

SHORT-TIME WORK ("*KURZARBEIT*") DURING THE CORONA CRISIS

To allow for a temporary reduction in personnel costs and to provide an additional means for safeguarding jobs during the economic and operational downturn caused by Covid-19, the German legislator has issued new rules facilitating the application of so called "short-time work" (*Kurzarbeit*). With retroactive effect from 1 March 2020 it has introduced important changes which lower the thresholds for state-sponsored short-time work allowances until 31 December 2020.

INTRODUCTION

"Short-time work" means the temporary reduction of working hours of the employees with a corresponding reduction in pay (including a reduction to "zero" hours, so-called "*Kurzarbeit Null*"). The reduction of pay can in part be compensated by the German employment agency (*Agentur für Arbeit*) by way of the so-called "short-time work allowance" (*Kurzarbeitergeld*). The short-time work allowance generally amounts to 60% of the employees previous net remuneration and 67% for employees with at least one dependent child.

The newly passed legislation lowers the preconditions for obtaining short-time work allowance:

- The required threshold of employees who must be affected by the short-time work is reduced to at least 10% of the workforce in the relevant business operation in which short-time work shall be introduced (previously, at least 33% of the workforce had to be affected).
- The need for accruing negative "working time balances" before applying for short-time work allowance has been (temporarily) waived.
- Employers are exempted from paying social contributions on the short-time work allowance granted to the employees.

The implementation of short-time work by an employer and the compensation mechanism for short-time work are quite complex and subject to the fulfilment of multiple preconditions. The following Q&A addresses certain important questions around the introduction of short-time work.

Key issues

- The German legislator has introduced important changes which lower the thresholds for short-time work in order to help companies tackle temporary business constraints due to the Covid-19 crisis and to retain their workforce.
- This briefing provides an overview of a range of important aspects relating to the process of implementing short-time work.

INTRODUCTION OF SHORT-TIME WORK

Question	Answer
1. Is the employer free to implement short-time work at its own discretion?	The implementation of short-time work requires a legal basis, e.g., a collective bargaining agreement, a works agreement (i.e., an agreement with the employees at company level) or an individual agreement with the respective employees.
2. How can short-time work be introduced in companies with a works council (<i>Betriebsrat</i>)?	Under German collective labour and co-determination rules, the introduction of short-time work is subject to a co-determination right of the works council (<i>Betriebsrat</i>) and therefore requires a specific agreement with the works council dealing with the introduction of short-time work due to the Covid-19 crisis. An existing framework agreement which generally authorises the employer to introduce short-time work will generally not suffice.
3. What is covered by such works council agreements?	<p>A works agreement must have a specific "minimum content" to justify the introduction of short-time work. It must, <i>inter alia</i>, regulate the start date and the duration of the short-time work and contain provisions regarding the applicable working hours (including the distribution of the working time over the day) as well as a precise definition of which categories of employee shall work short-time.</p> <p>If the agreement does not fulfil the minimum requirements, employers risk the short-time work not being deemed to have been properly introduced and employees continuing to be eligible for their full contractual pay (which would also mean that they are not entitled to short-time work allowances). It is therefore advisable not to rely on agreements reached with the works council present only via video conferencing and it is recommendable to continue to seek a written works agreement with the works council present in person, taking appropriate health precautions, as the validity of works council agreements reached other than in writing remains unclear despite the 23 March 2020 declaration of the Federal Minister of Employment and Social Matters suggesting works council presence could be ensured via video conference. Unless the current statutory framework, which requires presence of works council members at the same time, is also changed, agreements reached via video conferencing could be challenged.</p> <p>The amount of any "top up payments" offered by the employer in addition to the short-time work allowance is not subject to the works council co-determination right. As a result, the works council may not make its consent to the introduction of short-time work conditional upon the employer granting a specific amount of top-up payments.</p>
4. How can short-time work be implemented in companies with no works council?	Short-time work can be implemented either by way of agreements with the individual employees or an unilateral termination with an offer of changed terms of employment (<i>Änderungskündigung</i>). In practice, employees would typically consent to the short-time work since short-time work helps avoiding their dismissal for operational reasons. If possible, the consent should be given in writing.

PRECONDITIONS FOR RECEIPT OF THE SHORT-TIME WORK ALLOWANCE

Question	Answer
5. Who can apply for the short-time work allowance?	Only the employer and the works council (if any) can apply for short-time work allowances, <u>not</u> the individual employee himself/herself.
6. What are the general preconditions for receipt of the short-time work allowance?	<p>The general preconditions for short-time work allowances are as follows:</p> <ol style="list-style-type: none"> 1. A <u>substantial stoppage</u> of work resulting in a loss of compensation of the employees affected by the short-time work (for details, please see below); 2. The employer must have a business operation or business department with at least one employee ("<u>operational precondition</u>"); 3. Fulfilment of the so-called "<u>personal preconditions</u>" relating to the relevant employee who works short-time (for details, please see below); 4. The competent employment agency was properly notified about the stoppage of work (for details, please see below).
7. Can a work stoppage due to the Covid-19 crisis justify the receipt of a short-time work allowance?	<p>Yes, a work stoppage due to the Covid-19 crisis may generally justify the receipt of a short-time work allowance. This was confirmed by the Federal Employment Agency (<i>Bundesagentur für Arbeit</i>) on 28 February 2020. This applies in particular when production and working hours have to be reduced due to supply shortages, or the business operation has to be temporarily closed due to government protection measures. Similarly, a reduction in demand for products or services offered by the employer may lead to the required stoppage in work.</p> <p>The receipt of the short-time work allowance remains subject to the fulfilment of the other preconditions described in the section 6 (e.g. the work stoppage must be temporarily and unavoidable).</p>
8. When is a work stoppage substantial?	<p>A work stoppage is substantial if</p> <ol style="list-style-type: none"> 1. it is a result of economic circumstances or an unavoidable event (which is the case with a work stoppage due to the Covid-19 crisis, please see section 7); 2. it is temporarily and unavoidable; 3. the relevant gross income of at least 10% of the employees in the employer's business operation is reduced by more than 10% during a calendar month. <p>During the Covid-19 crisis and limited until 31 December 2020, the threshold described under item 3 ("at least 10% of the employees") has been lowered from what was previously one third of the employees.</p>
9. Is there a limitation on the number of employees for whom employers can apply for the short-time work allowance (e.g. only blue collar employees)?	<p>No, there are generally no limitations on the number of employees and no special employee groups which are excluded from short-time work. Even temporary leased employees may be eligible for a short-time work allowance during the Covid-19 crisis.</p> <p><u>Please note:</u> Employees under notice and employees on sick leave may be excluded from receiving a short-time work allowance. Since short-time work is a subsidiary measure, a prior reduction of credits on working-time</p>

Question	Answer
	accounts or the utilisation of holiday entitlements may be required (for details, please see sections 12 and 13 of this briefing.)
10. When is the work stoppage temporary?	<p>The work stoppage is "temporary" if a return to regular full-time work can be expected with a "certain degree of probability" following the expiry of the maximum period for the receipt of short-time work allowances and potentially a "grace period" of an additional one to two months.</p> <p>Details need to be discussed and agreed with the employment agency.</p> <p><u>Please note:</u> A work stoppage is not "temporary" if, for instance, the employer has already decided to close down the relevant business operation.</p>
11. When is the work stoppage unavoidable?	<p>Short-time work allowances may only be granted if the work stoppage is unavoidable. This means that the employer must generally have taken all reasonable precautions to prevent the occurrence of the work stoppage. This may, for instance, require transferring an employee to another business department which is not threatened by a substantial work stoppage.</p>
12. Is the utilisation of credits on working time accounts a precondition for the receipt of a short-time work allowance?	<p>Employers and employees are generally required to utilise employees' existing credits ("plus hours") on working time accounts. Certain credits on working-time accounts are "privileged" (e.g. "plus hours" which exceed 10% of the annual regular working time of the employee). Details should be carefully analysed prior to applying for short-time work allowances and be discussed with the employment agency.</p> <p>The German government has lifted the requirement that negative working time credits will have to have been built up during the Covid-19 crisis before short-time work can be applied for (limited until 31 December 2020).</p>
13. Is the utilisation of any holiday entitlements a precondition for the receipt of a short-time work allowance?	<p>Prior to notifying the employment agency and applying for the short-time work allowance, employers are required to assess on a case-by-case basis whether the work stoppage can be avoided by utilising holiday entitlements. There exist certain exemptions from this general obligation (e.g. "opposing legitimate holiday requests of the employees").</p>
14. Are requests to work overtime detrimental?	<p>According to the official guidelines of the Federal Employment Agency, overtime request are generally deemed to indicate that the short-time work was not "unavoidable". Any requests to employees to work overtime must therefore be carefully analysed.</p>
15. Is it permissible to dismiss employees for operational reasons during short-time work?	<p>The same employees cannot, in principle, be dismissed for operational reasons if they work in short time. Exceptions may apply if the chosen measure of short-time work is not sufficient, i.e. if there is a permanent loss of work and there ceases to be a need to employ the individual employee. A lack of work which is only temporary cannot justify a dismissal for operational reasons. If short-time work is implemented in the business operation (or part of it) or company, this may imply that the reduction in the need for work may not have been permanent.</p> <p>Dismissal of an employee for good cause due to serious breach of duty remains, of course, permissible (subject to the general requirements also during the period of short-time work).</p>

Question	Answer
	<p><u>Please note</u>: Collective bargaining agreements sometimes contain a ban on dismissals for operational reasons during the period of short-time work.</p>
<p>16. Is a minimum headcount a precondition for the receipt of a short-time work allowance?</p>	<p>No, but the employer must have a business operation in Germany with at least one employee. If a foreign employer does not maintain a business operation in Germany, its employees working remotely are not eligible for short-time work allowance even if they are covered by the German social security scheme.</p>
<p>17. Are new hires eligible for the receipt of a short-time work allowance?</p>	<p>Employees who join following the start date of the short-time work are only eligible for a short-time work allowance if the employer either hired them for "compelling reasons" (e.g. their employment contract is concluded before the start date of the short-time work) or if they join the employer following the completion of an apprenticeship.</p>
<p>18. Are employees under notice eligible for the receipt of a short-time work allowance?</p>	<p>A short-time work allowance is only granted if an employment relationship has not been terminated (by either the employer or the employee) or dissolved by a termination agreement. Different rules may apply if the employee has filed an unfair dismissal claim.</p>
<p>19. Are employees on sick leave eligible for a short-time work allowance?</p>	<p>Employees on sick leave are eligible for a short-time work allowance if their incapacity to work occurred after the introduction of short-time work in the business operation. Employees who were already on sick leave before this point in time are not entitled to receive a short-time work allowance, but may receive sickness benefits from the health insurance subject to the general rules and requirements.</p>
<p>20. How does the application process work?</p>	<ul style="list-style-type: none"> • <u>Step 1</u>: The employer needs to report the work stoppage and the introduction of short-time work to the employment agency "without undue delay" either in writing or online via www.arbeitsagentur.de. In businesses with a works council, a statement by the works council (i.e. agreement with the implementation of short-time work and its set-up) has to be attached to the application. • <u>Step 2</u>: The employment agency issues a decision whether the precondition of a substantial work stoppage and the operational preconditions for the receipt of short-time work are fulfilled (so-called <i>Anerkennungsbescheid</i>). • <u>Step 3</u>: The employer calculates the individual amounts of the short-time work allowance. This means that the employer will need to make advance payments to the employees and has to review whether the personal preconditions for the receipt of short-time work are fulfilled in relation to the individual employees. • <u>Step 4</u>: The employer files an application for a refund of the amount of the short-time work allowance paid-out to the employees in writing or electronic form. The application has to be received by the competent employment agency within a cut-off period of three months following the relevant calendar month for which the refund is requested.
<p>21. How much is the short-time work allowance?</p>	<p>The amount of the short-time work allowance is equivalent to 60% of an employee's flat-rate net remuneration, 67% for employees with at least one dependent child.</p> <p>It is currently discussed within the German government whether the short-time work allowance for employees with lower salaries is to be further increased (per the date of this briefing, no decision on this has been taken).</p>

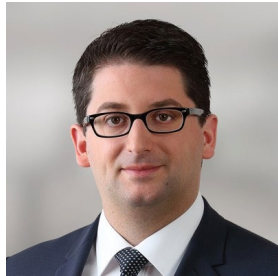
Question	Answer
	<p><u>Please note:</u> Applicable collective bargaining agreements or works agreements might require the employer to make top-up payments to employees and might provide for additional obligations concerning payments during short-time work (e.g., a pro-rated pay-out of certain benefits like holiday pay and the Christmas bonus).</p>
<p>22. From when is short-time work granted?</p>	<p>Short-time work allowance is generally granted at the earliest from the calendar month in which the notification about the substantial work stoppage was received by the competent employment agency</p>
<p>23. What is the maximum period for receipt of a short-time work allowance?</p>	<p>The maximum period for receiving a short-time work allowance is currently twelve months. If the Covid-19 crisis persists, the German government may resolve to extend the maximum period may to 24 months (but no decision has yet been taken on this).</p>
<p>24. Which employment agency is responsible in this context?</p>	<p>With regard to the notification of the loss of work, the competent employment agency is the employment agency responsible for the region where the business operation in which short-time work is to be introduced (i.e. not the seat of the company) is located.</p> <p>With regard to the application for the short-time work allowance, the competent employment agency depends on the location of the payroll accounting office responsible for the employer.</p> <p>A notification form is available on the internet at www.arbeitsagentur.de. The signed form can be sent (together with other documents, including the statement by the works council referred to in section 20) by fax or scanned and sent by email.</p>
<p>25. Social security contributions</p>	<p>Social security contributions for periods of the receipt of short-time work allowances until 31 December 2020 will be reimbursed by the Federal Employment Agency upon request by the employer. Until now, the employer had to pay a certain amount of such social security contributions.</p>

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