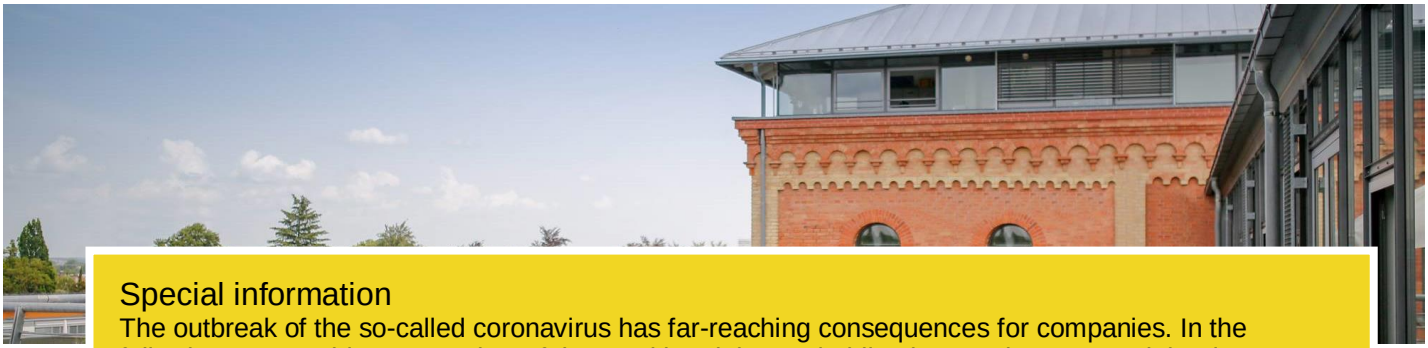

Special information

The outbreak of the so-called coronavirus has far-reaching consequences for companies. In the following, we provide an overview of the resulting rights and obligations under German labor law

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I. Effects on the employment relationship

1. Obligations of the employer

Employers have a duty of care towards their employees. Depending on the individual case, adequate measures must be taken to protect the workforce:

a. Obligations to provide information

Employers have to inform about the existing risk of infection and disease from COVID-19 and about typical symptoms of the disease. Furthermore, preventive measures and adapted behavior must be pointed out. The information can be provided by announcements in the business premises, by internal mail or on the intranet.

As a basis for the information, reference can be made to compliance with the hygiene rules which, according to the recommendations of the professional associations, must also be observed for protection against influenza:

- Avoid direct physical contact (e.g. shaking hands, keep a distance of approx. 2m);
- Wash hands regularly and keep them away from the face;
- cough into a handkerchief or the crook of your arm and sneeze;
- regular ventilation of rooms.

b. Hygiene precautions

In sanitary facilities, hygiene recommendations must be attached and disinfectants must be provided.

c. Obtaining information about stays in risk areas or contact with infected or sick persons

Employees may be asked to notify the employer of any travel to risk areas and of contact with infected or sick persons. Employees must therefore be informed about which areas are classified as risk areas and asked to inform the employer immediately if they are in these areas. There are no data protection concerns that prevent the employer from collecting this information. On the basis of the information received, further measures can be agreed upon.

On the other hand, a blanket request to all employees to inform the employer in general about their whereabouts or all social contacts is unlikely to be expedient or permissible under data protection law (for further information, please refer to our special information "*Data Protection in Corona Prevention*").

Irrespective of this, there is an obligation for employees to report their own corona disease (as

for any other infectious disease), which could lead to a risk for other employees. The personal data collected in this context, which regularly includes health data, may be processed for more extensive preventive measures against the spread of the infection (for further information, please refer to our special information "*Data Protection in Corona Prevention*").

d. Further protective measures (especially in case of concrete cases of infection)

If a case of infection has already occurred in a company, it is imperative that more extensive protective measures are taken to protect employees. However, even if there has not been a case of infection in the company to date, the following measures for more extensive risk prevention can be considered:

- **Use of electronic means of communication**
  As far as possible, personal meetings and appointments should be avoided. Instead, electronic means of communication such as telephone/video conferences should be used.

- **Home Office**
  Working from home can reduce the risk of infection, which is why the arrangement of a home office can be a component of risk prevention. However, a one-sided work instruction by the employer to work in the home office is only possible if there is a corresponding agreement (in particular individual contract, company agreement). If there is no such agreement, the employer cannot issue a unilateral instruction; however, an attempt can be made to supplement the employment contract by mutual agreement, which is currently in the interests of many employees. If there is a works council, it should be included in the planning of home office agreements at this stage on account of the existing co-determination rights. Further details should be accompanied by a legal advisor.

- **Keeping employees out of the company**

  If an employee falls ill or is suspected of being infected or ill by the coronavirus, the employer has the right and duty to keep the affected employee out of the company.

  If the employee's infection is only recognized after the infected or sick employee has continued to stay in the company, those third employees who have had contact with the infected or sick employee must be informed and, if necessary, also removed from the company in order to prevent further employees and third parties from being endangered. Data protection law requirements must be observed in this respect, which is why the name of the infected or sick person must not be mentioned as a matter of principle (for further information, please refer to our special information "*Data Protection in Corona Prevention*").

- **Plant closure**

  If, according to an official order or after an operational risk assessment, there is a health risk for the whole plant or for a defined part of the plant, the plant must be restricted accordingly and in the worst case even closed down completely.

- **Coordination with the competent authorities, in particular health authorities**

  Of course, every concrete case of infection in the company must be reported immediately to the responsible health authorities. Whether and which further concrete protective measures should be taken in the event of concrete cases of infection in the company must also be agreed with the responsible authorities in this connection. You will find the local health office responsible for you under the link: https://tools.rki.de/PLZTool/.

2. Employees' rights

a. Principle: No right to refuse performance for healthy employees

The general situation of a pandemic does not in itself entitle the employees to refuse to work and stay at home. If an employee is absent from work without prior permission, he/she is in breach of his/her duty to perform work. He may not demand remuneration for the time in question. Whether a warning or dismissal is effective if the employee does not show up for work for fear of contagion must be assessed on a case-by-case basis.

b. Missions and postings; private travel

Something else may apply if the employee is exposed to an increased risk of infection through intensive contact with other people (work colleagues, public traffic), so that the work is unacceptable for him (e.g. business trip to an area with an official travel warning). In such cases, the employee may be entitled to refuse to perform his work. Whether the contractual remuneration is to be paid can only be determined in each individual case.

On the other hand, an employer cannot forbid his employees from taking private trips - even to risk areas, if at all possible at present. The employer's right to give instructions does not extend to the private sphere of the employees.

c. Without agreement: no right to home office

Just as the employer is not entitled to unilaterally order work in the home office without a corresponding basis (cf. above), the employee is not entitled to work in the home office in the absence of a corresponding agreement. The employer can therefore, insofar as no official order to the contrary exists, instruct the employee not entitled to work in the home office to work in the company.

d. Right to refuse performance in the event of necessary childcare

The need to care for children may entitle the employee to a temporary refusal of performance, always taking into account the individual case.

If the employee's child falls ill, the employee may find it unreasonable to perform the work, which may entitle the employee to refuse to perform the work. The employee may also be entitled to a statutory right to leave of absence of ten days against the employer; in the case of single parents the entitlement increases to 20 days (§ 45 subsection 3,.5 SGB V (German Social Code)). However, whether, on what basis and to what extent the employee is entitled to refuse his performance is a question of the circumstances of the individual case.

If the employee's child is not ill, but needs care due to the closure of day-care centers and schools, taking into account the age of the child, the parents must first make every reasonable effort to provide childcare elsewhere. If, despite these efforts, childcare cannot be provided, the employee may, depending on the individual case, be unable to perform the work, so that he or she is released from the obligation to perform the work. However, there is no general entitlement to this.

A justified absence from work - even if this occurs against the employer's will - cannot be sanctioned under employment law, as there is no violation of contractual obligations due to the personal unreasonableness of the work performance.

e. Cancellation by the employer of leave already granted

If employees are absent due to illness or the need to care for children, staff shortages may occur. Employers may have an interest in cancelling leave already granted to third party employees in order to continue to have sufficient personnel available. However, leave granted can only be revoked by the employer in an emergency. Such an emergency only exists if, for

compelling operational reasons, there is no other way out than to revoke the granted leave, as otherwise the existence of the company would be endangered.

3. Loss of work and entitlement to remuneration of the employee

The issue arises in which case an employee continues to receive his or her remuneration despite the obligation or entitlement to stop work:

a. Sick employees

If the employee is incapacitated for work, there is an entitlement to continued remuneration for a maximum period of six weeks in accordance with § 3 of the Continued Remuneration Act (EFZG). The employee is not obliged to perform work. After the six weeks, the employee receives sick pay from his or her health insurance fund.

b. Official ban on activities or officially ordered quarantine

If an official ban on work or quarantine is imposed on an employee who is infected but not ill in accordance with §§ 30, 31 of the Protection against Infection Act (IfSG), the employee is entitled to compensation for loss of earnings in accordance with § 56 IfSG. The loss of earnings must be paid by the employer for a maximum period of six weeks. However, the employer will be reimbursed for this payment by the competent public health department upon application; he merely acts as "paying agent". You can find the local health office responsible for you by clicking on the link: https://tools.rki.de/PLZTool/. If the official measure lasts longer than 6 weeks, the employee will receive sickness benefit payments from the health office for the following period on request.

It is doubtful whether a company can also claim reimbursement of compensation costs under § 56 IfSG if the restriction of operations is not based on an official order but the company itself has decided to do so. Depending on the possibility, other options, such as the introduction of short-time work, should be considered in such cases (for further information, please refer to our special information "*Corona pandemic: introduction of short-time work*").

c. Officially ordered plant closure

If the plant is restricted or closed down in whole or in part on the basis of an official order or following an operational risk assessment, this generally falls within the operational risk to be borne by the employer. This means that employees do not lose their right to remuneration during the period of unemployment. Whether or not there are any provisions deviating from this in a collective bargaining or employment agreement, and whether these are permissible, must be legally assessed in each individual case.

In the event of an officially ordered closure of a plant, it must be examined on a case-by-case basis whether the companies can assert claims for compensation against the health authorities under the IfSG. As a precautionary measure, in the event of an officially ordered closure of a company, short-time work should also be reported to the Federal Employment Agency and an application for short-time work compensation should be submitted (for further information, please refer to our special information "*Corona pandemic: introduction of short-time work*").

d. Keeping employees away or voluntary (partial) closure of the plant for risk prevention reasons

If a company is obliged to provide for the welfare of its employees or if the company decides voluntarily to keep (individual) employees away from the plant or, if necessary, to close the plant completely or at least partially, the company remains obliged to pay the employees' remuneration.

Careful consideration should therefore be given to what design options are available to minimize the economic burden:

- **Grant of leave**

  Holidays are generally based on the wishes of the employee. Therefore, the employer cannot unilaterally order leave or determine short-term company leave. The ordering of leave is therefore only possible with the agreement of the employee. A discussion with the employee should therefore be sought.

- **Reduction of time credits**

  If a working time account is kept for the employees concerned in order to make them more flexible, the reduction of time credits can be ordered within the framework of this account. The possibilities for this depend on the respective rules in the individual or collective agreements on working time accounts. When ordering the reduction of time credits, however, the interests of the employees must be taken into account appropriately, in particular an appropriate period of notice must be observed.

- **Work in the home office**

  As far as employees are not sick incapacitated for work, but are to be kept away from the company only for reasons of risk prevention, it should be examined whether the employees can perform the work owed to them under their employment contract from their home office if necessary. As described above, however, this requires a corresponding agreement (e.g. in the employment contract or in a company agreement).

- **Introduction of short-time working**

  In order to limit the risk of continued remuneration in the event of major operational restrictions due to the effects of the coronavirus, the introduction of short-time working may be considered. For details on the subject of short-time working, please refer to our special information "*Corona pandemic: Introduction of short-time working*".

e. Childcare

A distinction must be made between the employee's right to be absent from work to care for children and the question of whether the employee is entitled to continued payment of remuneration during this period:

- **Continued payment for the care of sick children**

  If an employee's child is ill and has to be looked after, the employee may be entitled to stay away from work temporarily without losing the right to his or her remuneration (§ 616 BGB (German Civil Code)). According to the wording of the law, however, the entitlement to continued payment of remuneration, in particular for the care of the child, exists only "*for a relatively insignificant period of time*". Rigid time limits cannot be drawn here. The prevailing view is that a claim to continued payment of remuneration exists only for a period of

prevention of five to ten days. The prevention period must be determined within the framework of a forecast. If it is already foreseeable from the outset that the prevention will exist for a longer period, the claim is cancelled altogether. It should be noted that the claim to continued payment of remuneration may be excluded under Section 616 BGB by virtue of employment or collective bargaining agreements. Practice shows that the claim is excluded in many employment contracts.

If the employee is not entitled to continued payment of remuneration pursuant to § 616 BGB, employees who are members of a statutory health insurance fund may, if necessary, assert claims for sickness benefit against the fund if a medical certificate shows that they are required to be absent from work to supervise, care for or nurse their child who is ill and insured under the statutory health insurance scheme (§ 45.1 SGB V). This entitlement to sickness benefit exists in each calendar year for each child for a maximum of ten working days, for single parents for a maximum of 20 working days (§ 45.2 SGB V).

- **Continued payment of fees for the care of children in the event of the closure of schools and childcare facilities**

  If the kindergarten or school is closed and an employee's child must therefore be cared for at home, a claim to continued payment of remuneration can exist in accordance with § 616 BGB. However, this again only applies if the claim has not been excluded by employment or collective bargaining agreements. In addition, employees must make sufficient efforts to find alternative care options for the child and be able to explain the reasons why no other employment is possible.

  However, if schools, kindergartens and other facilities are closed for a period of several weeks, the entitlement to remuneration can be completely excluded from the outset, as the prevention of work performance is predicted to last too long. This applies if the child must be looked after by the employee himself for the entire duration of the closure. In this case, the employee must either take leave, reduce working time credits or take unpaid leave.

  From the employer's point of view, however, it should be considered to accommodate the employee for a certain period of about one week, so that the employees gets the chance to organize different childcare and create appropriate structures. Tough disputes should be avoided, also because employees have the opportunity to torpedo the employer's plans for a period of seven days due to the current facilitation of sick leave by telephone medical consultation.

  Employers and employees should therefore seek an amicable solution wherever possible.

II. Conclusion

If there is a risk of infection, the risks must be assessed and preventive protective measures taken. If disruptions occur, opportunities for alternative employment time reduction and short-time work can be used. The information provided is of a general nature and cannot take into account special features of individual cases. In the event of actual impairment, an individual analysis and advice is required in any case.

III. Further information

You can find all special information here:
https://www.sonntag-partner.de/kontakt/covid-19-aktuelle-sonderinfos/

The above statements are only a non-binding compilation according to the current status. No liability is assumed for the correctness and completeness. We would be pleased to support you in checking and, if necessary, implementing the above measures in your company.

The contact persons of our law firm who are known to you are also available here.
In addition, you will find the contact persons who have been particularly involved in the above-mentioned topics.

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Concluding remarks

You can find further information about our law firm and our consulting services at https://www.sonntag-partner.de/