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Germany: Short-Time Work Program

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In view of the corona pandemic, many employers in Germany are considering the implementation of short-time work. New "corona legislation" has made it easier for employers to apply and also provides for additional cost savings.

The following provides a brief overview of the current situation (please note that the information may be subject to changes).

In the essence, short-time work means that for a limited period of time the employee works a reduced amount of hours (this can even be zero) and his remuneration is reduced accordingly. Short-time work is a kind of "temporary part-time work".

Employees whose working hours are reduced due to the implementation of short-time work are (partly) compensated for the loss of income by short-time work payments (*Kurzarbeitergeld*, abbr. *KUG*), which is a benefit provided by the labour agency (under the statutory social security scheme governing unemployment benefits).

I. Implementation of short-time work (*Kurzarbeit*)

Short-time work cannot be implemented by a unilateral decision of the employer, but requires a valid legal basis.

An applicable collective bargaining agreement (*Tarifvertrag*), an applicable works council agreement (*Betriebsvereinbarung*) or – if there is no works council or if the affected employees are not represented by a works council – an individual agreement can serve as a legal basis for the implementation of short-time work.

1. Works council agreement

The works council has a **mandatory co-determination right** with regard to the implementation of short-time work according to § 87 para. 1 no. 3 Works Constitution Act (*Betriebsverfassungsgesetz/BetrVG*). Hence, a works agreement will be required to implement the short-time work for the employees who are represented by a works council.

It is quite common that the works council tries to negotiate certain benefits for the employees affected by short-time work (or maybe for the whole establishment), e.g., an exclusion of dismissals for operational reasons during the period of short-time work or an allowance to be paid by the company to top-up the publicly funded short-time work payments.



2. Individual agreement

If there is no works council or if the affected employees are not represented by a works council, an **individual agreement** is required in order to implement short-time work. The agreement can become effective at any time.

Sometimes the **employment contract** contains a clause that allows the employer to implement short-time work, in which case no additional agreement is necessary. However, this is rather rare. In any case, it is worth checking whether the employment contracts contain such clause.

Another possibility – in case an employee does not agree to a short-time working arrangement by individual agreement – is a **notice of termination** combined with an **offer** to continue the employment relationship (temporarily) under changed conditions. However, in practice, this is neither usual nor easily enforceable and should only be considered as a "last resort".

In case of an *ordinary* notice of termination combined with an offer to continue the employment relationship under changed conditions ("*ordentliche Änderungskündigung*"), the changes (here: reduced working hours and remuneration) will only become effective once the applicable notice period has expired. Thus, this is not likely to make sense for the employer, since he must react to a currently urgent situation and therefore cannot wait for the respective contractual or statutory notice periods to expire.

It would therefore only make sense to give an *extraordinary* notice of termination for cause combined with an offer to continue the employment relationship under changed conditions ("*außerordentliche Änderungskündigung*"). A good cause exists if the continuation of the employment relationship with the previous conditions is unacceptable and the immediate change of the working conditions is absolutely necessary. In addition, these changes must be tolerable for the person dismissed. For the existence of an important reason, the courts are likely to be guided by the requirements for the short-time work payment ("*Kurzzeitarbeitergeld*") (see below). Such an extraordinary notice of termination for cause combined with an offer to continue the employment relationship with changed conditions may arguably not be given without a notice period, but with a period of notice of three weeks so that the employee can adjust to the changed working and income conditions. However, please note that there is no federal court case law on these issues yet and such, there is a high degree of uncertainty. If notices of termination are issued, there is a high likelihood of litigation. Undesired outcomes could be either that the court decides that the hours were not validly reduced and thus, the employer has to pay the full remuneration (although the employee only worked reduced hours) or that employees accept the termination (but not the offer) and thus leave the company.

II. Short-time work payments (*Kurzarbeitergeld*)

As mentioned above, employees whose working hours are reduced due to the implementation of short-time work are (partly) compensated for the loss of income by short-time work payments, which is a benefit provided by the labour agency.

1. Requirements

According to § 95 Social Security Code III (*Sozialgesetzbuch III/SGB III*), employees are entitled to short-time work payments if

- (i) there is a significant loss of working hours with loss of pay,
- (ii) the operational requirements are met (i.e. at least one employee is employed in the establishment),
- (iii) the personal requirements are fulfilled (in particular, the employees are in an employment relationship in which neither a notice of termination has been issued nor termination agreement has been concluded), and
- (iv) the loss of working hours has been reported to the labour agency.

A loss of working hours is significant according to § 96 *SGB III* if

- (i) it is due to economic reasons or an unavoidable event,
- (ii) it is temporary,
- (iii) it is unavoidable, and
- (iv) in the respective calendar month (entitlement period) at least one third (1/3) of the employees employed in the establishment (or in a department, cf. § 97 clause 2 *SGB III*) is affected by a loss of compensation of more than 10% of the monthly gross remuneration.

According to a new law (recently enacted in view of the Corona crisis), the threshold of affected employees has been changed. From 1 March 2020 until 31 December 2020, it is sufficient that **one tenth (1/10)** of the employees in the establishment or department are affected by a loss of compensation of more than **10% of the monthly gross remuneration**.

2. Amount of payments

If the requirements for short-time work payments are met, the employee will receive short-time work payments for a maximum period of **twelve months** in accordance with § 104 *SGB III*.

The short-time work payment amounts to

- 60% for employees without children
- and 67% for employees with children



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of the "net salary difference" during the entitlement period, i.e. the salary lost as a result of short-time work, up to the contribution ceiling in the statutory unemployment insurance (currently € 6,900 gross per month in the Western part of Germany and € 6,450 gross in the Eastern part).

Previously, the social security contributions arising in relation to the "lost" working hours had to be fully paid by the employer. However, from 1 March 2020 until 31 December 2020, employers may apply to be reimbursed for these **social security contributions**, thus they are saving costs.

3. Procedure

In order for the employees to receive short-time work payments, the **employer** must make an **application to the labour agency** and prove that the requirements are fulfilled. The amount of the short-time work payments has to be calculated by the employer. The employer also has to make the payments to the employees and is reimbursed by the labour agency.

For more information or assistance with the implementation of short-time work in Germany, please contact:

Daniela Hangarter, LL.M. (Christchurch)
Rechtsanwältin, Fachanwältin für Arbeitsrecht

GREENFORT Rechtsanwälte
Arndtstraße 28
60325 Frankfurt am Main
Phone: +49 69 9799580
Fax: +49 69 97995810
E-Mail: hangarter@greenfort.de
Web: www.greenfort.de