

The coronavirus from the perspective of employment law – implications for business

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Questions relating to employment law

Everywhere you look, people are talking about the coronavirus. Caused by the pathogen SARS-CoV-2, this virus is responsible for a new type of respiratory disease, COVID-19, which first appeared in Wuhan, a Chinese city with millions of inhabitants, at the end of December and has since spread rapidly throughout the world. Its effects on the economy are already being felt. Many businesses have already taken action and have worked out emergency plans. For example, the press recently reported that the European Central Bank (ECB) among others last week introduced compulsory home office for all its employees as a test for precautionary measures against the further spread of the coronavirus. Not without reason, as it shortly afterwards transpired, when the first cases of infected persons in the ECB were reported. But in such exceptional circumstances can an employer simply compel my employees to work from home? This and other employment law questions in connection with the coronavirus will be examined in more detail below from an employer's perspective.

1. Can the employer make a unilateral decision to compel employees to work from home?

Pursuant to Section 106 sentence 1 of the German Industrial Code (Gewerbeordnung - GewO), an employer's instructions to switch from the office workplace in the company to home office is in principle outside the employer's remit (right to issue instructions), as long as there is no contractual agreement, works agreement or regulation in an applicable collective agreement with regard to the employee's activities, at least as far as home office is concerned, which stipulates that the employee must perform his work on the company premises in accordance with the contract of employment.

The question is whether such a unilateral instruction to work from home is to be judged differently in the light of the coronavirus. After all, according to Section 106 sentence 1 GewO, the employer's instruction to work from home must reflect "reasonable discretion". In the opinion of the Federal Labour Court, an instruction reflects reasonable discretion if the mutual interests have been weighed up in accordance with constitutional and statutory value judgements, general evaluation principles of proportionality and appropriateness as well as common practice and reasonableness. Although it follows from Article 13 of the German Basic Law (Grundgesetz – GG) that the employee's home is in principle inviolable, so that an encroachment by the employer in this area is out of the question, the employer's non-contractual duty of care, particularly where cases of illness have already occurred among colleagues, also requires that safety measures be taken in the interests of the employee. Such safety measures may very well also mean compulsory home office. In any case, the employer can still make a corresponding contractual agreement with his employees regarding home office or conclude a works agreement with the works council.

2. What about the employee's wages?

Does the employee continue to receive wages in case of illness or quarantine? What happens when kindergartens or schools of the employee's child close? What happens when the company shuts down completely?

If the employee is unable to work due to the coronavirus, he will receive continued remuneration for a maximum period of six weeks in the event of illness in accordance with Section 3 of the Continued Remuneration Act (Entgeltfortzahlungsgesetz - EFZG), unless otherwise agreed in the employment contract or collective agreement. According to prevailing opinion, this is to be assessed differently if an occupational ban on work has been pre-

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scribed in accordance with Section 31 sentence 2 of the Act on the Prevention and Control of Infectious Diseases (Infektionsschutzgesetz - IfSG) because in that case the employee is already receiving statutory compensation in accordance with Section 56 (1) IfSG. The continued payment of remuneration under the EFZG then no longer applies. If, during the officially prescribed quarantine (Section 30 IfSG), a ban on work is issued, the same applies. It is important to note that the employer must ensure interim payment of the statutory compensation in accordance with Section 56 (1) IfSG and reimbursement will be made to the employer only upon application. This should not be forgotten!

This is to be assessed differently if the employee cannot come to work because he has to look after sick family members or if the child's kindergarten or school is closed for a limited period on account of corona as is currently the case in most federal states in Germany. Then, under Section 616 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) the employer may be obliged to continue to pay the employee's salary if (not to the extent that!) the employee is prevented from working for a "comparatively not inconsiderable period of time". This is generally understood to be a period of up to ten days. For example, if the kindergarten is closed for 14 days, as is the case, Section 616 BGB does not apply. The following is also relevant for employers in the present circumstances: The provision of Section 616 BGB can be waived, i.e. the application of the provision may be excluded through an agreement with the employee, if not ideally already laid down in the employment contract, or in the collective agreement - even retroactively.

If the employer's business is halted or closed down by official decree, e.g. in accordance with Section 28 (1) IfSG, this is generally to be attributed to the employer's business risk (Section 615 sentence 3 BGB) even if this involves external circumstances affecting the business ("force majeure"). Affected employees are therefore still entitled to continued remuneration unless otherwise agreed between employee and employer. In these cases, as far as possible under the circumstances, at least a unilateral order from the employer to work from home should be considered. Also, an (ir)revocable release of employees from their employment duties in order to use up (remaining) holiday or overtime credits could be considered, if provided for in the employment contract or agreed between employee and employer subsequently or within the framework of works agreements.

3. May employees stay away from work for fear of infection?

As long as there is no realistic risk of infection in the company by infected colleagues, employees must appear for work. If employees absent themselves from work, initial warnings are issued and, in the event of repeated absence, dismissal is also an option. In these cases, the employer is also not obliged to pay the employee his wages because the principle of "no work - no wages" applies in employment law.

4. What about business travel?

Since 15.03.2020 the Foreign Office has generally advised against non-essential travel abroad, as further drastic restrictions in international air travel and tourist traffic, quarantine measures and the restriction on public life in many countries can be expected. In principle, even during a worldwide epidemic, employees are obliged to perform their work and, if provided for in their employment contract, to travel if requested to do so by the employer. Nevertheless, as part of his non-contractual duty of care, the employer will be required to reduce business trips to a minimum as far as possible in order not to endanger the health of the employees. An order from an employer to undertake business trips to countries for which a travel warning has been issued by the Foreign Office, the Robert Koch Institute or the WHO is, however, ineffective, as this is outside the employer's remit according to Section 106 sentences 1 and 2 GewO as being incompatible with reasonable discretion. The employee may refuse to follow such an order on the grounds of a considerable risk to life and health.

5. What safety measures must the employer take?

As already mentioned, the employer has a non-contractual duty of care towards his employees. It follows from this that the employer must take appropriate safety measures to protect his employees from infection and to prevent the spread of the infection in the company, for example by taking hygiene precautions such as providing disinfectants, by providing information on the risks of infection and illness or by requesting information on projected trips to risk areas.

If an infection occurs, the public health authorities must be informed, and these may impose work bans or quarantine restrictions.

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6. Conclusion: prevention yes, panic no!

Panic is always counterproductive and can have a significant negative impact on the working environment. Therefore, preventive and safety measures should always be openly communicated to employees and they should be continuously kept informed. In any case, it makes sense to draw up emergency plans as well as a safety and communication concept with the involvement of all stakeholders, if for no other reason than to be prepared for an emergency situation. It is also a good idea to partially restructure operational procedures and adapt them to the current situation. There are various ways of doing this, such as home office instead of office presence, in order to ensure at least "minimal normal operations".

We would be pleased to lend you our support in implementing the measures outlined above as well as answer any questions you may have regarding the above information.

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