

## Labour law responds to challenges of the COVID-19 crisis

At present, new developments in connection with the labour law management of the corona pandemic are taking place almost daily. A few days ago, for example, the legislator decided on financial support for working parents who have to look after their children (1.). The Federal Ministry of Labour and Social Affairs even assumes, against the background of the current legal situation, that works council resolutions can be passed in video or telephone conferences (2.). Finally, our advisory practice shows that employment agencies are noticeably reducing the bureaucratic hurdles for notification of and application for short-time pay (3.).

### 1. Financial support for working parents

Because of COVID-19, schools and daycare facilities for children have been closed since 16 March 2020. In many cases childcare was and is no longer guaranteed. Emergency care is available for children of professional groups which have systemic importance (including medical staff, police officers, members of the judiciary). For parents who do not belong to these occupational groups and cannot organise their own childcare, however, the motto is: do not go to work, but look after children.

In the employment relationship, the principle "no work, no pay" applies – i.e. those who do not work do not receive any remuneration. It is true that § 616 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) contains a legal provision which provides for continued payment of earnings if the employee is temporarily unable to work. However, it is disputable whether this provision is appropriate, and the current situation is no longer temporary, as the provision can only cover a few days at most. In many cases the application of Sec. 616 BGB is contractually excluded anyway. In these cases, overtime compensation, vacation or unpaid leave must be used to bridge the time, and all this must be agreed with the employer.

The legislator has recognised this difficult situation for parents and on 25 March 2020, decided on the provision of financial support. Parents who

- due to the closure of schools and day-care facilities because of the COVID-19 pandemic
- do not have reasonable and possible care alternatives,
- therefore have to stay at home and look after the children themselves, and
- will suffer a loss of earnings as a result,



shall be entitled to compensation in cash if

- the children have not yet reached the age of twelve
- or are disabled and in need of help.

The loss of earnings of the parents is at least partially mitigated: **67 % of net income** is granted for a **maximum of six weeks**, up to a **maximum of EUR 2,016** per month. Compensation is also limited by the fact that there is no entitlement for the period of **school holidays**, if the schools and day care facilities would have closed anyway during this time and the parents would have had to make other arrangements.

Payment is made by the **employer**, who can submit a **reimbursement application** to the competent state authority. The parents must also **credibly demonstrate** that it is not otherwise possible to provide childcare. Anyone who stays at home even though their partner is not working and would have time, is therefore not entitled. Also those who still have overtime on their working time account or hours on their flexitime account must first use them up. Claims for short-time pay take precedence over the reimbursement claim as well.

This regulation applies until the end of the current year. The legislator has recognized that Sec. 616 BGB does not help and has taken other remedial action. This makes sense, on the one hand, in order to take away the parents' worries about having to provide for their children and, on the other hand, to avoid possible disputes between employer and employees. We therefore recommend that employers inform their employees about this new regulation.

## 2. The virtual works council is on its way

According to the prevailing view in case law and literature, a works council can only pass resolutions effectively if its members meet in person (§ 33 Works Constitution Act [Betriebsverfassungsgesetz, BetrVG]). At present, however, a works council meeting with compulsory attendance in person involves health risks for those present. For this reason, the Federal Minister of Labour and Social Affairs, Hubertus Heil, spoke out in a declaration on 23 March 2020, in favour of the possibility of passing resolutions in works council meetings by means of video or telephone conference. It should also be possible to use WebEX meetings or Skype.

Unauthorized third parties should not be able to participate in the meeting in order to uphold the principle of non-publicity. Attention should be paid to this when participating at home. In the absence of a handwritten list of participants, participation should be confirmed to the works council chairperson in text form, i.e. by email. The resolutions passed in such a meeting are effective.

However, there is no legal regulation on this yet. Nevertheless, it seems appropriate and often necessary to proceed accordingly. We therefore recommend that the basis for virtual works council meetings be anchored in a works council agreement. We have prepared best practice templates for this purpose, which we would be happy to adapt to your company's situation. It would be welcome if the legislator were to regulate the permissibility of virtual works council resolutions by law, thus creating legal certainty for the parties to the agreement.

### **3. Experiences from advisory practice: Facilitation of notification and application for short-time pay**

In a previous newsletter, we had already reported that the legislator intends to reduce the prerequisites for receiving short-time pay and to introduce further favourable regulations for companies.

In practice, we have also experienced that the employment agencies are currently noticeably reducing the bureaucratic hurdles in connection with the notification and application for short-time pay.

Previously, notification of short-time work had to be submitted locally for each business operation. The decisive factor should be where the HR decisions are made. According to this, especially for companies with several business sites or branches, several notifications about lack of work to different employment agencies were necessary. Centralized "key support" should only be possible when applying for short-time pay and only if there is a central payroll accounting office in the company.

According to a new directive to the employment agencies, it is currently likely sufficient for large companies with several legally independent branches to submit one single notification to the employment agency relevant to the company's headquarters. The prerequisite for this is that subsequently only a single application then has to be filed for the entire company.

At the time of the release of this newsletter, the authors were only aware of the above-mentioned internal directive from their advisory practice and from calls with employment agencies. The procedure should therefore be discussed in advance with the contact person at the relevant employment agency. If this is possible, then the uniform notification of short-time work and application for short-time pay is a welcome relief for companies, which should definitely be used to avoid administrative work.

We would be pleased to support you in planning and taking appropriate measures.

#### **Further information:**

- Entwurf eines Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite:  
<https://dip21.bundestag.de/dip21/btd/19/181/1918111.pdf>
- Corona crisis and short-time working:  
<http://www.bakermckenzie-kompass.de/coronakrise-und-kurzarbeit/>

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For further information, please contact:



Dr. Gregor Dornbusch  
[gregor.dornbusch@bakermckenzie.com](mailto:gregor.dornbusch@bakermckenzie.com)



Katja Häferer  
[katja.haeferer@bakermckenzie.com](mailto:katja.haeferer@bakermckenzie.com)



Petra Hess, LL.M.  
[petra.hess@bakermckenzie.com](mailto:petra.hess@bakermckenzie.com)



Dr. Felix Diehl  
[felix.diehl@bakermckenzie.com](mailto:felix.diehl@bakermckenzie.com)



Kerstin Schmiedel  
[kerstin.schmiedel@bakermckenzie.com](mailto:kerstin.schmiedel@bakermckenzie.com)

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## Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB

### Berlin

Friedrichstrasse 88/Unter den Linden  
10117 Berlin  
Tel.: +49 30 2 20 02 81 0  
Fax: +49 30 2 20 02 81 199

### Frankfurt am Main

Bethmannstrasse 50-54  
60311 Frankfurt / Main  
Tel.: +49 69 2 99 08 0  
Fax: +49 69 2 99 08 108

### Dusseldorf

Neuer Zollhof 2  
40221 Dusseldorf  
Tel.: +49 211 3 11 16 0  
Fax: +49 211 3 11 16 199

### Munich

Theatinerstrasse 23  
80333 Munich  
Tel.: +49 89 5 52 38 0  
Fax: +49 89 5 52 38 199

[www.bakermckenzie.com](http://www.bakermckenzie.com)

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