ALERT MEMORANDUM

What employers in Germany should know in times of COVID-19

April 7, 2020

The spread of the corona virus poses unprecedented challenges to all employers. The following addresses some of the most relevant employment law questions for employers in Germany.

We have a COVID-19 Task Force within Cleary Gottlieb that is acting as a repository for practical solutions, best practice and issue-spotting to help our clients by sharing market experience, insight and advice from across our global presence.

If you have any questions concerning this memorandum or COVID-19 more broadly, please reach out to us on Global-Cleary_Covid-19_Taskforce@cgsh.com or the following authors:

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1. Partial or full closure of business imposed by the authorities: Do employers have to continue paying salary?

If the employer is subject to an administrative order to shut down all or part of its business, and the employees can therefore not perform their work anymore, the employees will nevertheless keep their salary entitlements under German employment law. The shut-down of the business by authorities is generally considered part of the business risk of the employer. Therefore, according to Section 615 sentence 3 of the German Civil Code (*Bürgerliches Gesetzbuch*) in connection with the doctrine of business risk (*Betriebsrisikolehre*), the employer bears the risk of loss of its business in such case and must pay the agreed remuneration.

2 Individual employee is banned from going to work by the authorities: Do employers have to continue paying salary?

The situation is different if an individual employee is subject to an employment ban imposed by the authorities and must stay at home. Unless such employee has the capability to work from home, the employer is released from the obligation to pay such employee's salary. However, the employer is obligated to pay out a compensation under Section 56 of the German Protection Against Infection Act (*Infektionsschutzgesetz*) to the employee, which is based on the employee's salary, for a maximum period of six weeks. The employer is entitled to reclaim from the competent authority the compensation amount paid out to such employee.

Please note that the foregoing does not apply if the employee is incapable to work at all due to serious illness. In such case, the employer must continue to pay such employee's salary for a maximum period of six weeks (like in case of any other kind of sick leave) under the German Act for Continuation of Remuneration (*Entgeltfortzahlungsgesetz*), which takes precedence.

3. How can employers save cost of personnel if business activity is reduced or completely gone? Brief introduction to the concept of short-time work (*Kurzarbeit*).

To mitigate the impact of a temporary disruption of business, German employment law provides for the possibility to introduce short-time work. This means a reduction of the working hours of the employees (even down to zero), coupled with a corresponding reduction of the salary. To mitigate the financial impact of short-time for employees, the Federal Employment Agency (*Bundesagentur für Arbeit*) pays short-time allowance (*Kurzarbeitergeld)* (typically 60 percent or 67 percent, if the employee is under an obligation to support dependents, of the net shortfall for the employee) to the employers who have to pay these amounts to their employees. Thus, the employer pays the short-time allowance in advance, but is entitled to reimbursement by the Federal Employment Agency. As a result, the employer must only pay salary for the reduced working hours (or none in case short-time is reduced to zero) and is therefore able to substantially save cost of personnel, because the German government steps in to finance the short-time allowance for the employees. The short-time allowance is capped at the social security contribution ceiling (*Beitragsbemessungsgrenze*), currently EUR 6,900 per month in the Western part of Germany, *i.e.*, the short-time allowance will in no case exceed an amount of EUR 2.891,65. The goal of short-time allowance is to prevent dismissals: Employees keep their employment relationship in place, although with reduced hours and lower income for an interim period.

So far, requests for short-time allowance from the Federal Employment Agency were only permitted, if at least one third of the employees had to work reduced hours and a reduction of hours could not be avoided by building up negative balances in the working hours account. With retroactively effect as of March 1, 2020, short-time allowance is now already payable if at least 10 percent of the employees work reduced hours; the requirement to build up negative balance in working hours has been completely waived. Furthermore, short-time allowance will now also be available for temporary/agency workers (*Zeit-/Leiharbeitnehmer*).

In addition, the Federal Employment Agency will now fully pay the social security contributions relating to the short-time allowance. Short-time allowance may be granted by the Federal Employment Agency for a period of up to twelve months.

Please note that the employer is not authorized to order short-time work unilaterally, but requires the consent of the affected employees. Such individual consent may be replaced by an agreement with the works council, if any. Short-time work may also be governed by collective bargaining agreements with unions.

The employer has to notify the short-time work to the Federal Employment Agency, including an indication of the reasons for the significant loss of business, and apply for the short-time allowance for the affected employees.

4. What obligations does the employer have to protect the employees' health?

The employer generally has an obligation to protect its employees from any health hazards at the workplace. According to Section 618 of the German Civil Code, the employer must take appropriate measures to protect his employees against risks to life and health. Under the current circumstances, the employer has the obligation to take specific appropriate measures to protect the health of its employees.

In particular, the employer shall direct all employees to work remotely (*i.e.*, working from home), if possible, in order to prevent the spread of the virus. If the employees have roles not being suitable for remote work, the employer shall instruct them to avoid unnecessary gatherings of more than two persons and to keep a distance of minimum one and a half meters to others. Exceptions can only be made for compelling business reasons (and, as the case may be, with protective masks and clothes).

5. Can the employer internally announce that one of its employees has been infected?

In case an employee is infected or suspected of being infected with the corona virus, the employer has a strong legitimate interest in obtaining this information and disclosing the information to other employees who (probably) had contact with such employee (*i.e.*, on a need to know basis). Such limited disclosure is generally permitted under German data protection and employment laws. The employer has the obligation to protect all of its employees from diseases due to employer's duty of care and the obligations under the German Occupational Health and Safety Act (*Arbeitsschutzgesetz*). This includes the processing of medical data of an employee, who is affected by the corona virus. Please note that such disclosure is only permitted if and to the extent the knowledge of the identity of the (potentially) infected employee is necessary for the purposes of informing the contact persons or implementing precautionary measures in order to prevent a further spreading of the virus.

6. Child care required by the employee due to the shut-down of child care facilities imposed by the authorities: Do employers have to continue paying salary?

Generally, employers do not have to pay salary if employees stay at home for child care.

However, in order to mitigate adverse economic effects for families affected by the shutdown of schools and day care facilities due to the corona virus, as from March 30, 2020, employees who have to care for their children may stay at home while keeping their entitlement to continued payment of salary, even without taking vacation: An employed parent, having a child (i) below the age of 12 or (ii) which requires care due to disability, and whose care cannot be ensured in any other way, has the right to refuse to perform his or her work and the employer may claim for such employee compensation under the German Protection Against Infection Act. However, any flex-time or overtime credit of the employee shall be used up first.

The compensation amounts up to 67 percent of the net shortfall for the employee (but not more than EUR 2,016.00 per month) and will be granted up to a maximum of six weeks. Such claim does not exist during school holidays.

Please note that the employer is obligated to pay out the compensation to the employee, but is entitled to reclaim any salary paid out to such employee.

7 What to watch out for when employees are working from home?

Working from home is one of the first measures employers chose in order to protect their employees' health and to ensure business continuity. However, working from home may raise several concerns from an employment law perspective, especially regarding work safety, confidentiality and employee data protection regulations. In addition, the employer has to provide the employee with all the work equipment that is required for home office (laptop, monitor, phone etc.).

In particular, the employer has to create the work place in a way that minimizes hazards for physical and mental health as far as possible. This applies as well to the workplace at home. The employer must take appropriate measures to ensure the employees' physical and mental health while they are working from home.

Besides work safety issues, the employer should instruct his employees working remotely to reiterate the ongoing obligations to confidentiality regarding work-related materials, regardless where work is performed. The employer must also consider data protection regulations. As the "responsible body" within the meaning of the General Data Protection Regulation (GDPR), the employer is responsible for compliance with the relevant data protection provisions and is, therefore, liable *vis-à-vis* his customers and suppliers for any data protection violations that occur within its area of responsibility.

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