

CORONAVIRUS SARS-COV-2

Employment law guide: short-time work and the „Work for Tomorrow Act“

With more preventative measures now in place through social distancing and remote working, businesses will be affected by the economic impact of the new coronavirus SARS-COV-2.

It is essential to prepare for an economic crisis and act early. Understanding your options under employment law will protect your businesses and safeguard your competitive position in the market in the long term.

Your human resources teams will also play a significant role. Among other potential workforce restructuring measures, short-time work has been in the headlines daily, as a means of responding to an impending difficult economic situation. Governments have already reacted and intend to provide more support for companies introducing short-time work to help save jobs. One of the most significant changes here is that temporary workers will also now be entitled to short-time work compensation. These changes are due to come into force in early April as part of the "Work for Tomorrow Act" and are set out below.

We have summarised the most important aspects and legal requirements below, and provided our recommended checklist if you're considering applying for short-time work structures:

1. Make sure that you are eligible for short-time work and short-time allowance (KUG) or for a temporary shutdown (zero short-time work).

a) Short-time work

Short-time work is the temporary reduction of the volume of regularly owed working time with subsequent return to the agreed amount of time (BAG, NZA 2016, 565). For a more detailed definition of the term "temporary", case law has most recently referred to the social law provisions in Section 96. para. 1 no. 2, Section 104. para. 1 sent. 1 SGB III. According to this provision, if a period of 12 months is exceeded, there is no longer a temporary reduction in the working time regularly owed.

By establishing short-time work, the working time owed can be reduced to up to zero hours and the salary is reduced to zero euros (**so-called short-time work zero**).

aa) Introduction of short-time working

The employer cannot unilaterally determine the implementation of short-time work, but needs precise legal basis (BAG 16.12.2008 – 9 AZR 164/08 – BAGE 129, 46, Rn. 27 ff.):

- on the basis of company agreements
- on the basis of collective agreements
- by specific, individual contractual agreements
- in the event of mass dismissal on the basis of Section 19 KSchG

bb) Legal consequences in the absence of an order/ agreement

If short-time work has not been effectively ordered / agreed under labor law, the employee's full salary claim against the employer continues to exist and there is no loss of remuneration. The employer can therefore be in default of acceptance if he assumes effective short-time work and therefore fails to delegate work to the employee, Sections 615, 296 BGB.

b) Short-time working allowance

The requirements for granting short-time working allowances are set out in Sections 95 et seq. SGB III.

aa) Entitlement of the Contractor to short-time work compensation

exists if the requirements of Section 95 sentence 1 no. 1-4 SGB III are cumulatively fulfilled

(1) Significant work loss with loss of earnings

- is determined according to Section 96 para. 1 sent. 1 no. 1-4 SGB III → work loss is due to economic circumstances or to an unavoidable Event; loss of work is temporary and inevitable.
- inevitable work loss, in particular the work loss which is mainly customary in the industry or customary in the company (Section 96 para. 4 sent. 2) → In the case of pure temporary employment agencies, temporary loss of working hours is mostly customary in the industry or company, so that entitlement to short-time working compensation for temporary employees is not applicable.

NEW: Temporary workers are also to be entitled to short-time work compensation!

Work loss affects at least one third of the workforce employed in the company and a loss of earnings of more than 10% of the gross salary.

NEW: Quorum of the affected employees should be lowered from one third to 10%!

(2) Operational requirements fulfilled, Section 95 sent.1 no. 1

at least one employee must be employed in the business unit concerned.

(3) Personal requirements fulfilled, Section 95 sent. 1 no. 3

if the employee concerned is in employment subject to compulsory insurance after the beginning of the period of absence from work; i.e. the employment relationship may not have been terminated or cancelled and the employee may not be excluded from short-time working benefits.

(4) Loss of work has been reported to the Federal Employment Agency

notification of the loss of working hours to the employment agency in whose district the business is located; Form: written or electronic; notification to be made by the employer or the works council; If notification is made by the employer, the opinion of the works council must be enclosed; With notification, credible evidence that there is a considerable loss of working hours and that the requirements for the KUG are fulfilled.

Pursuant to Section 99 para. 2, the period of entitlement under the KUG begins in the month in which the notification of the loss of working hours is received by the Federal Employment Agency.

bb) Scope of services, Sections 104 ff. SGB III

(1) Duration

Payment of the KUG by the employment agency for a maximum of 12 months; beginning with the first performance of the KUG by the employment agency, maximum 12 months; beginning with the first calendar month in which the employer pays KUG; if no KUG is paid within the period of at least one month, the period of entitlement is extended by this period; if no KUG is paid for three months and the conditions for entitlement to KUG are fulfilled again, a new period of entitlement begins.

NEW: It should be easier to extend the short-time working allowance to 24 months!

(2) Amount, Section 105 SGB III

KUG is basically 60% of the net salary difference in the entitlement period.

For employees who would meet the requirements for the increased allowance rate for unemployment benefit, i.e. who have children, 67%.

(3) Net pay gap, Section 106 SGB III

means the difference between the net remuneration from the target remuneration (normal remuneration of the employee) and the net remuneration from the actual remuneration (remuneration actually received)

(c) Contribution to social security

While receiving KUG, the employment relationship subject to compulsory insurance continues.

→ Employees pay half of their contributions to social security and the employer out of the earned income (so-called actual income) pays for the other half.

The KUG itself is not subject to income tax and does not constitute remuneration within the meaning of social security insurance; however, the employer must pay social insurance contributions for the fictitious part of the remuneration. → The contributions for the lost hours are calculated based on a fictitious remuneration (80% of the gross difference in remuneration → this is the difference between target remuneration and actual remuneration); the employer must basically pay these contributions alone

NEW: These fictitious social security contributions are to be fully reimbursed by the Federal Employment Agency!

2. Define which employees will be affected by the loss of working hours, or specify who should be exempted

3. Determine the duration and extent of the short-time work.

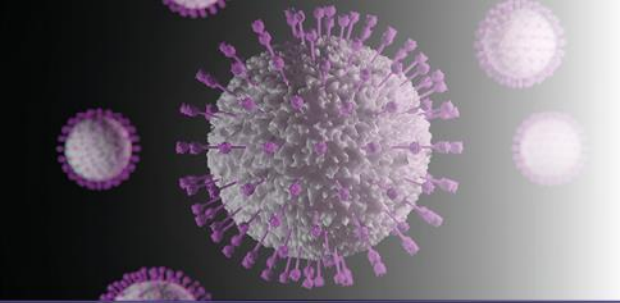
4. First take priority measures such as reducing time off/working time credits, granting leave, ordering company leave, etc.

However, since short-time work may only be the last resort to free oneself from a temporary financial emergency, the measures described above must be taken as a matter of priority to ensure that the Employment Agency approves the application for short-time work.

5. Find out the responsible Federal Employment Agency and the responsible contact person where short-time work is to be registered and where short-time work allowance is to be applied for. Obtain the necessary forms from the relevant employment agency.

6. Create the legal conditions for the introduction of short-time work

- a) First of all, check whether an applicable collective agreement exists or employment contracts that allow the introduction of short-time work and check the conditions laid down therein.
- b) If a works council exists in your company and no collective agreement is applicable, the introduction of short-time work is subject to co-determination in accordance with Section 87 para. 1 no. 3 BetrVG. In this case you must conclude a works agreement on short-time work with your works council. The Federal Labor Court has decided that the company may not introduce short-time work on the basis of the instruction right. The works agreement must regulate, among other things, the introduction and duration (start and end) of short-time work, the scope of short-time work, the employees affected, as well as the location and distribution of working time/short time, priority measures (see above), a regulation on short-time compensation, and the period of validity of the works agreement.
- c) If no collective agreement applies to your company and there is no works council, the only legal basis is the employment contract, which may have to be amended if it does not contain a provision on short-time working.



We are available at any time to answer your questions and would be pleased to support you. Please don't hesitate to speak to your contact at Taylor Wessing or to contact our Corona Task-Force:

- 1 | Corona-Hotline
+49 211 8387/[216]
- 2 | Task-Force
corona.task@taylorwessing.com

The Employment, Pensions & Mobility group at Taylor Wessing has over 50 lawyers across our offices in Hamburg, Berlin, Munich, Düsseldorf and Frankfurt. We provide our clients with comprehensive advice on all aspects of employment law and on special topics. Thanks to our personnel strength, experts are always available, even for short-term projects that require more complex consideration.