FAQ on sales slumps and staff shortages

1. How can sales slumps and staff shortages be addressed?

The coronavirus pandemic is affecting the economy asymmetrically in Germany and also worldwide. While some sectors have suffered catastrophic losses in revenue, demand in other areas is so high that capacity is insufficient to meet it.

Production lines in the manufacturing industry are mostly at a standstill, with workers sitting around at home waiting for the end of the crisis. Travel is impossible when hotels are closed and flights cancelled, so the tourism industry has also ground to a halt both here and abroad.

Logistics and retail, on the other hand, are being overwhelmed by increased demand. They are struggling to get goods into the shops and onto the shelves. The parcel delivery sector is also experiencing work levels similar to those during the Christmas season, while the need for care workers is at a record high.

Cooperation between sectors would make sense in this scenario, allowing both sides to compensate for the extreme effects of the crisis. The basic idea is to transfer the surplus workers in a crisis-ridden sector to a sector that is temporarily in need of more staff to cope with increased demand.

2. What are the advantages of such cooperation?

The workers in the locked-down sector avoid a loss of earnings and are given the positive feeling that they are making a contribution to the community in an unprecedented situation, while the permanent staff in the receiving sector benefit from the added support.

For crisis-hit employers, there are savings on personnel costs and a not inconsiderable boost due to positive media reporting, since social appreciation of responsible crisis management is particularly strong in these difficult times.

3. Can employers release their employees from their duty to work so they can be employed on a temporary basis by another company with greater demand instead?

It is possible for employers affected by the crisis to release employees from their duty to work, and for other employers with a temporary need for increased staffing to employ the employees on a temporary basis.

The original employer has no obligation to pay remuneration during this period; the workers are employed and paid by their temporary employers under the conditions customary in those businesses. There is no risk for the employees because they can be given a contractually guaranteed right to return to their original employer and previous employment under the usual conditions after the crisis is over. Since the legal relationship with their original employer is merely suspended and not terminated, any existing confidentiality and non-disclosure obligations continue to apply.

The employment relationship with the temporary employer is usually structured as a fixed-term relationship. Under section 14 (2) of the German Part-Time and Fixed-Term Employment Act (TzBfG), fixed-term contracts for a period of up to two years are generally possible without a specific reason. The written form requirement under section 14 (4) of the TzBfG must be satisfied, however. Failure to meet this requirement will result in open-ended employment relationships with employees that were intended to be hired on a temporary basis only. It is important to include a right to terminate employment for convenience in fixed-term employment contracts, to ensure maximum flexibility. In the event of a decline in the need for additional staff, or a normalisation of the order situation in the original company, a return to the status quo ante can then occur with minimum delay.

4. What rights of the employees and the works council must be considered with regard to this type of fixed-term employment with another employer?

Firstly, employment relationships can only be suspended with the employees' consent unless employment contracts or collective bargaining agreements contain a provision to the contrary. Before hiring temporary employees, the borrowing company must involve the works council pursuant to section 99 of the German Works Constitution Act (BetrVG). There are no codetermination rights applicable to the lending company, either prior to the employees' contracts being suspended or when the employees return to the company.

It is probable, however, that employees will give their consent, since this model is likely to be attractive to them as well. Particularly in cases where the original employer is able to provide only a modest or no top-up of the short-time work allowance paid by the Federal Employment Agency, a full-time job on full pay in another sector is one way to secure urgently needed income.

The original employer and the “borrower” can also formalise the cooperation by way of an agreement. Early termination of fixed-term employment relationships when orders pick up again can be included in such agreements, as well as mutual non-solicitation covenants.

Of course, this model, like the ones described below, requires that the risk of infection for the employees is no higher in the temporary employer's establishment than in the original establishment. Otherwise, alternative employment is likely to be extremely unattractive, even if the pay is better.

5. Can the employees of one company be provided to another company under the German Temporary Employment Act (AÜG)?

It is also possible to place employees at the disposal of another company by means of a conventional arrangement for the provision of temporary workers. In this case, they remain employees of the original employer (the lending company) and work as such for a business that needs more staff (the borrowing company). The exact arrangements must be stipulated in an agreement between the lending company and the borrowing company. It is advisable to set out the arrangements for terminating the assignment in this agreement, in order to be ready for a quick return to normal conditions when the crisis is over.

The provision of temporary workers is strictly regulated in Germany and indeed throughout Europe. For example, a licence is required under the German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz). Exceptions apply only in strictly defined individual cases, for undertakings with fewer than 50 employees or in the context of “neighbourly assistance”, if the provision of temporary workers occurs only “occasionally” and the employees were not originally hired for this purpose (section 1 (3) no. 2a, German Temporary Employment Act (AÜG)).

To overcome the current crisis, the Federal Ministry of Labor and Social Affairs (Bundesministerium für Arbeit und Soziales) has announced that the criterion of occasional assignment will be interpreted broadly until the end of 2020, such that the provision of temporary workers to cover unforeseeable staff shortages will always be legal if this compensates for a decline in the need for workers at the company providing the temporary workers, no permanent provision of the workers is planned and the employees consent to being assigned to the borrowing company. See also https://www.bmas.de/DE/Schwerpunkte/Informationen-Corona/Fragen-und-Antworten/Fragen-und-Antworten-corona/corona-virus-arbeitsrechtliche-auswirkungen.html. Unlike under the normal legal regime, neither a prior licence from the competent authority nor notification of the provision of temporary workers to the authority is required.

It is unclear from a legal point of view whether the crisis justifies deviating from the equal treatment precept under labor law. If and to the extent that the requirements set out in section 1 (3) no. 2a of the German Temporary Employment Act (AÜG) are met,

the key provisions of the AÜG – including the principle of equal treatment under section 8 of the AÜG – are surely not applicable (see the introductory sentence of section 1 (3) of the AÜG). However, it is possible that an attempt may be made to "read" the principle of equal treatment contained in the EU Directive on Temporary Agency Work into the German Temporary Employment Act to achieve an interpretation that is consistent with European law. Application of the principle of equal treatment is therefore a legally safer option, but is at the same time more expensive and organisationally more demanding.

Although employers may specify the time and place of performance of work by their employees at their own reasonably exercised discretion, the employees are not under an obligation to work for a third party. The consent of the workers is therefore required for them to be "loaned" to a different company.

Like the hiring of fixed-term employees, assignment of temporary workers to the borrowing company's establishment is subject to codetermination pursuant to section 99 of the German Works Constitution Act (BetrVG).

The provision of temporary workers in the construction sector remains prohibited (section 8 (1) sentence 1, German Temporary Employment Act (AÜG)), so the aforementioned model is not an option in this sector.

(On this topic, see also our more detailed FAQ on the temporary hiring out of employees.)

6. Can employees take secondary jobs during periods of short-time working to supplement their income?

If an employer, acting in conjunction with any works council that may be in place, has imposed short-time working, the employees' earnings are reduced by the same percentage as the reduction in their duty to perform work. Only 60 % (or 67 % if the employee has children) of the shortfall compared to their regular net income is paid by the Federal Employment Agency in accordance with section 105 of the German Social Code Book III (SGB III); the percentage increases in stages from the fourth month onwards. For details, see our FAQ on short-time working.

It would therefore seem to be a good idea for employees to take a secondary job to replace their lost earnings while they are furloughed.

Things are actually more complicated, however. Firstly, second jobs must usually be approved by the main employer. No problems are likely to arise here, though, in a time

of crisis, because it is safe to assume that a sensible employer will not object to secondary work, especially in sectors where there is high demand due to the crisis.

It should nevertheless be noted that at the present time, under section 106 (3) of the German Social Code Book III (SGB III), any earnings from a secondary job taken up during short-time working must be added to the actual remuneration used to calculate the entitlement to short-time work allowance. It is thus possible that despite the extra work, employees receive less money than they would have in form of short-time work allowance and reduced wages. Each employee should therefore carefully consider whether it makes sense for them to have a second job during short-time working.

A different rule applies to second jobs already performed before the commencement of short-time working. Earnings from such jobs are not added to the actual remuneration, and employees thus benefit fully from such earnings, in addition to their normal remuneration and the short-time work allowance.

Another exception to the above applies during the coronavirus crisis in the period from 1 April 2020 to 31 October 2020: earnings from a EUR 450 minijob in a key sector are not added to the actual remuneration unless the extra earnings cause the employee's normal remuneration to be exceeded (section 421c, German Social Code Book III (SGB III)). The decision as to whether a particular job is key is made by the individual federal states (Bundesländer) and may change depending on circumstances.

7. Can an employer join forces with another company temporarily?

Several employers can create a joint establishment as defined in section 1 (1) sentence 2 of the German Works Constitution Act (BetrVG) by combining their operating resources in pursuit of a shared work objective and under a uniform management structure. This involves the participating companies signing a corresponding management agreement. This must provide for mixed management of the joint establishment, for example by means of joint personnel management. Provisions regarding the contribution of material and infrastructure can also be included, as well as any desired mutual covenants regarding non-solicitation of employees and provisions on confidentiality and non-disclosure obligations of the respective employees.

If several employers do set up a joint establishment, the employment contracts concluded with their own employees will continue to apply. Similarly, the principle of equality will apply only within the company itself and not be extended to the entire joint establishment. There can therefore be quite different conditions of employment within the same establishment.

8. What are the advantages and disadvantages of joint establishments?

The employees of all employers in a joint establishment are included when calculating the thresholds set out in the German Act on Protection Against Unfair Dismissal (KSchG). As such, the provisions on protection against unfair dismissal apply if there are more than ten employees working in the joint establishment in total, for example, irrespective of how many of them are attributable to a single employer. Incidentally, it is also necessary to consider the comparability of all employees of the joint establishment in the event of redundancies and the related selection of employees for dismissal based on social criteria.

One advantage for employers is that this model generally does not require the employees' consent because employers are free to determine the place and time of work at their own reasonably exercised discretion. That is only not the case if transfer rights are restricted by individual employment contracts or collective bargaining agreements. In such a case, the employees' consent would be required. Giving notice of termination with the option of altered terms of employment, which is also generally possible in this case, is probably not appropriate in most cases since such a notice of termination does not take effect until the end of the notice period. An exceptional notice of termination with the option of altered terms of employment with immediate effect and without notice is permissible only when very strict conditions are met, which is unlikely even during a crisis of the current magnitude.

Forming a joint establishment is subject to codetermination in individual cases. Under certain circumstances, employers are required to negotiate a reconciliation of interests in accordance with section 111 of the German Works Constitution Act (BetrVG), i.e. if the joint establishment is intended to exist for a certain period of time – to be determined in each individual case – that is tantamount to a split-off of the constituent business units from their former establishments.

Once the crisis situation is over, the joint establishment must be dissolved by terminating the management agreement and separating the various business units again, in particular by dismantling the joint management structures.

9. Which model is best suited for which establishment?

A comparison of the above models shows that some of them are better suited than others.

The model described first has the immediate advantage of simplicity, which makes it easy and quick to implement. A downside for employers is that the employees' consent is required.

The second model, i.e. standard provision of temporary workers, also requires the employees' consent. One advantage here is that the lending employer is involved in the process by way of an agreement with the borrower on providing workers and can thus exert influence on the detailed conditions of employment. This ensures that the arrangement meets the needs of the lending company. The strict statutory restrictions that would otherwise have a negative impact are likely to be relaxed until the end of 2020, so they will not be a factor in assessing this option until then.

The option of secondary employment during short-time working is easy for employers to implement, since all they have to do is give their consent, but if employees were not already doing this prior to the beginning of short-time working, this involves deduction of their earnings from the short-time work allowance, which is unattractive for the employee.

A joint establishment can be an interesting option if the companies to be combined have different working conditions and the companies wish to avoid them being harmonised, as would be the case when providing temporary workers. Having said that, there are challenges in terms of coordination because new management structures need to be created.

Ultimately, the individual employer and the individual employee will need to consider which of the solutions makes most sense in a given situation.

10. What can employers do now in terms of starting up again after the crisis?

Despite all the concerns the current crisis is causing many companies, it is important to remember that the crisis will pass. Now is the time to prepare for the post-coronavirus world and engage with the new realities.

For example, one of the issues to be considered after lockdown ends is what standards of hygiene are needed to ensure employees stay safe. Consultations can already be held with the works council and guidelines developed for suppliers to ensure proper hygiene. See our FAQ on emerging from lockdown and the challenges for employers.

It may also be worth considering the introduction of the German government's tracking app, which is currently still at the planning stage, for employees' additional safety. Here again, it is advisable to talk to the works council now.

Dealing with outstanding leave entitlements of the workforce is another issue. Are there urgent operational matters that justify a decision by the employer to stipulate when a large part of employees' leave entitlement may be taken, or can the employer only urge employees not to take their leave for a certain period after the crisis? In an ideal scenario, the two sides will be able to agree a mutually satisfactory solution.

It is important here not to lose sight of the need to document working hours even when work is performed at home. According to the latest ruling by the Court of Justice of the European Union (judgment of 14 May 2019 – C 55/18), there may be evidential difficulties in "overtime litigation" (see Emden Labor Court, 20 February 2020 – Case 2 Ca 94/19).

Finally, one must also be prepared for the worst – the extension or reinstatement of the lockdown. Companies should be prepared for this financially and in terms of organisation.

11. Conclusion

These difficult and extraordinary times pose immense challenges for companies across all sectors. Who would have thought just a few weeks ago that we would have to deal with issues such as these? But in every crisis there are also great opportunities to do things differently. The models described above can make it easier to cope with business peaks and slumps.

(Last updated: 15 May 2020)