CORONA – EMPLOYMENT LAW ISSUES

The COVID-19 pandemic presents a number of practical and legal challenges for employers in relation to their employees. A growing number of new legislative projects are initiated; however, in practical terms, with limited case law available on pandemics, businesses will have look to general legal principles for the time being. This client briefing is designed to give you an overview of the employment law issues which are currently being discussed at many companies and the general principles guiding the solutions.

HR and legal departments are experiencing extreme workloads in the face of COVID-19. With this in mind, we have structured this briefing differently to usual so you can skip directly to the issues which are relevant to you.

Key issues

- There is little guidance available on pandemics in case law.
- Solutions need to be based on general legal principles.
- This briefing provides an overview of the application of such principles to the issues currently on the agenda and takes the latest announcements by the BMAS into account.

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WHEN ARE EMPLOYERS REQUIRED TO CONTINUE TO PAY EMPLOYEES' REMUNERATION?

Illness of employee

The general principles of the Continuation of Remuneration Payments Act (*Entgeltfortzahlungsgesetz*, "**EFZG**") continue to apply during the COVID-19 crisis. Pursuant to section 3 para. 1 EFZG, if an employee is ill and unable to work, they continue to receive their remuneration for up to six weeks. Employees may have additional claims against employers based on company regulations or provisions in their employment contracts (for instance, an extension of the period in which managers continue to be paid).

During the COVID-19 crisis, employees are still obliged to submit a doctor's certificate confirming that they cannot work if they are unable to work for more than three calendar days. Regulations deviating from this (e.g. provisions in an employment contract stipulating that the employee has to submit a doctor's certificate on the first day they are off sick) also remain in force.

However, the following exceptions apply during the COVID-19 crisis:

- The Federal Ministry of Employment and Social Affairs (*Bundesministerium für Arbeit und Soziales,* "**BMAS**") has stated that if an employee is unable to submit a doctor's certificate in good time (e.g. because doctors' surgeries are busy dealing with the large number of COVID-19 patients), a short delay can be excused due to the current strain on the healthcare system. However, the doctor's certificate then has to be submitted without undue delay. Details are available on the BMAS website: https://www.bmas.de/DE/Presse/Meldungen/2020/corona-virus-arbeitsrechtliche-auswirkungen.html (version of 14 April 2020);
- Following a decision by the German Association of Statutory Health Insurance Doctors (*Kassenärztliche Bundesvereinigung*) and the National Association of Statutory Health Insurance Funds (*GKV-Spitzenverband*) dated 23 March 2020, doctor's certificates certifying inability to work due to diseases of the upper respiratory tract may also be issued for a period of up to 14 days after consultation by telephone. This exception applies until 23 June 2020, but may be extended or prematurely terminated subject to the development of the COVID-19 pandemic.

In practice:

- It should be made clear to employees working remotely that, in terms of doctor's certificates and reporting other absences, the same rules apply as when they are working in the office.
- Existing works agreements must be reviewed to see whether they need adapting due to employees working remotely.

Provision of childcare by employees who are not ill

The COVID-19 crisis and the fact that many companies now have most or all of their employees working remotely means that employees face particular challenges in terms of caring for any children in their household. During the COVID-19 crisis, employees are still responsible for arranging childcare so that they can work. However, two scenarios require particular attention:

Continued pay when caring for sick children?

Depending on how the employee is insured (statutory or private health insurance), they may be entitled to continue to receive their remuneration either from their employer based on section 616 sentence 1 Civil Code (*Bürgerliches Gesetzbuch*, "**BGB**") or a statutory health insurance fund based on the special social security regulations in section 45 Social Security Code V (*Fünftes Buch Sozialgesetzbuch*, "**SGB V**"). The employee's claim under section 616 sentence 1 BGB has priority over the entitlement to child sickness benefits under section 45 SGB V: an employee is not entitled to receive child sickness benefits from their health insurer if they already have a claim against their employer to paid leave pursuant to section 616 sentence 1 BGB.

The claim under section 616 sentence 1 BGB can be contracted out in collective bargaining agreements and employment contracts, so the first step is to check whether such arrangements have been agreed. If a claim under section 616 sentence 1 BGB is excluded, an employee with statutory health insurance cover can claim child sickness benefits and release from their work duties from the health insurance fund pursuant to section 45 para. 1 SGB V provided the relevant conditions have been met.

Claim to continued receipt of pay pursuant to section 616 BGB

If the claim under section 616 sentence 1 BGB is not excluded, the situation is as follows:

- Any claim by an employee to receive continued pay from their employer is conditional on their grounds for not working being based on a personal right to refuse to work (*Leistungsverweigerungsrecht*). In this case, the claim to continued receipt of pay extends to a "relatively short period".
- A precise definition of what a "relatively short period" means is not given and different views exist on this in the legal literature. A period of up to five days is likely to be considered "relatively short" with the assessment of longer periods depending on the individual circumstances.

In any case, the specific amount of care required based on a child's age and condition is to be taken into account. Claims for time off to care for children over twelve years old are usually refused with reference to the arrangements set out in section 45 para. 1 SGB V, but no fixed age limit applies.

Daily sickness allowance pursuant to section 45 SGB V

If the claim under section 616 sentence 1 BGB is excluded, the situation is as follows:

- Only employees with statutory health insurance can potentially claim a daily allowance for children from their health insurer. If only one parent has statutory health insurance, they are only entitled to child sickness benefits if the child also has statutory health insurance. If both parents are privately insured, they generally do not have a claim to child sickness benefits and it depends on the terms and conditions agreed with their insurer.
- The claim to child sickness benefits is limited to ten working days per calendar year for each child, and to twenty working days for single parents (section 45 para. 2 SGB V). This is generally conditional on the child not having reached the age of twelve or being seriously disabled and therefore dependent on assistance.

Time off and pay when caring for children due to closure of nurseries, schools and other facilities – new legislation

It has not been clarified in case law whether employees are entitled to refuse to work if – as is currently the case due to the COVID-19 pandemic – nurseries, schools and other facilities are all closed for a period of several weeks and employees therefore need to care for their children themselves. It is also unclear whether employees are entitled to continued remuneration payments pursuant to section 616 sentence 1 BGB in such situations, which seems doubtful given the reason does not, strictly speaking, originate from the sphere of the employee and that the duration of closures and respective inability to perform the job will likely in many cases be "relatively material" by now.

Two things have transpired in this context:

- The BMAS assumes that section 616 sentence 1 BGB is also applicable in the current situation, although this is limited to a few days, "generally two to three" (https://www.bmas.de/DE/Presse/Meldungen/2020/lohnfortzahlung-bei-kinderbetreuung.html) (version of 14 April 2020), which does not cover the expected closure period;
- The German government has therefore now adopted a bill to amend the Infection Protection Act (*Infektionsschutzgesetz*, "**IfSG**") so as to include a claim of employees against the state for compensation in the event that the closure of schools and nurseries by the authorities during current pandemic leads to a loss of earnings (*Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl120s0587.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl120s0587.pdf%27%5D__1585559794231 (version of 14 April 2020)) which applies until the end of the year.

Claims in relation to a loss in earnings under the amended IfSG are conditional on parents or guardians not having any other suitable childcare options (e.g. care being provided by the other parent or emergency childcare at local facilities) and on employees not having other options for taking a temporary break from work on full pay (e.g. using overtime or similar). According to the explanatory memorandum to the bill, individuals belonging to high-risk groups, such as grandparents, do not have to be considered as other suitable childcare options. Claims to short-time work allowance (*Kurzarbeitergeld*) also take priority over the claim to compensation pursuant to the explanatory memorandum.

Compensation is made for the loss in earnings, at maximum 67% of the net income (capped at EUR 2,016 per month) for up to six weeks. No compensation is made for periods in which schools or other facilities would have been closed for holidays anyway.

While the claim is between the employee and the state, employers are per the statutory arrangement obliged to make the respective payments to employees and then obtain a refund from the relevant regional authorities (claim for refund to be made within an exclusion period of three months). This means that the risk in relation to whether the state ultimately covers the costs of releasing staff from their working duties falls in practice on employers, as does what may well be a considerable amount of work due to additional requests from employees.

In practice:

- Companies should therefore check straight away what potential additional work may be involved given their staff structure in order to put any necessary processes in place and delegate responsibilities to ensure that HR departments can handle such enquiries from employees despite the considerable increase in their general workload due to the COVID-19 crisis.
- This also necessitates a review of the policies and company information materials provided to employees at the beginning of the COVID-19 crisis and the responses by HR and legal departments on policy as regards releases from working duties as well as individual cases of such releases.

While this does not strictly concern the employment relationship, it may be helpful to know in this context that the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth has announced on 7 April 2020 that adjustments in relation to parental allowance (*Elterngeld*) will be adopted at short notice. This includes adjustments for parents working in systemically relevant jobs. In addition, the so-called partnership bonus (*Partnerschaftsbonus*) shall be secured even if parents work more or less due to the COVID-19 crisis. Furthermore, loss of income (e.g. due short-time work) shall not reduce the parental allowance.

Employees officially prohibited from working / officially ordered to quarantine

In the event of a pandemic, public authorities are entitled to implement measures under the IfSG. The most important of these are the ability to tell individuals to self-isolate (section 30 IfSG) and to officially prohibit them from working (section 31 IfSG).

Employees who are ill

If an employee is suffering from infection with COVID-19 and has been officially prohibited from working under section 31 sentence 2 IfSG, they are generally entitled to continue to receive remuneration from their employer under section 3 para. 1 EFZG (see "*Illness of employee*" above).

Under section 56 para. 1 IfSG, the employee is also entitled to a claim for compensation under public law as a result of any such prohibition. This claim may be seen as conflicting with the above claim to continue to receive remuneration, although this is disputed. In accordance with section 56 para. 1 IfSG, anyone who is *inter alia* a likely infection risk, suspected of being ill/infected or of otherwise carrying any form of pathogen and who is officially prohibited from carrying out their professional activities with a resulting loss of earnings is entitled to claim monetary compensation. For the first six weeks, the amount of this compensation is based on the loss of earnings suffered by the employee. As of the beginning of the seventh week, it is generally based on the amount of the statutory sick pay due (section 56 para. 2 IfSG). The employer is therefore required to make an upfront payment to the employee in this respect (section 56 para. 5 sentence 1 IfSG).

For the duration of the continued employment, but for no more than a period of six weeks, the employer is required to make this payment on behalf of the relevant public authority. Any such amounts paid by the employer will then be reimbursed by the state upon request (section 56 para. 5 sentence 2 IfSG). This application must be submitted to the relevant authority within three

months of the employee being allowed to recommence the prohibited activities or within three months of the end of the isolation period (section 56 para. 11 sentence 1 IfSG).

The same essentially applies to any official self-isolation imposed on an employee under section 30 IfSG. The conflict between the claim for receipt of continued pay under section 3 para. 1 EFZG and the public law claim for compensation under section 56 para. 1 IfSG is the subject of dispute. The scope of section 56 IfSG is very narrow. It is still a good idea for the employer to indicate any such payments as "Upfront payment – claim for compensation" ("*Vorleistung – Entschädigungsanspruch*") on the employee's payslip and to submit the request for reimbursement to the relevant authority within the three-month period indicated above.

Following the amendment of section 56 IfSG as of 1 March 2020, compensation is not payable if the prohibition on carrying out professional activities could have been avoided by a vaccination or any other preventative measure which is either a statutory requirement or a public health recommendation. While this does not currently apply to COVID-19, it may well become relevant in future.

In practice: With the risk of if and when the refund is ultimately received essentially being borne by the employer (since it has to make the upfront payment), a careful eye should be kept on the official vaccination recommendations.

Employees who are not ill

Even if an employee has not (currently) been tested positively for COVID-19, he or she may still be the subject of official infection protection measures, such as being officially prohibited from working (section 31 IfSG) to prevent or reduce potential health risks to other people. This essentially prevents the employee from continuing to pursue their professional activities. Any employee who is only "suspected" of being ill/infected does not have any claim to continue to receive pay from their employer under section 3 para. 1 EFZG. The employee may have a claim to continued payment of their salary under section 616 sentence 1 BGB and a public law reimbursement claim may exist in such regard under section 56 para. 1 IfSG. Any claim under section 616 sentence 1 BGB would require the employee to be prevented from working due to reasons relating to them as an individual and affecting their private/personal sphere (see "*Employees who are ill"* above). In 1970, for instance, the German Federal Court of Justice (*Bundesgerichtshof*, "**BGH**") took the view that this provision applied to a salmonella carrier who had been officially prohibited from carrying out their professional activities under the German infection protection provisions applicable at the time (*Bundesseuchenschutzgesetz*) due to the fact that the risk they themselves posed to others was the reason they were not allowed to work. The court held that the employer in that case was not permitted to allow the employee to continue to pursue their professional activities even if they had not been officially prohibited from doing so. The BGH therefore also took the view that there could be no claim for reimbursement under any applicable public law provisions.

Employees to whom quarantine has been recommended

Employees who are ill

If an employee is ill and unable to work due to infection with COVID-19 and is thereby prevented from pursuing their professional activities, they are entitled to continue to receive their remuneration under section 3 para. 1 EFZG for a period of up to six weeks.

Employees who are not ill

If the employee does not have COVID-19, there are no grounds to suspect that they are infected and they have not been required to self-isolate, both the employer and the employee will need to consider how to deal with a situation where the authorities have recommended that the employee self-isolate (e.g. the two-week period of self-isolation recommended by the Federal Ministry of Health (*Bundesgesundheitsministerium*) for anyone returning from holiday). In such case, the employee cannot simply choose to stay at home without consulting their employer, unless individual or collective remote working arrangements are already in place. Official "recommendations" do not constitute a binding requirement to remain in self-isolation and this means that the employee cannot assert a subjective right to refuse to work under section 275 para. 3 BGB in such cases. This generally also means that the employee does not have any right to continue to receive remuneration under either their employment contract or under section 616 sentence 1 BGB. Regardless of this, the employer is still required in the case of recommended self-isolation due to COVID-19 to comply with its general duty of care towards the employee concerned and to all of its other employees and to protect the health and wellbeing of everyone who works for it.

In practice:

- A set of centralised guidelines should be produced to help line managers make decisions to help avoid overstretching emergency committees and HR as far as possible. Any individual or collective arrangements which already exist for remote working should be used subject to consultation between the employer and the employee as necessary.
- In the event that no contractual provisions have been agreed, the codetermination rights of the works council (including those under section 87 para. 1 no. 2, no. 3, no. 6 and no. 7 *Betriebsverfassungsgesetz*, "**BetrVG**") will generally also apply to the introduction of any collective remote working arrangements at short notice. The statutory requirements set out in the Health and Safety at Work Act (*Arbeitssicherheitsgesetz*, *AsiG*) and the Employment Protection Act (*Arbeitsschutzgesetz*, *ArbSchG*) will continue to apply throughout the COVID-19 pandemic and until further notice and should be taken into account when agreeing any contractual arrangements. See "*How can it be ensured that the works council continues to have a quorum?*" below as regards the conditions for works councils having a quorum.
- A centralised and continuously updated record should be kept of how many employees are in which sort of self-isolation in order to be able to react rapidly in shifting employees around to cover demand in other departments/divisions where this is necessary (the works council will need to be consulted on any such measures).

Employees who are not ill but wish to stay at home to avoid infection

Right to refuse to work

Employees are not generally entitled to stay away from work in the event of a pandemic. Nor are they entitled to make their own decision to work remotely if there is no policy in place for doing so. An employee may, however, refuse to work under section 275 para. 3 BGB if it is not reasonable to expect them to work (i.e. it is subjectively impossible for the employee to work (*subjektive Unmöglichkeit*)). The COVID-19 pandemic itself is, in the vast majority of cases, not sufficient grounds to satisfy this requirement. This requirement may, however, be met in those cases where there is a significant objective risk to health and/or genuine objective grounds to suspect that such a risk may exist. This may well be relevant for those employees currently considered to be particularly vulnerable to COVID-19 . With the employer having a particular duty of care towards those employees (see "*When are employers required to continue to pay employees' remuneration?*" above), an arrangement should be reached which is acceptable to both parties, e.g. remote working (see "*Employees who are not ill*" above).

Claim to continued receipt of pay

The next question is whether or not any employee refusing to work under their employment contract is still entitled to continue to receive remuneration. This is not the case based on the "no work no pay" principle ("*ohne Arbeit kein Lohn*") and due to the fact that, in the case of a pandemic, the employer is not generally responsible for the employee being subjectively unable to perform their contractual duties.

WHAT IS THE SITUATION IF AN EMPLOYEE IS UNABLE TO GET TO THEIR PLACE OF WORK?

The risk of not being able to get to their place of work is generally borne by the employee. This means that the employer is not generally obliged to continue to pay the employee if the latter is unable to get to their place of work. Therefore, in the event of a pandemic, when public transport may no longer be running or when exclusion zones may have been put in place, for example, the employee generally bears the risk of not being able to get to their place of work. In such case, the employer would be unlikely to be required to continue to pay the employee (certainly as far as the current legal provisions apply).

WHAT STEPS CAN EMPLOYERS TAKE TO ALLEVIATE ANY ECONOMIC/FINANCIAL RISKS?

Key principle

The business risk, i.e. the risk that the employer is not in a position to accept the work offered by the employee due to any disruption preventing continued commercial operations, is generally borne by the employer (section 615 BGB). The Federal Labour Court (*Bundesarbeitsgericht*) has held that any disruption to / stoppages in commercial operations due to *force majeure* in particular are typical instances of the business risk to be borne by the employer. The only case in which this might be viewed differently is where the principles of business risk have been effectively contracted out under individual or collective contractual provisions.

Potential options

Measures may include:

Short-time work (*Kurzarbeit*)

A way of reducing the financial impact for the employer is to move employees to short-time work arrangements and to apply for short-time work allowance (*Kurzarbeitergeld*) so that the Federal Employment Agency (*Agentur für Arbeit*) pays at least part of employees' lost earnings. Please see our separate briefing on short-time work dated 3 April 2020 in this regard: https://www.cliffordchance.com/briefings/2020/03/short-time-work--kurzarbeit--during-the-corona-crisis.html).

Leave entitlement, time owing, annual closing

There is some dispute over whether it is acceptable for an employer to tell employees to take any leave entitlement they may have for the current year or which they may have rolled over from previous years or to tell them to take any time owing or to use up any overtime they may have when the business risk is to be borne by the employer. Provisions existing in this regard should be checked (e.g. collective bargaining agreement, works agreement, individual employment contract). Where they do not allow for such instructions, amendments should be considered, as well as options for a temporary closure of parts of the operation.

In practice: As the employer needs to ensure any codetermination rights of the works council have been exercised before such measures can be validly implemented, sufficient time is to be allowed to be able to go before a conciliatory committee should the works council not be able to conclude a works agreement in presence of half of its members, also see "*How can it be ensured that the works council continues to have a quorum?*" below in this regard.

WHAT OTHER MEASURES ARE AVAILABLE TO EMPLOYERS?

It may also become necessary for employers to take additional measures, e.g. to require individual employees to do overtime to make up for absences due to illness or to release employees from their work duties in order to reduce infection risk in the workplace or for other reasons.

In practice: Employers should be careful when requiring employees to do overtime in those cases where short-time work has already been introduced and the Federal Employment Agency has already approved the payment of short-time work allowances. This is because the Federal Employment Agency may view this as a reason to suggest that any loss of working time has been avoidable. This could lead to the approval for the payment of short-time work allowances being revoked.

Requirement to work overtime

An employee's duty of good faith means that they may be required in certain circumstances and particularly in emergency situations to work overtime even if there is no (individual or collective) arrangement on which the employer may request this. In the event of a pandemic, an employer may ask employees to work overtime if it sees no other way of dealing with a business emergency, for example in those businesses which are essential for the provision of basic goods and services. This needs to be examined on a case-by-case basis.

Releasing employees from their work duties

Employees generally have a claim under any existing employment contract to engage in professional activities in line with that contract. If an employee's contract does not contain valid provisions relating to the possibility of them being released from their work duties, the only cases in which such a claim no longer exists are where there are relevant material personal or operational reasons precluding such claim.

This may be the case during a pandemic if the employee has symptoms suggestive of an infection. A similar situation applies where employees have been exposed to potential infection for other reasons and are therefore thought to be potentially contagious, but have not been required to self-isolate. Such an objective reason may, however, exist if an employer releases employees from their work duties who are willing and able to work in order to reduce the risk of infection for key workers or to ensure the required level of physical distancing.

If an employer does make the decision to release such employees from their work duties, it is required to continue to pay them in accordance with the principles of delayed acceptance of the performance of work duties (*Annahmeverzug*), without being entitled to require that they make up for this by working this time at a later date.

Maintaining essential services

In deviation from the above, we take the view that any essential workers may not use arguments involving subjective possibilities or the employer's general business risk and are still required to do everything within their power to continue their work.

HOW CAN IT BE ENSURED THAT THE WORKS COUNCIL CONTINUES TO HAVE A QUORUM?

A lot of companies have been discussing over the past few weeks how to ensure that the works council still has a quorum despite the difficulties raised by the COVID-19 pandemic. If all employees and all of the members of the works council are working remotely or are unable to meet up due to physical and social distancing requirements, this may delay urgent resolutions or even prevent the works council from functioning effectively.

- Pursuant to a supreme court ruling in Germany works council resolutions cannot validly be adopted via written consent instead of a meeting (circulation procedure).
- While the BMAS assumes in its report of 20 March 2020 (https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Meldungen/2020/ministererklaerung-arbeit-der-betriebsraete-unterstuetzen.pdf?__blob=publicationFile&v=4) (version of 14 April 2020) that negotiations may be held via videoconference, such an opinion will not provide companies with the legal certainty they should have with regard to the adoption of crucial works agreements such as that on short-time work and where works agreements are to provide a legal basis for the processing of personal data pursuant to art. 88 para. 2, 3 GDPR.
- However, the Federal Government has announced on 9 April 2020 to suggest implementing the necessary legal framework for mobile decision-making procedures. In particular, a new section 129 BetrVG is intended to

be introduced which would allow for works councils and other employee representatives meetings to be held and decisions be made via telephone- or videoconferences, provided it is ascertained that third parties cannot access the telephone- or videoconference. The respective framework intended to enter into force with retroactive effect as of 1 March 2020 and to expire as per 31 December 2020.

In practice: Decision-making in presence and in writing currently still is the safest option as long as the new legislation has not become effective. The employer and the works council should therefore try to get the most crucial works agreements done now and in presence. Where this is not possible, it needs to be reviewed whether reconcilement committee procedures (*Einigungsstellenverfahren*) can be instigated on a particular matter and whether this may replace agreement with the works council where the works council cannot sit with a quorum to adopt an agreement. Meanwhile, employers and works councils should continue to negotiate further agreements in a flexible solution to be able to adopt them quickly in presence once a quorum of works council members can be present.

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