to the health authority as soon as possible after the shutdown has been ordered.

Can an employee stay at home on full pay out of subjective concerns about infection, even if there are no suspected cases in the company?

No. There is no right to paid leave when leave is taken due to concerns about becoming infected by the coronavirus. However, it may become unreasonable for the employer to continue to require employees to go into the company's office in individual cases, for example if the employer refuses to implement orders from the health authorities relating to the business. Companies remain called on to enable staff to work from home wherever possible. If an employer violates such obligations and an employee becomes infected with the virus as a result of this, there is a risk that the employee may claim damages.

Can the employer reduce wage costs by ordering short-time work?

Even without quarantine and employment bans and with a healthy, fit workforce, there may be cases where the employer's business is indirectly affected by the coronavirus, for example due to bottlenecks in the supply chain caused by Chinese suppliers having to close down or limit their activities. Usually, the employer bears this risk to ensure that employees are entitled to their regular pay (*see* "Remuneration," above). However, since even economically sound companies would not be able to withstand supply interruptions for long periods of time, employers can require employees to work shorter hours and thereby reduce their wage costs.

The following points should be noted in relation to short-time work:

- If short-time work is introduced in a legally correct manner, employee remuneration claims are cancelled completely or partially.

- In return, the Federal Employment Agency will contribute a short-time work allowance of 60% of the lost net wage or 67% for employees with children. Because of the crisis, the allowance is increased until the end of 2020: if the working time is reduced at least by 50%, the allowance is 70% (as of the fourth month) and 80% (as of the seventh month), or 77% and 87% for employees with children.

- The Federal Government has furthermore implemented steps to make the introduction of short-time work easier as of March 1, 2020. Up to now, short-time work compensation could be applied for only if at least one-third of the employees of the company were affected by such a loss of remuneration. Now, 10% of the employees being affected will suffice. Employers will now also be reimbursed for their full social security contributions for the lost working hours instead of only half, as was the case before the coronavirus.

As of May 1, 2020, until December 31, 2020, employees are permitted to work and earn wages in a side activity without the short-time work payments being reduced or set off. However, maximum amounts of additional earnings have to be considered.

Are there any tax benefits available in the context of the coronavirus crisis?

On April 4, 2020, the German Secretary of Finance announced that extra payments (bonuses) to employees are now tax free up to €1,500. The bonus must be paid in 2020 and must be in addition to the regular salary and to a bonus under an existing bonus scheme. For a "conversion" of a bonus that is payable in any case, the tax benefit is not available. Such bonus is also free of social charges. In companies with a works council, an agreement with the works council is needed beforehand if the bonus is supposed to be paid to more than one employee.

Until the end of 2020, increases paid by the employer on top of short-time work allowances are partly tax exempt.

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