

## Coronavirus: Questions relating to labour law

*Can I stay at home? Do I have to go into the office if my colleagues have a cough? We provide answers to these and other questions in our coronavirus FAQ.*

### **Do I have a right to work from home?**

There is no statutory entitlement to work from home. However, employees can do so if their employer agrees. Working from home might also be available as an option on the basis of a firm-level agreement or a collective agreement.

### **Do I have to go into the office if my colleagues have a cough?**

Employees do not have a general right to stay away from work during an outbreak of illness such as COVID-19. Employees would only be entitled to refuse to work if they cannot reasonably be required to perform their work (Section 275 (3) of the Civil Code (*Bürgerliches Gesetzbuch*)). The condition of unreasonableness is met if, for example, the work poses a significant objective risk to the employee's health, or if there are at least objective grounds for a serious suspicion that such a risk exists. The mere fact that colleagues have a cough, without further objective grounds for suspicion or indications that a risk exists, will probably not be sufficient to meet this condition.

### **Are employers allowed to require employees to work overtime if many members of staff are absent due to illness?**

Overtime is when an employee works more than the agreed normal working hours.

In principle, employees only have to work overtime if a collective agreement, a firm-level agreement or their employment contract requires them to do so. However, a secondary obligation to work overtime can also exist if the overtime will prevent the employer from suffering damage which cannot be averted in any other way. This could be the case if, for example, large numbers of staff are absent because of COVID-19.

If overtime pay is not regulated in the employment contract or a collective agreement, employees can, in principle, demand to be paid for the overtime at their basic rate, in accordance with Section 612 of the German Civil Code. An employee is only entitled to be paid for overtime if the overtime has been ordered, approved or tolerated by the employer or is, in any case, necessary for the employee to perform his or her contractual work.

### **Am I entitled to continue to be paid if my workplace experiences temporary disruption or is temporarily closed?**

As far as the continued payment of wages is concerned, employers are required, in principle, to continue to pay their workforce if the employees are able and willing to work but the employer is unable to employ them for reasons falling within the employer's operational sphere (the "operating risk" principle, Section 615, third sentence, of the Civil Code). For example, this would include cases where employers temporarily halt operations because of significant staff absences or supply bottlenecks caused by COVID-19. In other words, employees are still entitled to be paid in these cases, even if they cannot work.

**Please note:** individual contracts or collective agreements may contain different rules for circumstances where neither the employer nor the employee is responsible for the lack of work.

### **Can a company receive the short-time allowance (*Kurzarbeitergeld*) if it cuts working hours as a result of the coronavirus?**

If the coronavirus causes supply bottlenecks or if the authorities order closures, forcing companies to limit or stop production, this can lead to an entitlement to the short-time allowance for the employees affected.

Companies which want to apply for the short-time allowance must first notify the local Employment Agency (*Agentur für Arbeit*) about the short-time work.

The local Employment Agency examines whether the conditions for granting the short-time allowance are met on a case-by-case basis.

The short-time allowance can be granted for up to twelve months. It is paid at the same level as unemployment benefit and compensates for 67 or 60 per cent of the net pay lost as a result of the short-time work.

More detailed information about applying for the short-time allowance can be found on the Federal Employment Agency's website at the following link:

[www.arbeitsagentur.de/news/kurzarbeit-wegen-corona-virus](http://www.arbeitsagentur.de/news/kurzarbeit-wegen-corona-virus)

### **What happens if my employer has introduced short-time work (*Kurzarbeit*)?**

If an employer has justifiably introduced short-time work, the situation is somewhat different from that discussed for the question "Am I entitled to continue to be paid if my workplace experiences temporary disruption or is temporarily closed?". If short-time work results in a loss of working time and pay – for example, because the coronavirus causes supply bottlenecks which mean the company is unable to operate at full capacity or at all, or because the business is ordered by the authorities to stop operating – the employees affected may be entitled to receive the short-time allowance (*Kurzarbeitergeld*). The short-time allowance can be granted for up to twelve months. It is paid at the same level as unemployment benefit and compensates for 67 or 60 per cent of

the net pay lost as a result of the short-time work. The local Employment Agency examines whether the conditions for granting the short-time allowance are met on a case-by-case basis.

**What happens if my child isn't ill, but his or her day care centre or school is closed (for a longer period) and I've no other childcare available? Do I have to take holiday leave?**

If children are too young to be left on their own when a child day care centre or school is closed, the parents must initially make all reasonable efforts to find an alternative (for example, it may be possible for one parent to look after the children). If the necessary childcare cannot be arranged, an employee normally has the right to refuse to work as he or she can probably not reasonably be required to work (Section 275 (3) of the Civil Code). This means that in these circumstances the employee is released from his or her obligation to work; it is not strictly necessary to take holiday leave.

It is important to keep in mind, however, that when an employee has the right to refuse to work on personal grounds, he or she is only entitled to continue to be paid in very specific circumstances. Such an entitlement can exist, under Section 616 of the Civil Code, if the absence is for a relatively trivial period of time. It should also be noted that this entitlement under Section 616 of the Civil Code can be limited or completely ruled out by the provisions of an employment contract or a collective agreement. If the employee takes holiday leave, he or she receives holiday pay.

In this situation, it will probably be helpful to begin by discussing the options with your employer. The Federal Ministry of Labour and Social Affairs is calling on all employers to work with the affected employees to agree on pragmatic solutions (e.g. working from home, creative working time models, use of holiday leave and working time accounts, etc.) which take into account families' needs and enable organisations and facilities to keep functioning.

**What happens if I can't get to work, for example because public transport is not running?**

If an employee's workplace is open, but he or she is unable to get there because of generally ordered measures and cannot perform his or her work as a result, the employee has no statutory entitlement to receive his or her agreed wages, in principle. This is because employees bear the risk concerning their ability to get to work.

**What happens if I fall ill with COVID-19?**

If an employee falls ill due to coronavirus infection, and is therefore unable to work, he or she is entitled to continued payment of wages in the event of sickness for a period of six weeks (Section 3 of the Continuation of Wage Payments Act (*Entgeltfortzahlungsgesetz*)). After this period, people insured under the statutory health insurance scheme are entitled to receive sickness benefit (*Krankengeld*).

### **Am I entitled to be paid if I am the subject of a measure taken by the authorities to prevent infection?**

If an employee is personally the subject of a measure taken by the authorities, for example if the individual is banned from working or placed in quarantine, the employee can be entitled to be paid by his or her employer. The Federal Court of Justice has ruled that a situation of this kind can constitute a temporary, personal reason for absence from work, in which case the employer must continue to pay the employee's wages even though the individual is not required to work (Section 616 of the Civil Code). The duration of the continued payment of wages depends on the circumstances of the individual case (see Federal Court of Justice, decision of 30 November 1978, III ZR 43/77 – according to this decision, the maximum duration is 6 weeks).

In cases where Section 616 of the Civil Code is restricted or does not apply because of the provisions of an individual contract or a collective agreement, or does not apply for other reasons, people are entitled to compensation from the state in many circumstances. People who are suspected of being contagious and are isolated by order of the local public health office (*Gesundheitsamt*), and suffer a loss of earnings as a result, receive compensation under Section 56 of the Protection Against Infection Act (*Infektionsschutzgesetz*). The level of compensation is based on the loss of earnings. For the first six weeks, the compensation is equivalent to the full amount of the lost earnings. From the start of the seventh week, the compensation is the same amount as sickness benefit. Employees receive compensation equivalent to their net wages from their employer for the duration of their isolation, up to a maximum of six weeks. The employer can apply for reimbursement of these payments. After six weeks, the state pays compensation at a level equivalent to sickness benefit. This compensation rule does not apply to people who are ill, as they are already entitled to continued payment of wages in the event of sickness and to sickness benefit.

### **What obligations do employers have to protect their employees? Do risk assessments also have to cover protecting staff from infectious diseases?**

Under the Safety and Health at Work Act (*Arbeitsschutzgesetz*), employers have a fundamental obligation to assess the risks to the safety and health of their employees in the workplace (risk assessment) and take measures based on this assessment. In the framework of pandemic preparedness (civil protection), employers have to identify and take additional measures where necessary. Specific information on this can be found, for example, in the National Pandemic Preparedness Plan (*Nationaler Pandemieplan*) on the Robert Koch Institute's website.

As far as occupational safety and health is concerned, the Biological Agents Ordinance (*Biostoffverordnung*) applies when employees deal with biological agents as part of their work (Section 4 of the Ordinance). Biological agents such as viruses, bacteria, etc. have to be included in the risk assessment. Employers are required to identify and implement measures to protect their employees in view of these risks. These can be technical and organisational measures, such as separation of work areas or limits on the number of staff. Where a risk exists, employers must also make personal protective equipment available, such as protective gloves or respiratory protective equipment. Employees must be advised

about the risks, both generally, via instruction, and on an individual basis, via preventive occupational health care. Further details are contained in, for example, the Technical Rules on “Biological Agents in Health Care and Welfare Facilities” (TRBA 250) or Resolution 609, “Safety and health at work in the context of a human influenza which is not sufficiently vaccine-preventable”, which is currently being applied, with suitable modifications, in the efforts to prevent COVID-19.

### **What information do I have to give my employer about my health (proactively or if asked by my employer)?**

In principle, employers may only ask questions about an employee’s health if there is a special justification for doing so, as such questions constitute a considerable interference in the employee’s general right to privacy and to informational privacy. This is why a doctor’s certificate of incapacity for work for submission to an employer does not state any diagnosis, for example.

However, if employees are diagnosed with coronavirus, employers can require employees to inform them of this to enable employers to fulfil their duty of care and protection and to allow them to protect the health of other employees.

### **Do I have to go on business trips and attend work-related events?**

In principle, employees are obliged to perform the work required by their employment contract, which includes business trips and work-related events. However, employees can be entitled to refuse to work if they cannot reasonably be required to perform their work (Section 275 (3) of the Civil Code). The condition of unreasonableness is met if, for example, the work poses a significant objective risk to the employee’s health, or if there are at least objective grounds for a serious suspicion that such a risk exists. This must be decided on a case-by-case basis. Concerns about the coronavirus will probably not be sufficient on their own to allow employees to refuse to go on a business trip or to attend other work-related events, without further objective indications that a risk exists.

### **What happens if employers send employees home, for example because they have a cough?**

Employers have a duty of care towards their employees, and are therefore required to keep employees who are ill and objectively unfit for work away from the workplace. If employers send such employees home, the employees are entitled to continued payment of wages in the event of sickness. The provisions of the Continuation of Wage Payments Act (*Entgeltfortzahlungsgesetz*) apply.

Employers who send home employees who are able and willing to work, purely as a precaution, are required to pay these employees on the basis of the principle of default in acceptance (Section 615, first sentence, of the Civil Code). In such cases, employees are not required to make up the time.

### **When do I have to produce a certificate of incapacity for work (*Arbeitsunfähigkeitsbescheinigung*)?**

All employees who are unfit for work are required to notify their employer of this without undue delay, and to state how long they expect this to be the case (Section 5 (1), first sentence, of the Continuation of Wage Payments Act (*Entgeltfortzahlungsgesetz*)). They can do this by telephone, for example. If the employee is unfit for work for longer than three calendar days, the employee is required to submit to the employer, no later than the following working day, a doctor's certificate of incapacity for work which states that the employee is unfit for work and indicates how long this is expected to be the case (Section 5 (1), second sentence, of the Continuation of Wage Payments Act). Employers are entitled to require employees to submit a certificate earlier. However, employers can also set a later date for submission of the certificate or temporarily waive this requirement. In the current circumstances, it is recommended that employees contact their employer to discuss exactly how to proceed.

If employees who are ill are unable to submit a certificate to their employer immediately (e.g. because doctors' surgeries are overwhelmed), the certificate may also be submitted to the employer at a later date. If this has resulted in the employer initially not continuing to pay the employee's wages, the employer must then pay the wages retrospectively.

### **Is information available for non-hospital doctors and for hospitals and clinics about resource-efficient use of protective equipment?**

The ad hoc COVID-19 Working Group set up by the Committee on Biological Agents (ABAS) has issued advice on this subject at the request of the Federal Ministry of Labour and Social Affairs. It can be accessed at the following link:

<https://www.baua.de/DE/Themen/Arbeitsgestaltung-im-Betrieb/Biostoffe/FAQ/pdf/Empfehlungen-organisatorische-Massnahmen.pdf>

It is also recommended that you should contact the relevant occupational safety and health authority (*Arbeitsschutzbehörde*) or your occupational accident insurance fund (*Unfallversicherungsträger*) to discuss any specific questions or problems.

A list setting out the contact details of the occupational safety and health authorities is available at the following link: <https://www.baua.de/DE/Themen/Arbeitsgestaltung-im-Betrieb/Branchen/Bauwirtschaft/Baustellenverordnung/pdf/Arbeitsschutzbehoerden.pdf>

The contact details of the occupational accident insurance funds (*Berufsgenossenschaften*) and public-sector accident insurers (*Unfallkassen*) are available at the following link: <https://www.dguv.de/de/bg-uk-lv/index.jsp>

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