ALLEN & OVERY

COVID – 19 Update

Introduction of short-time work – what steps employers in Germany must take now

21 April 2020

In view of the current economic plight of many companies, the question arises as to how the effects of the corona crisis can be limited quickly, effectively and sustainably. The concept of short-time working offers such a solution and was adapted to the current situation at an early stage. In the following, we offer a brief overview of the principles of introducing short-time work and support through the receipt of short-time compensation.

Please be aware that the introduction of short-time work is an evident argument that there are no operational reasons for termination. Although this does not completely prevent the termination for operational reasons of such employees who are affected by short-time work, it does make it more difficult, because the introduction of short-time work indicates that the employer assumes that this is only a temporary phase.

For employers there is a hotline of the employment agency under the telephone number 0800 45555 20.

1. Agreement of short-time work with employees / works council

– Short-time work cannot be ordered unilaterally through the right of instruction.

– The introduction of short-time work requires an agreement with the individual employee or a notice of termination with the option of altered conditions of employment or an agreement by means of a collective agreement or a works agreement.

<u>The introduction by works agreement:</u>

– The works council's right of co-determination results from sec. 87 para 1 no. 3 Works Constitution Act (*Betriebsverfassungsgesetz* "BetrVG"). The right of co-determination covers the "whether" and "how" of the introduction of short-time work. The right of co-determination covers in particular the extent to which short-time work shall be introduced and by which employees short-time work shall be performed. Without the specification of the employees affected, the works agreement is invalid. In particular, it is not sufficient to grant the employer the right to select the employees (BAG dated 18 November 2015 – 5 AZR 491/14).

– An informal agreement between the works council and the employer does respect the right of co-determination, but does not lead to a normative change in the employment

contracts of the employees affected. A works agreement must therefore be entered into. If such an agreement is not obtained, the conciliation board must be called upon.

– If the working time of executive employees pursuant to sec. 5 para. 3 BetrVG shall be reduced, this requires an individual agreement.

<u>The introduction of short-time working in operations without a works council:</u>

– If no works council exists and there are no (effective!) short-time work clauses in the respective employment agreements, a corresponding agreement must be concluded with each affected employee. If necessary, a notice of termination with the option of altered conditions of employment shall be issued to this effect. A unilateral instruction is only conceivable in the cases of sec. 19 Protection against Dismissal Act (*Kündigungsschutzgesetz* "KSchG") in connection with mass dismissals.

– An agreement can, in principle, also be entered into by implication if it is instructed by the employer and is accepted without contradiction and the short-time work is approved by the employment agency (LAG Düsseldorf dated 14. October 1994 – 10 Sa 1194/94).

– However, this does not apply if the employment contracts contain clauses on written form. Although such clauses provide for exceptions for individual agreements (otherwise they are considered invalid). However, it is firstly seriously doubtful whether an individual agreement exists if short-time work shall generally be introduced in the operation or for an operation department according to identical principles. Typically, agreements on short-time work or the scope of short-time work are not negotiated individually with each employee. Therefore, it has to be assumed that such an agreement must be made in writing if a clause on written form exists.

– Even if there is no corresponding clause on written form, or the respective reduction is actually to be negotiated individually, we recommend the conclusion of a written short-time work agreement. This makes it easier to provide evidence and thus minimizes the legal risk that the concerned employee will assert the full compensation claim (in court). Furthermore, a written agreement makes it easier to apply for short-time allowance.

– Please note that a unilateral introduction of short-time work is invalid, and in this case the full amount of the salary entitlement will continue to apply. This applies even if the employee has actually fulfilled his or her work obligation to only a reduced extent, because the employer is otherwise in default of acceptance and thus his obligation to pay remuneration continues in full in accordance with sec. 615 German Civil Code (*Bürgerliches Gesetzbuch* "BGB"). The same risk exists if the proof of a short-time working agreement is not provided, therefore we also recommend a written agreement in this context (see above).

– If such an agreement is not reached, a notice of termination with the option of altered conditions of employment can be issued. In this context, it should be noted that notices of termination with the option of altered conditions are also "dismissals" within the meaning of sec. 17 KSchG and, therefore, a notification of mass dismissal must be submitted as soon as the thresholds of sec. 17 KSchG are reached. In this regard, it is irrelevant whether employees affected by an amending notice of termination have rejected the offer of amendment made to them at or after receipt of the notice of termination or have accepted it - possibly subject to the reservation of sec. 2 KSchG (BAG dated 20 February 2014 – 2 AZR 346/12).

Modalities of short-time work and selection of the affected employees:

- The work can be shortened smoothly as well as certain days/shifts can be cancelled completely.

- In principle, short-time work can also be introduced for individual operational departments only, cf. sec. 97 Volume III of the Social Insurance Code (*Sozialgesetzbuch Drittes Buch* "SGB III") on short-time work compensation.
- There is no requirement that short-time work be distributed equally among all employees or that a kind of social selection be carried out during the selection process (cf. BMAS "Questions and answers on short-time work and qualification"; https://www.bmas.de/SharedDocs/Downloads/DE/kug-faq-kurzarbeit-und-qualifizierung.pdf?__blob=publicationFile. The works council will (as far as possible) endeavour to distribute the burden of short-time work as evenly as possible. It is also usual to exempt individual employees by name in order to avoid social hardship.

Consideration of collective agreements:

- When introducing short-time work, the respective collective agreements - if applicable – have to be taken into account. These often contain, in particular, provisions on the period of notice.

- In all other respects, the works agreement or individual agreement also has to take into account any collective agreements. These may, for example, stipulate that a minimum level of remuneration or a certain amount of work must be maintained or provide for a top-up.

- Please note: An unlawful introduction of short-time work (e.g. unilaterally or without the involvement of the works council) results in the introduction of short-time work being invalid and the salary entitlement remaining in full, so that the full salary must be paid in accordance with sec. 615 BGB even if the work performance is lower.

- The introduction of short-time work is independent of the approval of short-time compensation. The (missing) approval of short-time work compensation does not therefore affect the effective introduction of short-time work as such.

2. Notification of short-time work

- The short-time work notification serves to prepare the application for short-time work compensation.

- According to sec. 99 SGB III, the loss of work has to be reported to the responsible employment agency in writing or electronically. This is to be carried out by the employer or the works council with the participation of the respective other. If the employer makes the notification, it must be accompanied by a statement of the works council. In the notification, it must be substantiated that there is a considerable loss of work and that the operational requirements for short-time work allowance are fulfilled.

- The template for such a notification is available at: https://www.arbeitsagentur.de/datei/anzeige-kug101_ba013134.pdf. It has to be signed by hand.

- This need not necessarily extend to the entire operation, but can also extend to individual operational departments.

- It shall be addressed to the responsible employment agency. Your responsible agency can be found via the following link: https://con.arbeitsagentur.de/prod/apok/metasuche/suche/dienststellen

- Another important point is that the notification only becomes effective upon receipt by the responsible employment agency, i.e. the employment agency in whose district the company, in which the

loss of work occurs, is located (sec. 95 SGB III). According to statutory regulations, the employment agency's responsibility is determined by the location of the operation or the operational department (sec. 97 sentence 2), not the company, firm or corporation. Based on the Federal Labour Court's case law on the notification of mass dismissals, however, it is important to note that the term "operation" of the BetrVG does not necessarily apply here. In this respect, even for sites that do not constitute an operation of their own within the meaning of the BetrVG, the local employment agency is probably responsible, since it has to take the local measures. In case of doubt, it is also advisable to inquire at the above mentioned hotline.

– The employment agency has to immediately issue the person making the notification with a written decision as to whether, on the basis of the facts presented and made credible, there is a substantial loss of work and whether the operational requirements are fulfilled, sec. 99 para. 3 SGB III.

3. Short-time allowance – application

– The template is available at this link: https://www.arbeitsagentur.de/datei/antrag-kug107_ba015344.pdf

– Instructions for filling in the template can also be found under this link: https://www.arbeitsagentur.de/datei/hinweise-kurzarbeitergeld_ba014273.pdf

– Short-time allowance requires the following in accordance with sec. 95 ff. SGB III:
  - **Considerable loss of work with loss of earnings**, which is due to economic reasons or an unavoidable event and which is temporary and unavoidable. Loss of work resulting from the consequences of the Corona crisis meets these legal requirements. The further condition that at least one third of the employees employed in the operation must be affected by a loss of earnings of more than 10 percent of their monthly gross salary in each case (sec. 96 para. 1 sentence 1 no. 4 SGB III), has been amended by legislative decree of the Federal Government. Retroactively as of 1 March 2020 the proportion of affected employees has been reduced to at least 10 percent of the employees.
  - **Operational requirements:** At least one employee must be employed in the affected operation, in the affected operational department. An operational department can be assumed to exist if it has a certain degree of independence (own organisational management, own purpose of work) and if there are certain economic risks which do not affect the whole operation.

  - **The personal requirements** are that the employment has not been terminated, that there is a corresponding loss of salary and that the employee in question is still subject to compulsory insurance.

  - A notification has to be made to the employment agency.

  - If there exists a company regulation (employment contract, works agreement, collective agreement) on the flexibilisation of working time, existing working time credit must be reduced first, sec. 96 para 4 sentence 2 no. 3 SGB III (then the loss of working time is avoidable). In sec. 96 para 4 sentence 3 SGB III, the law expressly excludes only five groups of time credits from the obligation to dissolve working time credits. In particular, under sec. 96 para 4 sentence 3 no. 4 SGB III, only overtime in excess of 10 per cent of the normal annual working time owed is protected. In other words, the protection of the working time credit is limited to the extent that more than 10 per cent of the annual working time has been saved. Example: Annual working time = 1,950.0 hours, working time account credit = 220.5 hours, 10% of the annual working time = 195.0 hours - Protected working time credit = 25.5 hours, i.e. the

195 hours must be used to avoid loss of working time, the remaining working time credit of 25.5 hours (= over the 10%) remains protected.
There is no requirement to build up negative working time balances before the short-time allowance is paid.

4. Short-time allowance payroll

– The short-time allowance amounts to 60 % of the net remuneration difference for employees without children or 67 % for employees with children.

– The amount of the short-time allowance is calculated on the basis of the lost salary to be compensated, whereby the so-called "net salary difference" is the decisive factor. The so-called loss of salary is the net salary that the employee would have earned without the loss of work ("target salary") minus the net salary that the employee actually earned.

– However, it has to be noted that the upper limit of the target salary that can be taken into account is the income threshold of the pension insurance. This means that short-time allowance is not paid as soon as a salary above the income threshold (currently: € 82,800 gross annual income) is still paid for the reduced work performed. If the working time has to be reduced to zero, this means that a gross monthly target salary of € 6,900 would have to be set, if the employee concerned was generally entitled to a higher salary.

– As regards social security contributions, the Federal Governmant has issued a legislative decree to the effect that, retroactively to 1 March 2020, the social security contributions which have to be paid solely by employers for employees working short-time are reimbursed at a flat rate by the Federal Employment Agency.

– In addition to the short-time working allowance, the employer can pay a supplement which is expressly not to be taken into account in the actual remuneration. A reduction of the short-time allowance is, therefore, not caused by the top-up payments (sec. 106 para. 2 sentence 2 SGB III). The employer's contributions to the short-time allowance pursuant to sec. 1 para 1 no. 8 Social Insurance Compensation Ordinance (*Sozialversicherungsentgeltverordnung* "SvEV") are non-contributory, provided that they do not exceed 80% of the difference between the planned remuneration and the actual remuneration together with the short-time allowance. Such a top-up amount is often provided for in collective agreements.

Your Employment & Benefits contacts

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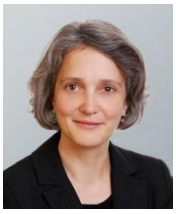

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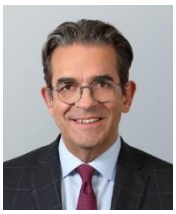

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