

COVID-19 and Labour Law: Germany

Rüdiger Krause, Jonas Walter Kühn *

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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. Various legislative support measures have been adopted through the "social protection packages I & II". Especially the provisions on short-time work, which were 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 and "online-courts" are enabled by several legislative actions. As slaughterhouses have emerged as coronavirus hotspots, the Government currently envisages a sector-specific ban on subcontracts to combat the misdevelopments in the meat industry.

Keywords: Covid-19; Labour Law; Short-time work; Care responsibility compensation; Virtual works council meetings; Online-courts; Ban on temporary agency work and subcontracts.

1. General Framework.

On March 25, 2020 the German Parliament declared that there is an epidemic situation of national significance due to the current spread of the new coronavirus (SARS-CoV-2) in Germany¹. Already three days before, on March 22, 2020 the Federal Government and the Minister-Presidents of the federal states agreed on a uniform approach of limiting social contact in the public area in order to curb the further spread of the COVID-19 disease². In addition to the new limitations to freedom of movement based on Section 28(1) Infection

* Rüdiger Krause, Professor in Labour Law, Institute for Labour Law, Georg-August-University Göttingen, Germany; Jonas Walter Kühn, Assistant Researcher, Institute for Labour Law, Georg-August-University Göttingen, Germany.

¹ Deutscher Bundestag, Stenografischer Bericht, 154. Sitzung am 25. März 2020, 19169 (C), Tagesordnungspunkt 6.

² <https://www.bundesregierung.de/breg-de/themen/coronavirus/besprechung-von-bundeskanzlerin-merkel-mit-den-regierungschefinnen-und-regierungschefs-der-laender-zum-coronavirus-1733266>.

Protection Act (IfSG)³, the restrictions on public life also brought large parts of the economy grinding to a halt. As a legislative counteraction, 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 pandemic⁴.

From the labour and social law angle, the German legislator was very active and set into force with unusual speed from March to May 2020 several Acts which target primarily to improve the social protection but also to facilitate the proper functioning of labour law and labour law proceedings. So did the Government with some important legislative decrees to which it was enabled by new competencies. The series started with an Act on the improvement of short-term work of March 13, 2020⁵ and went over the so-called "social protection package I" of March 27, 2020⁶ and some regulations in the Act on the protection of the population also of March 27, 2020⁷ to an Act of May 20, 2020 including changes in the Works Constitution Acts⁸ and the "social protection package II" also of May 20, 2020⁹. In the meantime, the legislative machinery seems to have essentially come to a standstill.

2. Specific Measures.

A focal point of the legislative activities was changes in the short-time work scheme in order to make this instrument more effective. According to the well-established regulations on short-term work in German law, enterprises have the option to reduce the working time of employees (if allowed by an individual or collective agreement) instead of terminating them and thus to achieve financial relief by lowering or even abandoning personnel costs when the economy turned sour. 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) to compensate for the net income loss (regularly 60 per cent respectively 67 per cent). This mechanism seeks to avoid unemployment and to secure a well-rehearsed workforce¹⁰. 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 1.4 million short-time workers back then¹¹. According to the Federal Employment Agency there were notifications of short-time work for as many as 2.64 million employees in March, 8.02 million employees in April, 1.14 million employees in May and 342,000 until June 25, 2020. However, not all notifications necessarily lead to the use of short-time work

³ BGBl. 2020, part I, p. 587, 590.

⁴ BGBl. 2020, part I, p. 573.

⁵ BGBl. 2020, part I, p. 493.

⁶ BGBl. 2020, part I, p. 575.

⁷ BGBl. 2020, part I, p. 587.

⁸ BGBl. 2020, part I, p. 1044, 1051.

⁹ BGBl. 2020, part I, p. 1055.

¹⁰ 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>.

¹¹ In that time, the maximum period for receiving short-time work compensation was increased by legislative decree of the Federal Ministry for Labour and Social Affairs to 24 months, BGBl. 2009, part I, p. 1223.

compensation. The number of unemployed rose to 2.85 million people (= 6.2 %) in June 2020, which is 637,000 more than in June 2019¹².

As a first step and based on the new Section 109(5) Social Security Code III (SGB III) implemented by the Act on the temporary crisis-related improvement of the Regulations for Short-Time Work Compensation of March 13, 2020¹³, the Government facilitated the access to short-time work compensation by legislative decree of March 25, 2020¹⁴. Along with the reimbursement of social security contributions paid to the employers, extending short-time work to temporary employees is significant¹⁵. Step two consists of the "social protection package I" of March 27, 2020¹⁶ which facilitated the access to social security benefits and created incentives to work in system-relevant areas¹⁷ by momentarily raising the supplementary income limit for pensioners and temporarily removing the crediting of income from jobs taken up during short-time working. As step three the Federal Ministry for Labour and Social Affairs, using an already existing competence (Section 109(1) SGB III), extended the regular maximum period of 12 months for receiving short-time work compensation (Section 104(1) SGB III) by legislative decree of April 16, 2020 to 21 months, however limited to December 31, 2020¹⁸. Finally, as forth step, the "social protection package II" of May 20, 2020¹⁹ further improved the conditions for short-time work by successively and temporarily increasing the short-time working payments to a maximum of 80 per cent respectively 87 per cent²⁰. Moreover, the preferential treatment for additional earnings is no longer limited to system-relevant branches and professions²¹.

With the new Section 56(1a) Infection Protection Act (IfSG)²², 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 to circumstances for which neither he nor the employee is responsible (*Betriebsrisiko*, Section 615 sentence 3 Civil Code (BGB)). 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 BGB). In such a constellation, the employee can now claim compensation, which is paid by the employer on behalf of the competent authority. This view is underpinned by Section 56(1) IfSG stating that employees who suffer a loss of earnings because of an imposed employment ban or quarantine receive compensation.

¹² <https://statistik.arbeitsagentur.de/Statistikdaten/Detail/202006/arbeitsmarktberichte/monatsbericht-monatsbericht/monatsbericht-d-0-202006-pdf>.

¹³ BGBl. 2020, part I, p. 493.

¹⁴ BGBl. 2020, part I, p. 595.

¹⁵ 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.

¹⁶ BGBl. 2020, part I, p. 575.

¹⁷ See BT-Drs. 19/18107, p. 26 for an enumeration of the branches and professions considered essential.

¹⁸ BGBl. 2020, part I, p. 801.

¹⁹ BGBl. 2020, part I, p. 1055.

²⁰ For those who have been furloughed for seven month or more.

²¹ See Section 421c SGB III.

²² BGBl. 2020, part I, p. 590.

Furthermore, on the grounds of a new competence implemented by the "social protection package I" of March 27, 2020²³, the Federal Ministry of Labour and Social Affairs (BMAS) in accordance with the Ministry of Health (BMG) allowed the extension of working times as an exception to the provisions of the Working Hours Act in extraordinary emergencies with nationwide implications by a legislative decree passed on April 7, 2020²⁴. However, this exception is limited to July 31, 2020.

In a very early stage, already since March 9, 2020, the duty of the employee to deliver evidence of being ill was facilitated. Instead of presenting personally at the physician it was sufficient to contact the physician by telephone in cases of slight symptoms of breathing problems in order to get the necessary certification for a period up to 7 days which must be passed to the employer²⁵. However, this facilitation ended on May 31, 2020.

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 online²⁶. Furthermore, special bonuses for employees up to an amount of 1,500 Euros will also be exempt from tax and social security contributions in 2020.

3. Social Partners' Measures.

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"²⁷. Moreover, on March 13, 2020 the top-level representatives of the social partners published a statement on taking shared responsibility and putting aside their different views during the crisis²⁸. 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 6, 2020, the social partners of the care sector agreed on bonuses for care workers amounting to 1,500 Euros per person.

²³ BGBl. 2020, part I, p. 575, 578.

²⁴ BAnz AT 09.04.2020 V2.

²⁵ https://www.gkv-spitzenverband.de/media/dokumente/presse/pressemitteilungen/2020/Gemeinsame_PM_KBVGKV_AU_GKV_2020-03-09.pdf.

²⁶ <https://www.bmwi.de/Redaktion/DE/Downloads/E/eckpunkte-corona-soforthilfe>.

²⁷ <https://www.tagesschau.de/wirtschaft/coronakrise-wirtschaft-105.html>.

²⁸ <https://www.dgb.de/presse/++co++6f58fa66-652b-11ea-833c-52540088cada>.

4. Latest Developments and 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 safety²⁹. 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 members³⁰. 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, with Act of May 20, 2020 an amendment is inserted into the Works Constitution Act which allow works councils to take decisions by video or telephone conferencing³¹. This Section 129 Works Constitution Act is to enter into force retroactively from March 1, 2020 and is limited in time until December 31, 2020.

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. Here, the "social protection package II" of May 20, 2020³² provides a remedy. With the amendment of Section 114 Labour Court Act (ArbGG) empowering the Labour Courts to order oral proceedings using video and sound transmission ("online-courts") for the sake of protection against infectious diseases, the Legislator ultimately ensures a careful balance between health protection on the one hand and the right to legal protection provided by the rule of law on the other hand. It remains to be seen whether this option will be widely used *in praxi*. Nonetheless, the courts' digital infrastructure as a potential pitfall could also counteract positive resonance. Moreover, this innovative option is currently limited in time until December 31, 2020.

Furthermore, the debate on 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*. Seen in the light of labour law context, 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.

The pandemic also shed light on the grievances in slaughterhouses where several hundreds of workers tested positive for SARS-CoV-2 and could lead to significantly improved occupational safety in the meat industry. In response to these exploitative conditions reported, the BMAS has already announced comprehensive measures. To counteract *de facto* low wages and to better monitor the compliance with health and safety laws, a ban on temporary agency work and on subcontracts by January 1, 2021 has been adopted by the Federal Government on May 20, 2020³³. Therefore, meat processing

²⁹ Cf. Section 87(1) no. 7 Works Constitution Act (BetrVG).

³⁰ Cf. Section 33(1) sentence 1 BetrVG.

³¹ BGBl. 2020, part I, p. 1044, 1051.

³² BGBl. 2020, part I, p. 1055.

³³ https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Pressemitteilungen/2020/eckpunkte-arbeitsschutzprogramm-fleischwirtschaft.pdf?__blob=publicationFile&v=3.

companies will only be allowed to pursue their core activities with directly employed workers. Nevertheless, such a project must be assessed in the light of the relevant legal framework. At the level of national constitutional law, an appropriate balance of conflicting interests must be achieved within the framework of the requirements of the severe affected freedom to pursue an occupation under Article 12 Basic Law (GG). At the level of European law, given the existence of occupational health and safety as an overriding requirement of the general interest, such a provision should also be compatible with the freedom of services according to Article 56 TFEU. If such an Act will be passed, the corona pandemic would thus have at least one positive side-effect.

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