

COVID-19 and Labour Law: Germany

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Abstract

The corona pandemic raises a vast range of legal issues. From the labour and social law perspective, some of them are of downright existential importance for the employees and enterprises affected. Initial support measures have already been adopted through the government's "social protection package". Especially the regulations on short-time work, which are immediately adjusted to the current crisis, attempt to address the financial risks for enterprises and employees. Support is also given to particularly strongly affected professions such as the (solo)self-employed persons. Moreover virtual works council meetings will be enabled and a debate on the establishment of "online-courts" started.

Keywords: Covid-19; Labour Law; Short-time work; Care responsibility compensation; Virtual works council meetings; Online-courts

1. General Framework.

Even though no national health emergency has been explicitly declared in Germany, some quite far-reaching restrictions have already been put in place to curb the further spread of the COVID-19 disease. On March 22nd 2020 the Federal Government and the Minister-Presidents of the federal states agreed on a uniform approach aimed at limiting social contact in the public area¹. In addition to the new limitations to freedom of movement based on section 28(1) Infection Protection Act (IfSG)², the restrictions on public life have also brought the whole economic sector grinding to a halt. As a legislative counteraction, certain laws specifically tailored to the crisis have already been passed at the federal level, such as the ban on the termination of tenants who are in financial difficulty due to the pandemic³. From the labour law angle, the so-called "social protection package"⁴ is particularly noteworthy. Besides facilitating access to social security benefits, one of the purposes of this law is to create incentives to work in system-relevant areas⁵ by

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¹ <https://www.bundesregierung.de/breg-de/themen/coronavirus/besprechung-von-bundeskanzlerin-merkel-mit-den-regierungschefinnen-und-regierungschefs-der-laender-zum-coronavirus-1733266>.

² BGBl. 2020, part I, p. 590.

³ BGBl. 2020, part I, p. 573.

⁴ BGBl. 2020, part I, p. 575.

⁵ See BT-Drs. 19/18107, p. 26 for an enumeration of the branches and professions considered essential.

momentarily raising the supplementary income limit for pensioners and temporarily removing the crediting of income from jobs taken up during short-time working. Furthermore, the Federal Ministry of Labour and Social Affairs (BMAS) in accordance with the Ministry of Health (BMG) may allow exceptions to the provisions of the Working Hours Act in extraordinary emergencies with nationwide implications by legislative decree. Such a decree has been passed on April 7th 2020⁶.

2. Specific Measures.

With the well-established short-time work scheme, German law provides the option for enterprises in economic difficulty to reduce the working time of employees (if allowed by an individual or collective agreement) instead of terminating them and thus to achieve economic relief by lowering or even abandoning personnel costs. Under certain conditions, the affected employees are entitled to social security benefits (technically paid by the employer who can reimburse his expenses from the labour administration) in order to compensate for the net income loss (60 per cent respectively 67 per cent). This mechanism seeks to avoid unemployment and to secure a well-rehearsed workforce⁷. As a model, this instrument has already been successfully tested from 2009 to 2011 in the aftermath of the global financial crisis of 2008/2009 with a peak of 1.5 million short-time workers back then⁸. However, current forecasts expect between 2.3 and 5 million short-time workers. As stated by the Federal Employment Agency, until April 6th 2020 as many as 650,000 notifications of short-time work have been submitted by enterprises at the local employment agencies⁹. Based on Section 109 (5) of the Social Security Code III (SGB III), the BMAS has now facilitated the access to short-time work compensation by legislative decree (KugV)¹⁰. Along with the reimbursement of social security contributions paid to the employers, extending short-time work to temporary employees is significant¹¹.

With the new section 56(1a) IfSG¹², the legislator has also created financial relief for employees affected by the closure of schools and childcare facilities. In principle, even in times of pandemic, the employer must pay remuneration if no work can be performed due

⁶ https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Gesetze/arbeitszeitverordnung.pdf;jsessionid=8ADCFB03E074957BC9EDD8912D46FB1E?__blob=publicationFile&v=2.

⁷ There is also an economic aspect: According to a recent study, the decline in economic output in Germany with short-time work was around 45 per cent less in comparison to a scenario without this instrument. <https://www.zeit.de/wirtschaft/2020-04/kurzarbeit-coronavirus-pandemie-wirtschaftseinbruch>.

⁸ In that time, the maximum period for receiving short-time work compensation was increased from 12 months (section 104(1) SGB III) to 24 months, BGBl. 2009, part I, p. 1223. To date, the Federal Government has not yet made use of this authorization in section 109(1) no. 2 SGB III in the corona crisis.

⁹ <https://www.arbeitsagentur.de/presse/spr-2020-22-anzeigen-kug-waechst-weiter-dynamisch>.

¹⁰ BGBl. 2020, part I, p. 595. The legal basis for this is the Act on the temporary crisis-related improvement of the Regulations for Short-Time Work Compensation, which was passed on March 13th 2020, BGBl. 2020, part I, p. 493.

¹¹ Section 3 KugV. Here too, the legal basis (section 11a Temporary Work Act) was established by the Act on the temporary crisis-related improvement of the Regulations for Short-Time Work Compensation.

¹² BGBl. 2020, part I, p. 590.

to circumstances for which neither he nor the employee is responsible (*Betriebsrisiko*, section 615 sentence 3 Civil Code). However, if it remains possible in principle to perform the work and the employee is just unable to do so because of his or her care responsibilities, the employee is only entitled to remuneration for a relatively insignificant period (section 616 Civil Code). In such a constellation, the employee can now claim compensation, which is paid by the employer on behalf of the competent authority. This supplements the section 56(1) IfSG stating that employees who suffer a loss of earnings because of an imposed employment ban or quarantine receive compensation.

To secure the economic existence of micro-enterprises and self-employed persons, emergency financial aid has been made available, which is non-repayable and can be easily applied for online¹³. Furthermore, special bonuses for employees up to an amount of 1,500 Euros will also be exempt from tax and social security contributions in 2020¹⁴.

3. Social Partners' Impact.

The social partners and works councils have a crucial role in dealing with the current situation. For example, the Federal Government consulted trade union and employers' association representatives immediately before the draft law on the "social protection package"¹⁵. Moreover, on March 13th 2020 the top-level representatives of the social partners published a statement on taking common responsibility and putting aside their different views during the crisis¹⁶. As short-time work cannot be ordered one-sidedly by the employer, it is often collective agreements and works agreements that make short-time work possible in an uncomplicated manner. Moreover, in many enterprises, the short-time allowance paid by the labour administration is increased through additional payments to the employees on the grounds of collective agreements, works agreements or unilaterally in order to reduce their loss of wages. Furthermore, the social partners of the metal and electro industry, which is crucial for the German economy, agreed on a non-increase of salary for this year ("zero-round") to secure employment and also to provide additional leave days for employees with young children. Finally, on April 6th 2020, the social partners of the care sector agreed on bonuses for care workers amounting to 1,500 Euros.

4. Pending Issues.

Even in times of a pandemic, the works council is entitled to mandatory co-determination rights, for example, in the area of occupational health and safety¹⁷.

¹³ <https://www.bmwi.de/Redaktion/DE/Downloads/E/eckpunkte-corona-soforthilfe>.

¹⁴ Please visit the following link:

<https://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2020/04/2020-04-03-GPM-Bonuszahlungen.html>.

¹⁵ <https://www.tagesschau.de/wirtschaft/coronakrise-wirtschaft-105.html>.

¹⁶ <https://www.dgb.de/presse/++co++6f58fa66-652b-11ea-833c-52540088cada>.

¹⁷ Cf. section 87(1) no. 7 Works Constitution Act (BetrVG).

Nevertheless, works councils' activities have raised some questions and uncertainties. The prevailing opinion suggests that decisions of works councils are only valid if they are taken in the personal presence of the works council members¹⁸. In times of video conferencing tools, the sword of Damocles is therefore currently hanging over its decisions as to formal legitimacy. Regardless of whether such an interpretation of the law is mandatory, on April 9th 2020 the Government adopted a draft bill on an amendment of the Works Constitutions Act which shall allow works councils to take decisions by video or telephone conferencing¹⁹. This regulation is to enter into force retroactively from March 1st 2020 and be limited in time until December 31st 2020. It is expected that the German Parliament will pass that Act directly after Easter.

However, the use of digital infrastructure is also essential in a different context. No clairvoyant skills are needed to predict that the current situation will be followed by many labour court proceedings. A legislative proposal sensational for German procedural law could provide a remedy here. Essentially, this would result in an amendment to the Labour Court Act empowering the Labour Courts to order oral proceedings using video and sound transmission ("online-courts") for the sake of protection against infectious diseases²⁰. It remains to be seen whether there will be such a far-reaching development. Nonetheless, the courts' digital infrastructure as a potential pitfall could also thwart the approach just mentioned.

Furthermore, the debate about the balance between data protection and health protection aspects, such as the use of mandatory apps to trace infection chains, is proving to be *terra incognita*. Transferred to the employment situation, the conflict between the employer's duty of care and the protection of the employee's personal sphere must also be carefully reconciled here – a task that has not yet been tackled entirely. In this respect, it is still necessary to monitor the ongoing development from the perspective of labour law.

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¹⁸ Section 33(1) sentence 1 BetrVG.

¹⁹ <https://www.bundesregierung.de/breg-de/aktuelles/betriebliche-mitbestimmung-1739914>.

²⁰ <https://www.faz.net/aktuell/wirtschaft/digitec/corona-arbeitsrichter-fordern-verfahren-per-video-schalte-16709107.html?premium>; <https://www.zpoblog.de/arbeitsgerichte-online-courts-videokonferenz-oeffentlichkeit-remote-courts/>.