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Legal

The employment during the pandemic
The currently ten most important labour law questions... and answers
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The employment during the pandemic*
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1. Sick employees - continued payment of remuneration and "self-inflicted"
2. Remote work
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4. Dealing with suspected cases
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6. Employees "stuck" abroad - Remuneration of "stuck"?
7. Childcare due to school and kindergarten closure
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*We would like to point out that (official) company-wide measures due to a pandemic (CoVid-19) are "uncharted territory" from the point of view of labour law and that several of the discussed questions have not been so far subject to the jurisdiction of the (German Federal) labour court. We have made our assessments and recommendations in a balanced and at the same time needs-based manner. It cannot be ruled out that the legal development will bring new or other findings in the next few days (e.g. due to temporary injunction proceedings initiated by the labour courts by the affected employees). We will continuously update the questions (and their answers).

The employment during the pandemic

1 Sick employees - continued payment of remuneration and "self-inflicted"

1. Is the employee who is ill with CoVid-19 entitled to continued payment of remuneration if he travels privately...

In principle, an employee who is ill with CoVid-19 is entitled to continued remuneration for the period of incapacity for work up to a period of six weeks in accordance with Sec. 3 para. 1 German Act on Continued Remuneration (*Entgeltfortzahlungsgesetz, EFZG*).

(1) ... to a destination designated by the Robert Koch Institute (RKI) as a risk area prior to departure and falls ill there?

- The claim to continued payment of remuneration under Sec. 3 para. 1 EFZG exists only if the employee is not at fault for the illness. In the event of incapacity to work for which the employee is responsible as a result of the illness, there is no entitlement to continued remuneration.
- According to the standard of the German Federal Labor Court (*Bundesarbeitsgericht, BAG*), culpable conduct exists if the employee grossly violates the conduct that can be expected from a reasonable person in his own interest (see BAG judgement dated 11 November 1987, 5 AZR 497/96). It can therefore be argued materially that this is the case if the employee travels to a destination that is designated as a risk area.

(2) ... to a destination which is designated by the RKI as a risk area during his stay and, despite that designation, continues his private stay and falls ill during that continued period?

In general, a prudent employee can be expected to end his or her private stay there after classification as a risk area, so that in this case, too, there are material reasons to assume that the employee who is ill is at fault and thus has no claim to continued payment of remuneration.

In practice, two aspects in particular must be taken into account in this constellation:

- Burden of proof for infection: The employer has the burden of proof for the facts justifying the fault; the employer has to show (and in case of denial by the employee to prove) that infection of the employee occurred in the continued period. However, the employer may claim relief from the burden of proof (proof of first appearance).
- Reason for continuation of the stay for illness: fault of the employee should be denied if he had to continue the stay for reasons he could not justify (e.g. because he was quarantined as a hotel guest - together with all other guests of the hotel at the destination - due to a CoVid 19 case and became infected during the quarantine period).

(3) ... to a destination which is "only" covered by the general travel warning issued by the Federal Foreign Office on 17 March 2020, but which has not been designated as a risk area by the RKI, and there falls ill with CoVid-19?

In this case, there is unlikely to be any fault on the part of the employee suffering from CoVid-19 at the place of destination and therefore a right to continued payment of the fee would exist.

The employment during the pandemic
2 Remote work

2. Can the employer instruct Remote Work? Can the employer authorise remote work from home on his own authority?

Remote Work includes the provision of work temporarily at a location other than the workplace.

(1) How can Remote Work be distinguished from work in the home office? Why is this distinction legally relevant?

- Work in a home office includes - as telework within the meaning of the German Workplace Ordinance (*Arbeitsstättenverordnung, ArbStättV*) - the activity of the employee at a permanently installed computer workstation in his private sphere. Among other things, it is subject to the restrictive requirements of the ArbStättV.
  - ArbStättV determines, among other things, health-related minimum requirements for teleworking workplaces, the duty of the employer to assess the risk of working conditions at home office workplaces and to instruct the employee.
- Differentiation is made according to the intention of the employee and the employer when they begin to provide services in the private sphere (ex ante evaluation):
  - Remote Work: The employee shall only carry out activities in the private sphere during the pandemic-relevant period and afterwards the regular workplace shall again be exclusively the operational workplace in the employer's premises.
  - Home Office: Activity even after the end of the pandemic-relevant period at the computer workstation set up in his private home.
- Legal relevance of the demarcation: Work in the home office is subject to comprehensive requirements of the ArbStättV, among others.

(2) Can the employer instruct Remote Work to the employee? Can the employee decide autonomously to perform its work remotely?

- Employer can generally unilaterally determine the place of performance of work in the exercise of its right of direction in accordance with the provisions of the employment contract.
  - The employer cannot instruct Remote Work if the employment contract determines the place of work and does not contain a provision on the change of the place of work by the employer by virtue of the right of direction.
- In the case of existing employment contract regulations: Employer must exercise the right of direction at its own discretion (Sec. 106 s. 3 of the German Industrial Code (*Gewerbeordnung, GewO*).
  - When weighing up the interests of the employee, the private sphere of life of the employee has to be considered. In individual cases, however, the interests of the employer must be given higher priority in the event of a pandemic (e.g. in the event of a concrete risk of infection).
- Autonomous decision of the employee not lawful; in particular, the employee cannot cite general concern about an infection as a reason for a preventive absence from work. In this context, the employee has no claim to mobile work (here: remote from home).

The employment during the pandemic
2 Remote work

(3) Is Remote Work subject to special labour law requirements?

- Remote Work is generally subject to (only) general labour law requirements
  - Application of the ArbStättV to remote work has not yet been clarified in case law; although this is partly accepted in practice, the more weighty reasons (including the will of the legislator of the ArbStättV) speak against application of the ArbStättV.
- General requirements include above all compliance with the German Work Protection Act (*Arbeitsschutzgesetz, ArbSchG*), German Working Time Act (*Arbeitszeitgesetz, ArbZG*), General Data Protection Ordinance (*Datenschutzgrundverordnung, DSGVO*) and German Data Protection Act (*Bundesdatenschutzgesetz, BDSG*), as well as the participation rights of the elected works council/staff council:
  - ArbSchG requires above all the extension of the instruction (Sec. 12 ArbSchG) on safety and health protection to mobile work.
  - Requirements of the ArbZG include observance of the legal maximum working hours and compliance with rest breaks.
  - The requirements of the DSGVO and BDSG include above all legally compliant processing of the data made available by the employer or used by the employee from digital sources (cloud, employer's network, USB stick) or analogue sources (documentation in file folders etc.)
    - Employer must ensure that the data is processed by the employee in conformity with data protection regulations (above all by means of suitable technical security for remote access (tokens etc.), by technically excluding the integration of external IT (external printers, USB sticks etc.).

(4) What provisions should be included in agreements on remote work?

- As far as operationally feasible, it is recommended that the employer and the employee agree on remote work with regulation of individual particularities, among others:
  - on alternating working hours if the employee - due to the closure of a day care centre/school - has to look after children during normal working hours in addition to his remote work activities,
  - Documentation of working hours (if working hours are not documented electronically (e.g. via IT-login),
  - Regulations on the obligation to maintain secrecy and the treatment of confidential information of the Principal (includes, in addition to regular use of the general security instruments for the IT used (password protection, screen blocking), in particular data processing of the data processed during Remote Work in conformity with data protection regulations (in particular from analogue sources such as paper documentation in file folders etc.).

The employment during the pandemic
3 Home office

3. When, in view of the further implementation of the employment relationship during the pandemic, is it appropriate to determine a home office activity? Which legal framework conditions must be considered for home office work?

(1) Which legal requirements do the employer and employee have to observe when setting up the home office activity?

- Home office activity is conditional at the starting point (Sec. 2 para. 7 ArbStättV):
  - a written agreement between the employer and the employee on the permanent installation of a computer workstation and its material framework conditions (working hours, duration of telework, technical equipment and facilities of the teleworkstation), and
  - the provision by the employer of the equipment required for the domestic computer workstation with furniture, work equipment, communication facilities, etc. (whereby furniture, work equipment and existing telecommunications equipment (e.g. Internet connection) can also be used by the employee (which are taken into account with special remuneration).

(2)Can employer instruct Home Office to the employee? Does the employee have a claim to a home office workplace?

- The employee has no claim to home office activity and employer generally cannot unilaterally instruct Home Office to perform the work.
  - Home office activities require a separate legal basis as an individual contractual agreement or as a company/service agreement.
  - Arbitrary "establishment" of the home office activity by the employee without an effective legal basis includes violation of the contractual obligation to perform the work at the contractual workplace, which the employer may sanction if necessary.

The employment during the pandemic
3 Home Office

(3) Which legal requirements are subject to the implementation of the home office activity from the ArbStättV?

- Employer must carry out and document a risk assessment for a specific workstation (Sec. 3 ArbStättV)
  - Risk assessment includes, among other things, physical stress and psychological stress for individual employees; it also includes an on-site analysis at the employee's specific workstation (determination of the specific physical and psychological stress is, incidentally, typically carried out using questionnaires).
  - Risk assessment must take into account legal requirements for workplaces from the appendix ArbStättV (among other things, sufficient space and sufficiently large working areas in the employee's private sphere).
  - Documentation of the risk assessment shall include any hazards identified and measures to eliminate the hazard.
- Employer must instruct the employee before the start of the home office activity and during its execution annually (Sec. 6 ArbStättV)
  - Instruction essentially refers to the concrete implementation of the home office activity, taking into account the findings of the risk assessment and the measures for risk avoidance/removal determined by the employer.

(4)What other legal requirements have to be considered for home office activities?

- General requirements include in particular ArbSchG, ArbZG, DSGVO and BDSG
  - ArbSchG requires above all an extension of the instruction (Sec. 12 ArbSchG) on safety and health protection to the location of the home office activity.
  - Requirements of the ArbZG include observance of the legal maximum working hours and compliance with rest breaks.
  - The requirements of the DSGVO and BDSG include above all legally compliant processing of the data made available by the employer or used by the employee from digital sources (cloud, employer's network, USB stick) or analogue sources (documentation in file folders etc.)

The employment during the pandemic
3 Home Office

(5) What rules should be included in agreements on home office activity?

- Establishment of the specific workstation (with concrete designation of the relevant IT, the furniture to be brought in by the employee)
- Lump-sum reimbursement of the employee's expenses arising from the establishment and operation of the home office (including the use of the employee's private internet connection, furniture, etc.)
  - Taking into account wage tax law impact (above all, any pecuniary advantage, if flat rate > actual costs of the employee).
- Right of access of the employer to the computer workstation to control compliance with the legal framework
  - With the consent of the other members of the household living in the employee's private home (if their private home is affected by the employee's access to the computer workstation)
- Other general labour law regulations:
  - about possible alternating position of working time and documentation of working times (if working times are not documented electronically (e.g. via IT-login)),
  - about reporting/escalation process in the case of technical IT malfunctions that directly affect the employee's ability to work,
  - about any necessary attendance times of the employee at the place of business (for partial home office activities)
  - Regulations on the obligation to maintain secrecy and the treatment of confidential information of the Principal (includes, in addition to regular use of the general security instruments for the IT used (password protection, screen blocking), in particular data processing of the data processed during Remote Work in conformity with data protection regulations (in particular from analogue sources such as paper documentation in file folders etc.).

(6)Which participation rights of the works council/staff council are subject to the establishment of the home office?

- Co-determination rights of the work council can include (a) Sec. 87 para. 1 no. 1 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) with special rules of conduct in the Home Office), (b) Sec. 87 para. 1 no. 2 BetrVG (above all possible modification of the working time in the Home Office), (c) Sec. 87 para. 1 no. 6 BetrVG (display screen work place), (d) Sec. 87 para. 1 no. 7 BetrVG (prevention of industrial accidents).
- Participation rights of the staff council are assessed in accordance with the German Staff Council Act (*Bundespersonalvertretungsgesetz, BPersVG*) Act or the respective District Staff Council Act (*Landespersonalvertretungsgesetz, LPersVG*).

The employment during the pandemic
4 Dealing with suspected cases

4. Is the employee obliged to inform the employer (1) of physical symptoms that give rise to suspicion of the pandemic disease, (2) of personal contacts with persons affected by the symptoms? Is the OP obliged to inform the staff of such suspected cases?

(1) Obligation of the employee to report physical symptoms or contact with persons affected by symptoms

- In the starting point, there is generally only an obligation to report physical symptoms that include incapacity to work due to illness; the employee does not generally have to provide any information on the illness itself.
- There is an exception to this rule in the case of illnesses which endanger other employees, i.e. which may expose them to the risk of infection by the symptomatic employee. In this case, the ill employee is obliged - by virtue of his duty of loyalty and consideration under his employment contract - to inform the employer of this so that the employer is in a position to take appropriate protective measures in favour of the rest of the workforce. In this case, the duty of notification already exists in the case of physical symptoms.
- On the other hand, from an employment law perspective, mere contact with symptomatic persons should not (yet) trigger such a duty of notification; from a practical perspective, however, it is recommended for the employer to induce relevant employees to make such a notification (through active general communication with employees).

(2) Obligation of the employer to report (a) infected persons, or (b) suspicious cases to the staff

- Within the scope of his duty of care (Sections 241, 618 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), the employer is required to inform the staff about any infections that have occurred in the employee/employee with symptoms. For reasons of data protection law, the name of the affected employee is generally not to be disclosed by the employer.
- The employer should obtain a list from the infected employee of all the employees in his company with whom the symptomatic/afflicted employee last had direct contact, inform the affected employees of this and, if necessary, send them to quarantine.

The employment during the pandemic
5 Quarantine for risk area returnees

5. Can the employer order a domestic quarantine for employees returning from private stays in risk areas? What is the legal situation if the quarantine is ordered by a responsible state authority? In each case, what are the consequences for employee's claim for remuneration?

(1) Order of quarantine by the employer

- Employer can, for the protection of the workforce, exempt a employee who has been in a risk area from the obligation to work until it is clarified whether the employee concerned has become infected. A employer has this possibility independent of a corresponding official quarantine order. If the stay in the risk area was a business trip resulting from the employment, the employer has to compensate the employee during the release from work. If the stay in the risk area was for private purpose, a distinction must be made: If the RKI assesses the risk area after the employee has returned, the leave of absence must also be remunerated. If the assessment as a risk area already existed before or during the employee's stay and the employee continues his stay in the risk area after the assessment, there are important reasons for not remunerating the period of exemption.
- If an employee shows objective (i.e., verifiable) signs of the relevant infection, the employer can instruct the employee to consult a doctor for clarification of an infection. If the employee refuses to comply with this, an exemption shall also be considered; in this case, the remuneration shall also be withheld for the exemption period until the employee has complied with the request. Refusal to comply with the instruction includes a violation of the duty of repentance and consideration under the employment contract, so that the employer can take further sanctions under employment law (warning, etc.) if the refusal continues.

(2) Order of quarantine by authority

- If a healthy employee is quarantined due to an official order or if an official ban on activities is imposed on him (Sections 30 et. of the German Infection Protection Act (*Infektionsschutzgesetz, IfSG*), the healthy employee has no claim for remuneration against the employer from the employment relationship for these periods of non-fulfilment of the work performance due to the official order. The employee may assert the loss of earnings associated with this for a maximum period of six months against the federal state in which the official measure was ordered (Sec. 66 para. 1 IfSG). The compensation shall be paid by the Principal on behalf of the competent authority and the Principal may - upon application - demand reimbursement of the relevant expenses from the authority (Sec. 56 paras. 1 and IfSG).

The employment during the pandemic
6 Employees "stuck" abroad - Remuneration of "stuck"?

6. Is there a claim to remuneration for employees "stuck" abroad who have to extend their private stay abroad for reasons for which they are not responsible?

This case constellation concerns, for example, employees who have to extend the vacation originally granted by the employer due to (1) quarantine of the vacation hotel occupied as a hotel guest, or (2) the delay of the return trip due to a cancellation of the originally booked return trip (e.g. flight connection).

(1) Generally no claim to remuneration

- Prolongation of the private stay abroad concerns risk of the private sphere of life and therefore has no relation to the employment relationship.
  - ➢ No entitlement to (continued) payment of remuneration under the EFZG, as the employee is not incapable of working due to illness.
  - ➢ No claim under Sec. 56 IfSG, as IfSG is only applicable to domestic matters.
- However, in individual cases, a claim for remuneration under Sec. 616 BGB (unless this is excluded by employment or collective bargaining agreements) is conceivable; in particular in the case of quarantine matters (for details of Sec. 616 BGB, see the answer to Question 8)

(2) Mutual agreement with employer

In all other respects, amicable agreement with the employer on the amicable extension of the non-performance of work beyond the originally granted leave is relevant, as otherwise the employee will not perform his work without excuse

- by granting additional vacation days from annual vacation entitlement ./. reduction of overtime or other leisure time credits,
- through unpaid release from work for the period of the extension.

The employment during the pandemic

7 Childcare due to school and kindergarten closure

7 Which employment law framework conditions (and possibilities of structuring) are to be observed for the employment relationship with employees who are affected by the closure of a school or kindergarten and have to look after their children?

(1) Temporary entitlement to remuneration for employees who are unable to perform work due to care at home

- Temporary continued payment of remuneration in accordance with Sec. 616 BGB, unless application of the standard is excluded by contract (collective agreement ./. employment contract).
- Care must be provided:
  - Restriction to children to be looked after who have not yet reached the age of 12,
  - There is no other suitable person for the care.
- Continued payment for "relatively insignificant time" within the meaning of Sec. 616 BGB: To determine the exact period in the individual case, taking into account, for example, the length of employment, whereby a period of a few days to a few (probably max. 6) weeks is usually still regarded as "relatively insignificant time":
  - Due to the comparability with the care of sick children, the lower limit is five days (during this time the employee should (be able to) organise other care),
  - Granting remuneration for up to ten working days may be advisable in individual cases - considering that childcare is currently more difficult to organise due to the pandemic,
  - Risk for the employer in the event of too short granting period: subsequent payment of the remuneration for the period which would have had to be remunerated under Sec. 616 BGB.
- After five to ten working days, agreement with the employee on unpaid leave; if necessary, recommendation to "celebrate" overtime or take leave or, if necessary, order short-time work.

(2) Possibilities for the employer to arrange for the employee to perform work despite childcare (in compliance with the co-determination rights of the works council/staff council)

- Offer remote work (with more flexible working hours if necessary).
- Support in the search for carers.

The employment during the pandemic

7 Childcare due to school and kindergarten closure

(3) The expected new regulation: Compensation claim according to Sec. 56 para. 1a IfSG (version of the government draft of 23 March 2020)

- Compensation for loss of earnings for a maximum period of six weeks, if AN has to look after children who have not yet reached the age of 12 or who are disabled due to school or kindergarten closure.
- No entitlement:
  - ➢ Existence of any other reasonable possibility of reasonable care:
    - Other parent, suitable childcare facility (e.g. "emergency care" by kindergarten).
    - Not to be considered for reasonableness: Persons who belong to a risk group with regard to the pandemic, for the prevention or spread of which the school/kindergarten is temporarily closed by the competent authority (e.g. grandparents of the employee who have reached the age of 60, parent with relevant previous illnesses).
  - ➢ Care in periods of school holidays, in which closing would take place anyway because of school holidays.
    - Currently at times of Easter holidays (e.g. in Schleswig-Holstein from 30 March 2020 to 17 April 2020).
    - But: (Probably) claim if school would offer care during the school holidays (e.g. through open all-day school, after-school care, etc.)
- Level of entitlement: 67% of the loss of earnings, maximal EUR 2,014 per month.
- Realisation of the claim: Agreement between employer and employee recommended on unpaid leave of absence due to childcare.
- New regulation to come into force on 30 March 2020.

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8 Official order for temporary restriction/closure of business operations

8) Which employment law framework conditions (and possibilities for structuring) must be taken into account when the authorities order the temporary restriction/suspension of the employer's business operations?

(1) Starting point: operational risk theory and other employment opportunities

- Temporary restriction/suspension due to an official order generally means that relevant employees are temporarily unable to work, which does not affect the employee's claim to remuneration (Sec. 615 p. 3 BGB).
- Employer may, if necessary, temporarily instruct the employee to work elsewhere by means of the right to issue instructions and in compliance with the relevant provisions of the employment contract
  - with modification of the content of the work to be performed,
  - with transfer to another place of work, provided that the employee can reasonably be expected to modify the content of the work performance or the place of work (with unchanged remuneration).
  - Alternatively, the modification can be brought about by mutual agreement with the employee.

(2) Arrangement of short-time work and receipt of short-time allowance

- Temporary restriction/suspension of business operations due to official order includes standard case for ordering short-time work and receiving short-time compensation (see the answers to question 9).

The employment during the pandemic
9 Short-time work and short-time allowance

9. In connection with a pandemic, is there the possibility of short-time work? Is the employee entitled to short-time work compensation? What legal framework conditions must be observed and what are the possible arrangements?

Employer can take pandemic as an occasion to order short-time work and apply for short-time work compensation. The legislator has considerably eased the requirements for short-time work and the granting of short-time work compensation (*Kurzarbeitergeld, KUG*) with the "Act on the Temporary Crisis-Related Improvement of the Regulations for Short-time Work Compensation" (KUG-2020) passed on 13 March 2020. The legal ordinance (RVO KUG-2020) for the application of the relief in practice under KUG-2020 has been issued by the German Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales, BMAS*) on 23 March 2020. The KUG-2020 is limited until 31 December 2021.

(1) When is short-time work in effect?

Short-time work exists if the working hours agreed in the employment contract are temporarily reduced.

- In practice, the working time can be reduced to a lower weekly working time (e.g. from 40 hours to 20 hours) or to a complete failure to perform work ("short-time work zero").
- Main performance obligations of the employee (provision of work) and the employer (remuneration for work performed) shall be suspended to the extent of short-time work during its duration.

(2) Can the employer order short-time work unilaterally?

No, the ordering of short-time work requires an effective legal basis:

- Works agreement: If a works council is elected in the company, the introduction of short-time work is subject to the mandatory co-determination of the works council (Sec. 87 para. 1 no. 3 BetrVG). In this case, the introduction of short-time work is regularly based on a works agreement.
- Collective bargaining agreement: The legal basis for employment relationships governed by collective bargaining agreements can also be a collective bargaining agreement. In past, collective agreements in the metal and electrical industry, for example, contained such collectively agreed regulations.
- Employment contract: If neither of the two aforementioned legal bases under collective law are available to the employer for the introduction of short-time work, the introduction of short-time work requires an individual contractual agreement with the employee. The possibility of introducing short-time work can be agreed upon alternatively (1) already in the initial employment contract or (2) in a supplementary agreement to the employment contract.

The employment during the pandemic
9 Short-time work and short-time allowance

(3) Which regulations should the legal basis for short-time work (collective agreement or employment contract) typically contain?

- Start and duration of short-time work (for reasons of flexibility: generally recommended: exhaustion of the maximum statutory period),
- Concrete scope, location and distribution of the weekly working time - taking into account short-time work - to be performed by the employee (including arrangements for flexible modification during the period of short-time work),
- Arrangements for ending short-time working (especially if the legal requirements no longer apply; the contractual working hours then apply again)
- If a working time account model is in place, agreement that positive balance of working time account will be reduced before short-time work is taken up,
- Top-up payment from the employer (if this is to be granted),
- (Clarifying) regulation of the handling of the KUG (= immediate application by the employer to the responsible employment agency (AfA), application available on the website of the AfA: https://www.arbeitsagentur.de/datei/antrag-kug107_ba015344.pdf; in addition, the employer must notify the AfA of any loss of working time: https://www.arbeitsagentur.de/datei/anzeige-kug101_ba013134.pdf).

(4) Which legal framework conditions must the employer take into account when granting a top-up payment?

- Supplementary payment includes employer's subsidy to KUG to mitigate economic disadvantages which employee suffers as a result of short-time work (taking into account KUG) compared with his net remuneration from his work performance with working hours under employment contract.
  - ➢ Top-up payment with the sole purpose of compensation privileged under social security law (non-contributory up to 80% of the regular net salary for working hours under the employment contract)
  - ➢ Employer has to document this exclusive compensation purpose transparently in the legal basis of the top-up payment (e.g. by direct regulation at KUG and designation as "short-time work allowance").
- Employer can generally determine the amount of the top-up payment autonomously, as long as the sum of the top-up payment and the KUG does not exceed the net remuneration from work performance according to the working hours under the employment contract
  - ➢ But administrative practice of the AfA: top-up payment, which together with KUG fully compensates the net loss of remuneration through short-time work, does not include a compensation function (more)
    - The view of the AfA does not necessarily follow from the legal regulations of the KUG (Sec. 95 et. of the 3rd book of the German Social Security Code, *Sozialgesetzbuch III, SGB III*).
    - Increase to 100% should be clarified with the responsible contact person at AfA.

The employment during the pandemic
9 Short-time work and short-time allowance

(5) What are the conditions for granting KUG under KUG-2020?

- Unavoidable temporary substantial loss of working hours for at least 10% of employees subject to social insurance contributions and the associated loss of earnings. Based on economic reasons (e.g. no follow-up orders or temporary postponement of current orders, regular application of pandemic-related short-time work) or due to unavoidable event (e.g. storm disaster).
- Operational requirements: Employment of at least one person subject to social insurance contributions.
- Personal requirements: Employee subject to social insurance contributions in an employment relationship that has not been terminated.
- Notification to the Federal Employment Agency (AfA): In writing by the employer at the latest in the calendar month in which the days for which KUG is applied for lie. Responsible is AfA in which district the payroll accounting office responsible for the employer is located is responsible.
- Effective legal basis for reducing working time (see answer to question 9 (2)).

(6) Unavoidable temporary substantial loss of working hours: When is this present? What should be taken into account if short-time working is not to apply to the entire company but only to individual departments?

- Unavoidable loss of working hours means that employer cannot avoid loss of working hours through alternative HR measures; alternative measures include in particular
  - Reduction of free time credits/plus hours on working time accounts
    - No alternative measure: granting (residual) leave to relevant employees.
    - Use of negative working time balances in working time account models to avoid short-time work during the period of application of KUG-2020 not necessary.
  - If short-time work does not affect the entire company, but only individual departments: temporary transfer of employee from department affected by short-time work to a department for which there is (still) an additional - temporary - need for work.
    - Transfer in compliance with the employment law framework: only within the framework of the exercise of the right to manage.
    - Loss of working hours is therefore unavoidable, also with regard to individual employees, if the transfer is not covered by the right of direction (the employer is not obliged to declare a change of notice in order to fulfil the requirement of unavoidability).

The employment during the pandemic
9 Short-time work and short-time allowance

(7) Personal prerequisites for KUG: Are (1) employees who are incapacitated for work, (2) employees in terminated employment, (3) managing directors, (4) trainees also entitled to KUG?

- According to Sec. 98 SGB III, the personal prerequisites for entitlement to benefits under the KUG are as follows: (1) the employee continues or takes up employment subject to compulsory insurance after the beginning of the loss of working hours, (2) the employment relationship is not terminated by a termination agreement, (3) the employee is not excluded from the KUG
  - ➢ Incapacitated employees entitled to KUG for the period of continued remuneration within the meaning of the Continued Remuneration Act, if incapacity for work occurs on or after the beginning of the KUG
    - In the event of incapacity for work even before the start of the KUG: the employee receives sickness benefit at the level of the KUG for the duration of the KUG (Sec. 47b para. 3 SGB III).
  - ➢ No KUG entitlement of the employee in terminated employment
    - In the event of a lack of employment opportunities due to operational reasons, the employer shall only be entitled to release the employee (with continued payment of the remuneration until the termination of the employment relationship in accordance with the notice of termination).
- Managing directors of capital company are entitled to the KUG if their employment relationship is subject to social security contributions within the meaning of Sec. 7 of the Fourth German Social Security Code (*Sozialgesetzbuch IV, SGB IV*).
  - ➢ However, in view of their overall responsibility for the company's business operations, especially during the pandemic-related short-time work, managing directors should not be able to avoid a regular loss of working hours.
- In principle, trainees are entitled to the KUG (Sec. 25 para. 1 s. 2 SGB III); in practice, however, ordering short-time work and the associated entitlement to the KUG is out of the question, at least during the first six weeks of the loss of working hours.
  - ➢ In general, training allowances do not constitute remuneration for work performance and trainees are entitled to continued payment of training allowances even if they are absent from work during the first six weeks (Sec. 19.1 no. 2a BBiG).
  - ➢ For this reason, trainees are regularly not included in collective agreements on short-time work in practice.

The employment during the pandemic
9 Short-time work and short-time allowance

(8) To what amount and for what duration is KUG granted? Does the employer has to contribute to the costs of granting KUG? What is the (income) tax assessment?

- Amount: 60% of the net salary due (67% for households with at least one child).
- Duration: 12 months, extended to a maximum of 24 months by Legal Ordinance (*Rechtsverordnung, RVO*).
- Costs for employer: According to KUG-2020, subsidisation of social security contributions by AfA (i.e. AfA bears these costs during the term of KUG-2020). Employer can voluntarily grant a subsidy to the KUG (as a remuneration component that is then subject to tax and social insurance).
- (Income) tax treatment: KUG granted by the AfA includes tax-free income for the employee (Sec. 3 no. 2 of the German Income Wage Tax Act, (*Einkommenssteuergesetz, EStG*)). However, it is subject to the progression proviso; i.e., the individual income tax rate is increased for the employee, since the tax-free wage replacement benefits (incl. KUG) are also included in the calculation of the applicable tax rate. As a result, the taxable income is subject to a higher tax rate. Any subsidy granted by the employer to the KUG includes a taxable remuneration.

(9) Can KUG under KUG-2020 also be granted retroactively to 1 March 2020?

- According to the current administrative practice of the AfA, KUG can also be granted retroactively under KUG-2020 (i.e., with the assumption of social security contributions) if, at the time of the application for KUG, employer has not (yet) carried out the accounting and payment of the remuneration for the accounting period March 2020.

The employment during the pandemic
9 Short-time work and short-time allowance

(10)What other consequences under labour law result from the order of short-time work on the employment relationship?

- Company pension scheme: Suspension of the employee's remuneration to the extent of short-time work - conditional for defined contribution plans (BOLZ) and defined contribution plans with minimum benefit (BZML) - no contributions during the period of short-time work
  - ➢ None (zero for short-time work) or reduced deferred compensation during the period of short-time work.
  - ➢ In the case of employer-financed company pension schemes or employer subsidies for deferred compensation: No or reduced payment of employer‘s contributions.
  - ➢ If the BAV is implemented through direct insurance and the pension fund: insurance contract is exempt from contributions in the event of short-time work zero
    - If no premiums are paid, there is usually no insurance cover for disability/occupational incapacity; it is therefore recommended in these cases that the employee continues the insurance with own premiums.
- Reduction of other remuneration components whose amount depends on the remuneration of the employee in the relevant reference period (e.g. continued remuneration according to EFZG, holiday pay according to BUrlG).

The employment during the pandemic
10 Co-determination rights of the works council/staff council

10 What co-determination rights does the works council/staff council have in the case of pandemic-related measures of the employer?

(1) Participation rights of the works council may include, depending on the pandemic measures taken by the employer:

- Ordinance on special hygienic behavior (if not part of the work performance): Co-determination from Sec. 87 para. 1 no. 1 BetrVG; if linked to health protection, additionally from Sec. 87 para. 1 no. 7 BetrVG.
- Order of short-time work or other temporary reduction of working hours: Sec. 87 para. 1 no. 3, BetrVG; when company holidays are ordered, Sec. 87 para. 1 no. 5 BetrVG (but: no co-odetermination in the case of temporary paid leave).
- Home office / remote work: Co-determination from Sec. 87 para. 1 no. 6 BetrVG (if this includes additional technical supervision / control of the employee compared to previous activities).
- Agreement on unpaid exemption: Section 87 (1) no. 10 BetrVG.

(2) Participation rights of the staff council are assessed according to the respective legal basis:

- Staff councils in federal authorities have co-determination rights under Sec. 76 (3) BPersVG for the aforementioned measures of the working group.
- Participation rights for staff councils in state authorities ./. other public employers covered by the respective state staff representation law are assessed in accordance with the respective state staff representation law (in Hamburg for the aforementioned measures of the employer e.g. from Sec. 74 para. 1 HPVG).

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