

COVID-19: EMPLOYMENT POLICIES AND FACT SHEETS FOR COMPANIES IN GERMANY

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The outbreak of novel coronavirus ("Coronavirus" or "COVID-19") affects employment relationships in Germany. Employers are facing a number of issues on how to deal with the current situation and potentially upcoming scenarios.

The intention of this factsheet is to provide answers to frequently asked questions arising for employers and their employees in Germany. The answers reflect the current situation regarding the expansion of the Coronavirus in Germany (as of April 1, 2020). As the situation further develops and changes quickly, answers may change as well and may require amendments from time to time. This is especially the case as the German legislator is currently planning and passing a number of laws in response to COVID-19 that might have further implications on the answers below.

We will continue to monitor the situation in Germany including information published by the competent German authorities (such as the local health authorities (*Gesundheitsämter*), the German Federal Disease Control And Prevention Institute (*Robert Koch Institute*) and Federal Ministries).

The answers below are generally based on the assumption that no works council has been established at the employer's business in Germany. Question 13 highlights some key implications for employers in Germany with a works council.

This factsheet shall not replace legal advice and it should not be regarded as comprehensive or conclusive summary. Before relying on this factsheet we recommend to obtain individual advice taking into account any specific individual circumstances as well as new developments.

Q1 - WHAT MEASURES ARE EMPLOYERS IN GERMANY REQUIRED TO TAKE IN RESPONSE TO THE CORONAVIRUS?

1. Every employer has a general duty of care (allgemeine Fürsorgepflicht) towards its employees. The employer is obliged to take all reasonable measures in order to protect its employees, especially from infections at the workplace.
2. With the current situation, reasonable measures will generally include (i) providing general information to employees about how to reduce the risk of an infection (e.g. general hygienic precautions; avoiding close contact with people having symptoms; elbow cough; not touching the face; etc.), (ii) providing soap and/or alcohol-based hand sanitizer and (iii) asking employees to stay or go home when they feel sick. Where possible, employers should also consider offering their employees the option to work from home.

3. In addition, it will generally be reasonable to further request employees to immediately notify the employer if either (i) they have been in direct or indirect contact with an infected person or a person that is in government required quarantine, or (ii) they have traveled to specific risk areas (especially such areas for which specific warnings have been issued by German government authorities, Reisewarnungen).
4. It would not be permissible to prohibit employees to undertake personal travel to specific areas, even if these have been declared to be risk areas by government authorities. However, the employer could request that employees returning from specific risk areas do not attend work for a reasonable time period (approx. 14 days based on current incubation time period data). The employer would be obliged to continue paying employees their full remuneration in case of such self-quarantine measure. Further, it could be argued that an employer will not be obliged to continue an employee's remuneration in case the employee is infected while traveling to a risk area (whereas it may be difficult to enforce such position in practice given the difficulties to prove time and place of an infection).
5. If an employer learns that one of its employees (a) has been infected, (b) is in government required quarantine or (c) has been in contact with a person who is infected or in government required quarantine, the employer should generally as a measure of precaution consider closing the affected office (and ask employees to telecommute, if possible). The closure should occur for a reasonable period of time, generally either until (a) it has been confirmed that there has been no infection or (b) for approx. 14 days following the affected employee's last day at work (based on current incubation time period data). Further, the affected workspace should be isolated and/or disinfected, as reasonably possible. Nevertheless, the employer will need to keep in mind an affected employee's right to privacy (and potentially of the employee's family) and be careful with disclosing information on an affected employee's situation unless such employee has provided consent.

Q2 - CAN AN EMPLOYER IN GERMANY IMPLEMENT SAFETY CONTROLS BY NON-INVASIVE TEMPERATURE SCANS OF EMPLOYEES AND/OR CUSTOMERS?

6. German law generally prohibits employers from unilaterally conducting health assessments on employees or customers (unless such assessments are strictly required for the employee's/customer's specific activity which generally not be the case). At the same time, employers are obliged to take adequate measures to protect their employees and other individuals visiting the office. These conflicting interests need to be balanced.
7. Given the current Coronavirus situation in Germany and guidance provide by public and private institutions, it is our assessment that the employees' and the visitors' interests in not being subject to health assessments currently rather clearly prevails. Therefore, safety controls through the use of non-invasive temperature scanners by private employers are likely currently not permissible in Germany. This could change, especially in case of updated guidance from German authorities.

Q3 - ARE EMPLOYEES OBLIGED TO CONTINUE WITH BUSINESS TRAVEL?

8. If an employee generally is obliged to perform business travel as part of his or her duties under the employment agreement, this obligation will generally continue to apply regardless of the Coronavirus

9. However, employees are not obliged to travel to areas for which the German Foreign Ministry (*Auswärtiges Amt*) has issued a travel warning. As far as we are aware, such travel warnings (as far as business travel is concerned) have currently only been issued for certain areas of China.
10. For travel which is not business related, a world-wide travel warning has been issued and employer should take this into account also when considering business travel requirements. Especially given severe and quickly developing limitations on free movement (e.g. restrictions of air transportation, shutdown of many borders for foreigners, required quarantine in case of entering a country, etc.) travel might also hardly be possible from a practical standpoint currently.
11. Further, the German Foreign Ministry and other government institutions recommend avoiding any unnecessary travel at least to areas which are considered risk areas (currently, this seems to cover Egypt, France, Iran, Italy, Austria and Spain as well as parts of Switzerland, South Korea and the US). Furthermore, given the rapid spread of COVID-19, government institutions continuously urge to avoid any unnecessary travel and only travel where it is strictly necessary.
12. An employer should carefully review whether travel to any areas (especially to areas that are specifically considered risk areas) is strictly necessary. If not necessary, the employee will not be obligated to travel. The higher the risk in an area, the higher the bar will be for a trip to be considered "necessary". It will also need to be taken into account whether the purpose of the trip can be achieved with less endangering methods (e.g. utilizing telephone or videoconference systems).
13. Updated travel warnings and risk area specifications are issued by the [German Foreign Ministry](#) and by the [Robert Koch Institute](#) (each in German language).
14. Where an employee conducts business travel even though not being required to do so in accordance with the above principles, the employer could potentially be subject to damage claims (if any damages occur, such as treatment costs, emergency evacuation costs, and similar).
15. If an employee refuses to travel to a respective area (even to regions other than risk areas), the employer ultimately cannot force the employee to travel. However, such refusal by the employee can constitute a breach of contract with formal disciplinary measures applying (such as a formal warning and, ultimately, termination of employment).

Q4 - WHAT IS A COMPANY'S OBLIGATION TOWARD EMPLOYEES WHO CANNOT COME TO WORK OR TELECOMMUTE DUE TO MEDICALLY (OR GOVERNMENT) REQUIRED QUARANTINE?

16. The employer is obliged to continue payment of full remuneration for a period of up to six weeks (same maximum as continued remuneration in case of sickness). If an employee is affected for more than 6 weeks, the employer would no longer need to continue the remuneration (but the employee would instead receive a reduced continued payment from the competent health insurance [in case of sickness] or from the health authority [in case of quarantine]).
17. In case of a quarantine, the employer can apply for a refund of the remuneration it had to continue (i.e. during the six week period) from the competent local health authority provided that the quarantine was a necessary measure (which will be the case if imposed by the government, but not necessarily if merely

recommended by a doctor). The application would need to be filed within three months of the respective quarantine measure.

Q5 - WHAT IS A COMPANY'S OBLIGATION IN CASE THE COMPANY DIRECTS EMPLOYEES NOT TO COME TO WORK OR TO TELECOMMUTE OR IN CASE A COMPANY DECIDES TO CLOSE A SITE?

18. The employer is obliged to continue payment of the full remuneration. Depending on the specific reason for office closure, the employer might be able to apply for statutory short time work benefits in such scenarios (see Question 10).
19. It should be noted that employees can only be required to work from their home offices if that has been agreed to in their employment agreement or otherwise. Without such agreement, employees could refuse to work from home, even in case of an office closure, while still remaining entitled to continued payment of full remuneration.
20. Further, in case employees are instructed by the employer to work from their home, there is a risk that such employees could claim reimbursement (such as partial rent, utility costs, etc. for the use of their home offices). This risk can be excluded where employees are not strictly instructed to work from home, but are provided with the option to work from home.

Q6 - WHAT IS A COMPANY'S OBLIGATION IN CASE EMPLOYEES DECIDE NOT TO COME TO WORK AS A MEASURE OF PRECAUTION WITHOUT ANY DIRECTIONS OF THE COMPANY AND WITHOUT MEDICAL DIRECTIONS OR SYMPTOMS?

21. Such cases generally constitute an unauthorized leave. Remuneration does not have to be continued and disciplinary action can be taken (e.g. starting with an informal or formal warning and up to termination of employment).
22. It should be noted that the travel to work remains the employee's responsibility. Thus, a shutdown of public transportation or the employee's fear to use such methods of transportation will not constitute an authorized leave.

Q7 - WHAT IS A COMPANY'S OBLIGATION IN CASE EMPLOYEES DECIDE NOT TO COME TO WORK DUE TO OTHER REASONS, ESPECIALLY IN CASE THEY HAVE TO TAKE CARE OF THEIR OWN CHILD?

23. Where an employee is not able to attend work for a relatively brief period of time (generally no more than for a couple of days) due to specific personal reasons, the employer is generally obliged to continue remuneration for this period (unless agreed otherwise with the employee). Such scenario could include doctor's appointments to clarify a self-suspected infection, ensuring that necessary arrangements are made for the care of a close relative such as an infected child.

24. The same can apply in case of a shutdown of childcare facilities and other similar situations that prevent the employee from attending work. The German government is currently urging companies to voluntarily take a reasonable approach on continued remuneration payments in such scenarios.
25. Given a recent change of law, employees who cannot work because they have to take care of their children (up to an age of 12) due to the shutdown of childcare facilities can claim a partial compensation for their loss of income. The compensation is paid out for a period of up to six weeks by the employer. The employer can apply for a reimbursement for such costs at the competent authority. The compensation only applies if and to the extent that no other reasonable options for care of the children exist and there are no school holidays.

Q8 - UNDER WHAT CIRCUMSTANCES CAN A COMPANY REQUIRE AN EMPLOYEE TO USE VACATION OR OVERTIME ENTITLEMENT IF DIRECTED TO REMAIN OUT OF WORK AND CANNOT TELECOMMUTE?

26. If an employee is directed by a doctor (upon presentation of a doctor's certificate) or the government (quarantine measure or general safety measures) to not continue working then the employer cannot direct an employee to use any vacation or overtime entitlements for this purpose.
27. If an employee wishes for mere personal reasons (such as fear of infection even though no medical measure or government quarantine has been ordered) to remain at home, then the employer can ask the employee to make use of vacation entitlements for such purpose. If the employee refuses to do so, but still does not attend work then the answer for Question 6 can apply.
28. If no such cases exist, then an employer can potentially decide unilaterally with equitable discretion that employees shall make use of vacation entitlements. However, there is no clear case law on how extensively an employer can make use of this right. Likely, requiring employees to make use of their entire vacation entitlements would not be considered a decision with equitable discretion. Requiring employees to make use of one to three weeks could be considered a decision with equitable discretion provided that (a) employees do not have overriding personal interests (e.g. where employees state that they require the entitlement at other times during the year for other reasons), (b) some notice is provided to the employees prior to commencement of the instructed vacation. Thus, such imposed vacation could be used in case there is a lack of work due to virus-related impacts (and before making use of more severe measures such as short time work (see Question 10) or making employees redundant).

Q9 - ARE EMPLOYEES OBLIGED TO WORK OVERTIME WHERE THERE IS A VIRUS-RELATED BUSINESS NEED FOR ADDITIONAL WORK (E.G. ILLNESS OR QUARANTINE OF OTHER EMPLOYEES, INCREASED PRODUCTION NEEDS, ETC.)?

29. Generally, employees are obliged to work overtime only if and to the extent this has been agreed and only within the framework of statutory limitations (such as the German Working Time Act and the German Minimum Wage Act).
30. Where there is no agreement on overtime, employees can nevertheless be obligated to work overtime in limited cases. This can especially be the case if and to the extent that overtime is necessary to prevent

significant damage for the company. Any such overtime will need to be reasonable and will need to take into account the employees' interests

Q10 - WHAT ARE THE BENEFITS A COMPANY CAN APPLY FOR IN RELATION TO SIGNIFICANT CORONAVIRUS IMPACTS (E.G. SIGNIFICANT VIRUS-RELATED REDUCTION IN BUSINESS, AUTHORITY-ORDERED AND VIRUS-RELATED CLOSURE OF THE OFFICE, OR SIMILAR)?

31. The employer could consider implementing short time work (*Kurzarbeit*) and applying for statutory short time work benefits (*Kurzarbeitergeld*). This would involve reduced working hours and reduced remuneration (up to reducing the working time and remuneration to 0).
32. If the requirements for short time work are met, statutory payments to partially make up for the reduced remuneration could be granted for a period up to a maximum of 12 months. Key requirements for the benefit are (a) reasons for the reduced work/remuneration beyond the company's control (for example, lack of work due to Coronavirus outbreak or related closure of customer sites), (b) short time work for at least 1/3rd of the employer's workforce in Germany (exception limited up until 31 December 2020: 10% of the workforce is sufficient), (c) significant remuneration reduction (more than 10%) and (d) taking other reasonable measures first (such as requiring employees to make use of parts of their annual vacation entitlements, see Question 8).
33. This benefit would especially generally require (a) individual agreements with the employees and (b) a formal application at the competent employment agency.
34. Note that the requirements for applying and granting short time work benefits has been lowered for a limited period up until 31 December 2020 by (a) requiring that only 10% of the workforce in Germany is affected by the short time work, (b) fully exempting employers from social security contributions for the reduced working hours, (c) extending the short time work benefit also to temporary agency workers (*Leiharbeitnehmer*) and (d) waiving the requirement to build up negative working hour balances prior to the payment of short time work benefits. These changes are entered into force retroactively as of 1 March 2020. In addition a simplified and non-bureaucratic issuance of the short time benefits is expected due to a simplified application procedure and a reduced applicability test.
35. In addition to short time work, the German government is currently implementing extensive liquidity aid for companies in Germany. The aids available for companies will especially include (a) options for deferring tax payments, social security contributions and reducing tax advances, (b) making easier access to cheap loans via state-owned development bank *KfW*, and (c) opening existing large-scale guarantee programs beyond its current scope of companies in structural weak regions. In addition, one-off payments which must not be paid back can be granted on federal or state level to companies up to a specific size. In general, such measures are to be assessed separately under State aid law. However, the EU Commission has already announced an economic stimulus package, which is to include in particular a simplification of State aid regulations, so that the member states themselves can provide appropriate financial support to their entrepreneurs and citizens.

36. Additional programs are currently under discussions within the German government. These could, for example, include temporary financial cover for fixed costs (such as rent) where a company due to government-imposed measures (such as general country-wide shutdowns) suffers a loss in revenue.

Q11 - CAN A COMPANY APPLY FOR A REIMBURSEMENT FROM THE AUTHORITIES WHERE ITS BUSINESS IS AFFECTED BY GENERAL SHUTDOWN MEASURES (E.G. LOSS OF PROFITS DUE TO A GENERAL BAN FOR INDIVIDUALS TO LEAVE THEIR HOMES, RESTRICTIONS OF MAXIMUM CUSTOMERS WHO MAY ENTER A SHOP, ETC.)?

37. The situation is not fully clear, but it seems that reimbursement claims will not apply (other than for continued remuneration where there are specific quarantine measures, such as outlined in Question 4). There is some room for dispute and a deviating position could be taken (i.e. that the authorities can be held liable), but we believe that the likelihood of such claims succeeding based on current legislation and case law is rather low.
38. The company may, however, apply for other benefits and liquidity aids, see question 10.
39. In addition, there are ongoing discussions in the government concerning how to reasonably handle severe impacts for companies. We will continue to monitor the situation and provide updates on the further developments.

Q12 - CAN EMPLOYEES BE TERMINATED? ARE THERE SPECIFIC RULES THAT APPLY DUE TO EXISTENCE OF THE CORONAVIRUS?

40. Terminations are still possible also in times of the Coronavirus. This generally also applies with regard to employees who are sick or cannot attend work due to other reasons.
41. However, no simplified rules for terminations apply due to the existence of the Coronavirus. Especially, in case an employer employs more than 10 employees in Germany, terminations generally are subject to the strict limitations of the German Dismissal Protection Act. In addition, special dismissal protection may need to be taken into account - for example with regard to pregnant or severely disabled employees, employees on maternity or parental leave and works council members.

Q13 - DO THE ANSWERS ABOVE CHANGE IN CASE A WORKS COUNCIL HAS BEEN ESTABLISHED AT THE BUSINESS IN GERMANY?

42. Yes. Most potential measures described above are subject to a mandatory co-determination right of the works council. Therefore, a corresponding agreement with the works council would generally need to be entered into prior to the implementation of such measure. Exception can apply in emergency situations, but the works council should always be notified and involved as soon as possible.
43. In some cases, the existence of a works council can also simplify the process. This is especially true with regard to short time work as it would not be required to enter into individual agreements with all affected employees, but rather one single agreement could be agreed with the works council.

44. A works council generally would not need to be involved where an employer merely takes measures specifying how exactly the work shall be performed - for example by minimizing physical meetings, canceling business trips, or similar. Further, the works council would generally not need to be involved where official orders need to be implemented with the employer having no discretion on how such implementation shall happen (such as an authority ordering to immediately close the office or to evacuate certain individuals).

The employment policy and fact sheet provided above can be shared with your employees. If you have any questions or need legal advice on your company's specific circumstances or situation, please email COVID-19@klgates.com.

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