

As of 1 March 2020

CORONAVIRUS SARS-COV-2 FAQ Labour law

The new challenge of coronavirus SARS-CoV-2 raises numerous questions in terms of labour law. We have collated the most important questions from the management team's point of view for you. Caution is required in labour law, as it always depends on each individual case. Legal advice is just as important in dealing with the virus as proper hand hygiene. This FAQ does not replace a review of the legal situation in individual cases and does not constitute legal advice.

Preventative response and prompt action is essential. Our expert task force members – Dr. Oliver Bertram, Dr. Kilian Friemel, Dr. Johannes Höft and Dr. Michael Pils – are available to support you

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Corona-Hotline
+49 211 8387/[216]

2

Task-Force
corona.task@taylorwessing.com

3

Webinars/Info:
Further information and webinars can be found at <https://deutschland.taylorwessing.com/de/webinar-das-arbeitsrechtliche-handling-des-corona-virus>

Keyword	Question	Answer
General right to ask questions	<i>Does the employer have a general right to ask about an employee's state of health?</i>	No. German law does not provide for a general right to ask questions about an employee's state of health. Caution is advised with regard to data protection law. However, in the case of a concrete/ reasonable suspicion of illness, or for certain sensitive companies (e.g. health care/hospitals), or in a hazardous situation, there may be a right to ask questions, taking into account the works council's co-determination (personnel questionnaire) and the statutory special rainfall.
Employee data protection	<i>What applies to sickness in relation to colleagues?</i>	Employee data protection must be strictly observed in the event of illness. Reporting of Corona to the authorities is only obligated in accordance with the Infection Protection Act. In individual cases, it may be necessary to inform work colleagues of the illness or non-illness due to your duty of care. However, the employer must ensure that the employees themselves do not pass on the notification. In this respect, employees are obliged to maintain secrecy in order to protect the personal rights of the sick person concerned. A detailed examination of the individual case is recommended.
Duty to work	<i>Can workers stay at home because of general danger or because of the "pandemic"?</i>	No. If an employee is not sick, the employee has to show up for work. The risk of possible infection on the way to work does not entitle the employee to refuse to perform his work. Anyway, it has not been classified as pandemic by WHO.
Medical examination	<i>Can the employer demand a medical examination of the employee?</i>	The employer can only order a company medical examination if there is an overriding interest. This is to be assumed if the worker has faced a clear exposure risk, e.g. because the worker had been in a crisis region for which a travel warning had been issued. This is a question in each individual case. Because of the employee's right of personality (<i>Persönlichkeitsrecht</i>), a legal examination is always required.
Operating risk	<i>What applies if there is a high level of sick leave in the company?</i>	In principle, the employer bears the risk that, due to illness of the workforce, the business cannot be maintained. However, the employer can take various measures to minimise the financial risk, such as short-time work compensation or overtime arrangements.
Disinfectants / Masks	<i>Does the worker have to use disinfectants and are they obliged to wear a mask?</i>	With the exception of special operations (e.g. hospitals, food production), there is no fundamental obligation on the employer to put up disinfectants or to equip employees with masks (unless personal protective equipment according to the Occupational Health and Safety Act is concerned). Correspondingly, there is no general obligation for workers to use disinfectants or to wear masks. If the employee wants to oblige the employer to use disinfectants, this requires a company regulation. In the case of face masks, for example, the works council's right of co-determination on the dress code should also be considered. The employee must also be instructed accordingly, e.g. with regard to the health hazards of incorrect use of disinfectants (skin diseases, allergies, etc.).



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Recommendations of the Robert Koch Institute	<i>Must the employer follow the recommendations of the Robert Koch Institute?</i>	There is no obligation to implement the recommendations of research institutions such as the Robert Koch Institute. However, the recommendations of recognised research institutes must be taken into account within the framework of health protection measures, with due regard for co-determination at the workplace, especially if they are also scientifically responsible for assessing the risk situation. For reasons of duty of care, the employer is therefore obliged to pass on appropriate recommendations to employees (e.g. hand washing rules). In this respect, the employer is also obliged to follow the current official recommendations.
Posting	<i>Can a worker refuse to be posted to a crisis area if there is a travel warning from the Federal Foreign Office?</i>	Yes. The employee may only refuse to be posted if there is an official travel warning. This follows from the mutual duty of consideration. However, travel warnings from other countries are generally not sufficient. This also depends on the individual case – a Chinese or Japanese travel warning may therefore have to be taken into account depending on the circumstances.
Secondment (obligation to retrieve)	<i>Does the employer have to bring back a posted worker?</i>	Where German labour law applies (which depends on the posting), there may be a right of retrieval. Priority should be given to other measures, unless there is a specific risk to life as indicated in the travel warning. A safety notice is not sufficient. However, the employer is obliged to inform the employees about the possibilities of registration with the Foreign Office (“German List”) and the information service provided by the Foreign Office.
Illness (continued payment of remuneration)	<i>Should remuneration continue to be paid in the event of a “pandemic”?</i>	Yes. In the event of incapacity for work, the employee is entitled to continued payment of remuneration if the other requirements are met. However, employees who travel to a area despite a travel warning from the Federal Foreign Office can, legally speaking, lose their right to continued payment of wages.
Right to ask questions regarding crisis regions	<i>Does the employer have the right to ask questions for employees returning from abroad?</i>	Here, a distinction must be made. If it is a risk region for which there is a travel warning, the employer is entitled to ask the employee about their whereabouts. However, as a rule, the employer may only demand negative information that the employee has not been in particularly dangerous places.



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Harmlessness to health (certificate)	<i>Can the employer insist on a health certificate?</i>	Apart from the statutory cases, e.g. in the context of compulsory occupational health care, the employer cannot insist on the submission of medical certificates or even health reports. However, an employee who has recovered from a coronavirus illness must be declared harmless to health due to public law regulations (Infection Protection Act). In this case, the employer may require the employee to present the relevant decision to the employer.
Home Office/Remote	<i>What applies with regard to home working arrangements?</i>	The employee is not entitled to work from home unless this has been granted to the employee e.g. in a works agreement or employment contract. As a result, the employee is not entitled to tele-work or mobile working without any company or employment contract regulations. On the other hand, the employer cannot unilaterally order home working. If work is to be carried out remotely, it must be ensured that the employee has a workplace that meets the legal requirements. A pandemic, for example, does not exempt an employer from complying with workplace legislation. The instruction of the employer to take laptops and work from home is therefore only conceivable in emergencies. For example, if the risk situation develops unclearly over a weekend off or over holidays. In exceptional cases, it is conceivable that the strict occupational health and safety regulations may be suspended in the short term (for example, in the event of a real emergency). As a rule, however, it is reasonable and necessary to comply with the rules of occupational health and safety law even when working from home in the event of corona virus. This is because employers must be prepared for such risks of globalisation (see emergency plan).
Kindergarten/school/nursing	<i>What applies if the kindergarten, nursery or school is closed due to coronavirus?</i>	Even though there is no Japanese situation (where all schooling has been suspended for March) in Germany, if a school /kindergarten is closed, the employee can assert a right of refusal to pay benefits against the employer and be absent from work if the employee is responsible for raising children (custodially). Apart from exceptional operational rules, the obligation to pay remuneration does not apply in this case. However, if the child is ill, the statutory provisions on continued remuneration apply.
Costs	<i>Who bears the costs, e.g. for occupational health care?</i>	The employer bears the costs of occupational health and safety, e.g. for occupational medical care. This also applies to changing times or the establishment of suitable remote workstations.
Hospital staff	<i>What are the employer's duties to protect hospital staff?</i>	The basis for the employer's concrete existing protection obligations is the risk assessment. In addition to the legal obligations for hospital hygiene and the prevention of infection, the employer has a particular obligation to provide information and to monitor health. Details depend on the hospital staff.
Short-time work (practical experience at Corona)	<i>Is there already practical experience of applying for short-time work due to the coronavirus?</i>	Yes. In North Rhine-Westphalia, a low number of companies have already requested short-time work due to coronavirus in the last week of February. The German Federal Employment Agency has expressed the view that short-time work compensation could be granted not only in the event of production stoppages due to, for example, supply bottlenecks by Chinese suppliers, but also in the event of precautionary plant closures.



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Management duties	<i>What are the duties of management?</i>	<p>Management is not only obliged to comply with the law, but must also ensure that the company's organisational structure is able to respond appropriately to threats such as the coronavirus. In this respect, the following five key points are recommended as a reminder, which can, for example, form the basis of a management decision:</p> <ul style="list-style-type: none"> ▶ Operational arrangements: Analysis of the existing regulations to identify the need for action and, if necessary, adaptation, especially with regard to emergency plans. ▶ Instruction and training of employees. ▶ Establishment of a crisis unit or a crisis management team. ▶ Delegation of supervision and monitoring duties to reliable and suitable staff and ensuring efficiency e.g. through clear reporting lines, task assignments. ▶ Moderate, level-headed communication both internally and externally with business partners, customers, the press.
Measures taken by the employer to mitigate the operational risk	<i>What measures can an employer take to mitigate the operational risk of high sickness rates or supplier failure?</i>	<p>Labour law provides a number of possibilities to mitigate the consequences of the corona virus.</p> <ul style="list-style-type: none"> ▶ Short-time work: The employer may provide short-time work compensation. The prerequisites, in particular the existence of a significant loss of working hours due to an unavoidable event, should be examined. In addition, short-time work requires a regulation, be it a company agreement or (in the absence of a works council) an individual contractual regulation. A supplier default is usually an unavoidable event for which short-time work is applicable. ▶ Ordering overtime: In exceptional cases, the employer may order overtime. However, the case law of the Federal Labour Court applicable in this regard is limited to genuine emergencies. Here it is necessary to consider whether the risk of a potential pandemic – which is an obvious one due to globalisation – constitutes such an emergency. In older case law, the Federal Labour Court tends to assume that in the case of hazards to operating facilities, goods or workplaces, an emergency situation can be assumed in which the employer may unilaterally order overtime. However, the details must be carefully examined in relation to the company. If a works council exists, for example, company emergency plans can restrict the right to order overtime. ▶ Flexible deployment of personnel: The German Law on Temporary Employment also offers numerous opportunities to react flexibly to fluctuations. Because of the compliance relevance, precise advice is required in individual cases. .
Meetings/Fairs	<i>Does the employee have to participate in meetings or trade fairs if this is in principle consistent with their employment contract activity?</i>	<p>Yes. There is no general right of refusal. However, the employer must check at meetings whether face-to-face meetings can be dispensed with, because of possible risks to the participants. Japanese companies, for example, are making increasing use of video conferencing.</p>
Duty of notification	<i>Does the employee have to provide information on his whereabouts on his own initiative?</i>	<p>The employee is not obliged to provide the employer with information on their whereabouts on their own initiative. However, the employer can ask whether the employee has been in crisis regions (see right to ask questions).</p>



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Mobbing	<i>What are the employer's obligations if he discovers that panic arising from the virus results in people being treated unfairly in the company?</i>	In principle the employer is obliged to prevent bullying. The employer must ensure that the workforce does not exclude colleagues who, for example, come from risk areas or may have contact with colleagues. It should be checked whether appropriate measures against discrimination and bullying are in place in the company, e.g. bullying prevention agreement and education and information.
Pandemic Plan	<i>What should be regulated in a corona virus emergency plan?</i>	<p>As a preventive health protection measure, the employer is obliged to draw up a corona virus emergency plan, taking into account the works council's right of co-determination. The following control areas are often found:</p> <ul style="list-style-type: none"> ▶ Scope of application: Inclusion of all employees in accordance with the Occupational Health and Safety Act and, from a factual point of view, inclusion of all measures for the operational containment of infection risks. In addition to examples of regulations, reference can also be made to the measures ordered by the company crisis management team. It makes sense to have equal representation on the crisis team, including the work security experts (SiFa) and the company doctor ▶ Examples of measures: Depending on the operation and hygiene requirements, special protective measures must be taken. The employer must be guided by (occupational) medical expertise. For example, due to the lipid-based nature of the coronavirus, extensive hand hygiene has been proven to be more effective than the use of disinfectants or even wearing masks. ▶ Reporting obligations/Hotlines/Whistleblowers ▶ Transfer rights, substitution rules, overtime orders, holiday regulations or short-time work ▶ Arrangements for remote working (home office/telework arrangements) ▶ Monitoring, documentation, data protection measures ▶ Period of validity/entry into force: Exact definition of which measures take effect at which level. Here, the WHO and the Robert Koch Institute offer assistance. ▶ Training/information on disease prevention
Quarantine	<i>What applies to quarantine?</i>	Quarantine measures are only possible as sovereign measures on the basis of the Infection Protection Act. Anyone who is subject to a quarantine measure receives compensation in accordance with the rules of the Infection Protection Act. The works council clearly has no right of co-determination due to a lack of regulatory competence. However, compensation is not granted in every case: If the employer is obliged to continue to pay the remuneration for other reasons (e.g. due to company or collective bargaining agreement regulations), the claim for compensation is not applicable. The amount of compensation is based on the rates of the health insurance fund, i.e. 70% of the gross salary, maximum 90% of the net salary, but not more than 109.38 euros per day. Payment of the compensation is to be made by the employer, who is in turn entitled to reimbursement from the authority and may request an advance payment. The regulation, which is stricter for employers in this respect, is ultimately based on the business risk theory.



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Suspension (General)	<i>Can the employer suspend the employee against their will?</i>	A unilateral suspension is only possible if the employer's interest in suspension outweighs the suspension interest. This is the case if the employer has justified reason to assume that the employee is ill and, due to the risk of infection, it can be assumed that the colleague is at risk. A concrete suspicion based on facts is needed, such as staying in crisis regions with a proven high risk of infection.
Suspension (works council/co-determination)	<i>What needs to be considered with regard to the works council?</i>	The suspension may constitute a dislocation. In addition, the works council has a mandatory right of co-determination, as this is a health protection measure. Employers are therefore well advised to agree emergency plans with the works council.
Suspension (continued payment of remuneration)	<i>Does the employer have to continue to pay the salary in the event of a unilateral suspension?</i>	In the case of justified suspension, i.e. in the event of a concrete health hazard, the employee is entitled to remuneration if (i) the suspension is not excluded by contract/tariff and (ii) the period of suspension is not disproportionately long. The Federal Civil Court considers a period of six weeks to be conceivable in an older decision. However, the circumstances of the individual case must always be taken into account.
Suspension due to reports in the media/WHO	<i>Can the employer release the employee on the basis of media reports?</i>	The employer's interest in suspension cannot be based (exclusively) on media coverage or WHO reports. This is because the employer must react prudently and weigh up carefully because of his duty of care. Official state sources must be considered in any case. However, depending on the exposure or risk situation, it may also be that the employer must already take precautions on the basis of media reports and is obliged to take action. This always requires consideration of each individual case.
Holiday	<i>Can an employee refrain from taking authorised leave or request that leave be carried over beyond 31 March on the grounds that travel opportunities are currently restricted?</i>	No. If the leave is approved, it must also be taken in principle. The risk that the employee is not able to make the trip of their choice lies in the sphere of the employee. In special cases, deviations may result, for example, from special company regulations. Apart from the legal side, HR departments will often make exceptions for goodwill reasons.
Insurance cover	<i>Is the employee insured if they are infected by a colleague?</i>	Employees, especially those working in hospitals or medical practices, are protected against illness by the statutory accident insurance.
Cooperation with colleagues from crisis regions	<i>Can a worker refuse to work because their colleague has returned from a crisis region and fears contagion?</i>	No. A right of retention is also excluded in this case.