

Short-time work during the corona crisis

Bundestag passes law to enable simplified granting of short-time work allowance

Status as at 17.03.2020

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Wirtschaftsprüfungsgesellschaft
Steuerberatungsgesellschaft

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Short-time work and short-time work allowance

The economic consequences of the spreading corona pandemic are already becoming apparent in many companies, with some companies already experiencing production cutbacks due to supply bottlenecks for example. Many companies are thinking in terms of short-time work and the short-time work allowance, which proved to be an effective means of helping companies, not least during the global economic crisis of 2008/2009. Against this background, last Friday the Bundestag passed an expedited law entitled **Gesetz zur befristeten krisenbedingten Verbesserung der Regelungen für das Kurzarbeitergeld (KUGermG)** (Act on the Temporary Crisis-Related Improvement of the Regulations Governing Short-Time Work Allowance), which came into force on 15.03.2020. A corresponding legislative decree based thereon is to follow without delay, and according to the Federal Minister of Labour, Hubertus Heil, the resulting simplifications and improvements to the new law (KUGermG) are to take effect retroactively as of 01.03.2020. But what changes will the new law bring about and under which circumstances can a company now introduce short-time work and obtain the short-time work allowance? What must be observed here? Answers to these and other questions are provided in the following guideline.

1. What is short-time work and short-time work allowance?

Short-time work means the temporary reduction of the normal working hours of the employees concerned possibly down to zero (known as zero short-time work) in order to

reduce staff costs and react appropriately to work shortage - also in order to preserve jobs or avoid redundancies for operational reasons.

Since the employees concerned will also receive correspondingly lower wages as a result of the reduction in working hours, the loss of earnings is to be compensated for by the short-term work allowance.

2. Under what circumstances is short-term work allowance paid to employees? What are the changes as a result of the new law?

Entitlement to the granting of short-term work allowances is based on Sections 95 to 99 of the Third Social Security Code (Drittes Sozialgesetzbuch - SGB III), provided the following four conditions are met:

- The **work shortage** is **significant** with an accompanying loss of earnings,
- the **operational requirements** are fulfilled,
- the **personal requirements** are fulfilled and
- the work shortage has been **reported**.

Specifically:

Work shortage is **significant** if it is

- due to economic reasons or an inevitable event,
- unavoidable,
- temporary and
- if a minimum level is reached.

Short-time work and short-time work allowance

The work shortage must be due to an **inevitable event** or **economic reasons**. In the opinion of the Federal Employment Agency, this may, **currently** at any rate, be the **case** if, for example, deliveries cannot be made **due to** the global incidence of illness caused by the **corona virus** and production has to be restricted or stagnates, resulting in the necessity to reduce working hours. This also applies to statutory safety measures, e.g. under the Federal Act on the Prevention and Control of Infectious Diseases (Bundesinfektionsschutzgesetz - IfSG), which lead to plant closures.

Furthermore, the work shortage must be **unavoidable**, whereby the Employment Agency evaluates this criterion on a case-by-case basis. In general, it can be said that for unavailability to occur, positive working time accounts ("plus hours/overtime") would first have to be reduced and negative working time accounts ("**minus hours**") would have to be replenished, **insofar** as there is a **legal basis** for the latter, e.g. based on a collective agreement. According to the new law, the use of minus hours is then to be dispensed with in the future. Holiday leave must also be reduced first and, as a rule, in this context the employer can probably unilaterally require that holiday leave be taken, unless the employee's holiday leave has already been approved by the employer for a later date. In the current corona crisis, company interests therefore take priority over other wishes of employees.

In addition, the work shortage must reach a **minimum level**. Until now, at least 1/3 of the employees employed in the company had to be affected by a loss of earnings of more than 10% of their gross monthly salary. According to the new law, this limit is to be lowered and in future it will suffice if 10% of the employees are affected. The above-mentioned minimum level is of course also reached if a complete closure of the company is ordered on the basis of the IfSG.

The **personal requirements** for short-time allowance are fulfilled with regard to a particular employee if, after commencement of the work shortage, he is employed by the employer in an occupation subject to social insurance contributions, which has not yet

been terminated or otherwise discontinued, e.g. by a termination agreement (note: expiring fixed-term contracts are not covered by this!). Employees who are not subject to social insurance contributions are thus especially **mini-jobbers/the marginally-employed** or **pupils and students in part-time employment**. Although **trainees/apprentices** are not excluded from the outset, in matter of fact short-time work allowances leave them practically empty-handed because the interruption of their training/apprenticeship relationship is usually not unavoidable. The Federal Employment Agency recommends contacting the relevant Chamber of Industry and Commerce. **Managing directors** are in principle only entitled to short-time work allowance if they are employed subject to social insurance contributions and are not self-employed. In practice, however, the entitlement to short-time work allowance often fails due to avoidability, as the managing director is rarely dispensable for a company, even in a crisis, and it is precisely his task to acquire orders, for example, in order to prevent or end short-time work, which means that a reduction in the number of hours he works is probably out of the question. **Temporary and agency workers** have not been eligible for benefits to date. This should also change as a result of the new law.

The **operational requirements** are met if at least one employee is employed in the company.

The significant work shortage must be **reported** to the Employment Agency in writing or electronically. The competent authority is the Employment Agency in whose district the payroll accounting office responsible for the employer is located.

3. How can a company introduce short-time work?

The introduction of short-time work is an essential first step before applying for short-time work allowance. The decision to introduce short-time work is not under the employer's general remit in accordance with Section 106 sentence 1 of the German Industrial Code (Gewerbeordnung - GewO). It therefore requires a special legal basis. Initially, **short-time work clauses in collective agree-**

Short-time work and short-time work allowance

ments qualify for consideration here, if the prevailing view is that at least the employer is bound by collective agreements.

If this is not the case, a **works agreement** between the employer and the works council can be considered - if a works council exists at the employer's company. Finally, short-time work can also be **agreed in individual contracts**. If a clause permitting the introduction of short-time work is not already included in the original employment contract, a supplementary agreement to the employment contract is recommended. Existing individual contractual provisions are usually subject to the same checks that apply to general terms and conditions of business and rarely comply with the resulting principles of appropriateness and sufficient transparency. For this reason, they must be examined in detail in each case. If an amicable settlement cannot be reached, it is also possible to terminate the employment contract by **notice of dismissal with the option of reemployment on altered conditions**. However, this generally brings with it implementation problems (e.g. observance of notice periods, employees' right to sue) and should therefore only be considered as a last resort. It is always necessary in advance to appeal to the common sense of the employees or the employee representatives. In addition, the Federal Employment Agency may empower the employer to **introduce short-time work in the course of mass redundancies** pursuant to Section 19 of the Dismissal Protection Act (Kündigungsschutzgesetz, KSchG).

4. Can the company choose which employees it selects for short-time work?

The employer can also prescribe short-time work for particular sections of his company if only these areas are affected by the work shortage. If possible, reduced working hours can also only be prescribed for particular employees in these sections. When making the decision, the employer must use his **reasonable discretion**, i.e. not act arbitrarily. Important: in companies with works councils, the introduction of short-time work and the regulation of the details are also subject to the co-determination of the works council, which must be involved.

5. How much is the short-time work allowance and how long will it be paid for?

The short-time work allowance is calculated according to the net loss of earnings. This means that the employees affected generally receive 60% of the flat-rate net pay (e.g. without overtime pay) lost as a result of short-time work in the month in which the work shortage occurred, up to the amount of the current income threshold. If at least one child lives in the employee's household, this is increased to 67%. A table for calculating the short-time work allowance can be found on the homepage of the Federal Employment Agency at:

https://www.arbeitsagentur.de/datei/kug050-2016_ba014803.pdf

The short-time work allowance is tax-free, but subject to social security contributions. Thus, the employer must in principle continue to pay his share of the social security contributions. However, the new law provides for the possibility of introducing a full or partial reimbursement of the employer's social security contributions.

The short-time work allowance is granted for a maximum of 12 months, whereby the duration can be extended to up to 24 months by legislative decree of the Federal Ministry of Labour and Social Affairs.

6. How to apply for short-time work allowance. Are there deadlines to be met?

Short-time work allowance must be applied for by the employer or the works council. The employer is also responsible for handling payments to the employee. As already explained, the first step is to report the significant work shortage to the relevant Employment Agency. This notification is followed by a preliminary decision of the Employment Agency, which accepts or rejects the existence of the conditions of eligibility for short-time work allowance. The actual application for the short-time work allowance for the employees concerned must then be submitted within a cut-off period of three months (beginning at the end of the month for which short-time work allowance is applied for).

Short-time work and short-time work allowance

The forms required for the report and the application can be found on the website of the Federal Employment Agency at:

<https://www.arbeitsagentur.de/unternehmen/fianziell/kurzarbeitergeld-uebersicht-kurzarbeitergeldformen>

7. Summary

When introducing short-time work and applying for short-time work allowance, a number of points must be taken into account and considered in advance. We have tried to present these as briefly as possible. Ultimately - as the lawyer likes to say - it depends on the specific case. In this respect, current developments, including those relating to the pending legislative decree, must continue to be monitored. We will of course inform you immediately about any new developments here. You may rest assured of our support on all matters concerning short-time work and short-time work allowance in your company as well as its introduction and implementation.

Please do not hesitate to contact us in this context. We would be pleased to advise you at any time.

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