A. Reporting requirements

Does the employer have a duty to report to health authorities?

There is no general reporting duty that would require any employer to report a coronavirus infection to the competent authority. Stricter requirements exist in certain sectors with special regulations, such as the food industry.

Section 6 (1) sentence 1 no. 1 German Protection Against Infection Act (Infektionsschutzgesetz) in connection with the Ordinance “2019-nCoV” (Meldepflicht-Verordnung “2019-nCoV”), since 1 February 2020, extends the duty to report the names of persons with suspected disease/infection with the new coronavirus. In accordance with section 8 German Protection Against Infection Act, it is first and foremost the physician in charge and other medical staff who are obliged to report to the competent authority, but not the individual employer.

B. Preventive measures of the employer

1. Is the employer allowed to carry out fever measurements of its staff by using an ear thermometer?

Such a medical examination can only be carried out with the consent of the respective employee concerned. There is no case law on fever measurement to prevent coronavirus; opinions are divided.

Fever is not a necessary condition for corona virus disease. Fever measurements should therefore only be permissible at an advanced stage of the spread in order to enable an earlier diagnosis for employees who are unfit to work as well as to protect employees who are already sick from further risks. The measurements may not be carried out by the employer himself, but only by a (company) doctor or his medical staff. The data protection of the employees concerned must be strictly respected.
2. May the employer demand a “quick test” from its employees?

No, a mandatory order from the employer to carry out a “quick test” is inadmissable. Medical examinations can only be carried out with the consent of the respective employee concerned.

The quick tests are also criticised as being unreliable (in some cases they show a negative result even though the person tested is already infectious).

C. Conflict between childcare and duty to work

May the employee stay away from work to look after his children when schools or kindergartens are closed?

The employee is allowed to stay away from work if he cannot be reasonably expected to work due to an epidemic-related school or kindergarten closure (section 275 (3) German Civil Code (Bürgerliches Gesetzbuch) as he needs to care for his child. “Not reasonably expected” means that employees first have to try unsuccessfully to find other childcare options. However, the right to be absent from work without own sickness or sickness of the child does not mean that the employer must pay remuneration. The principle remains the same: no work, no salary. In this case, employees should be informed that they can take leave or reduce overtime to still receive their salaries. Where possible, the loss of remuneration could also be prevented by the employee working from home.

To find more detailed information on the continued payment of remuneration in this case, please see D.5 and in our FAQ regarding claims of parents where childcare is required as a result of the pandemic.

D. Effects on the duty to pay remuneration

1. Does the employer have a duty to continue to pay remuneration if an employee has fallen sick with the coronavirus?

A sickness of the employee with the coronavirus must be treated like any other sickness. If the employee is unable to work due to the sickness, the employer must continue to pay remuneration for up to six weeks in accordance with section 3 German Continuation of Remuneration Act (Entgeltfortzahlungsgesetz).
2. **Does the employer have to continue to pay remuneration if the employer releases an employee from his duty to work because the employee is suspected of having such sickness?**

The employer should release employees suspected of having coronavirus from their duty to work in order to protect the rest of the staff. However, the employer's duty to pay remuneration is not affected by this. The employer must pay salary for default in acceptance of the employee's work in accordance with section 615 German Civil Code.

3. **Does the employer have to continue to pay remuneration if the authority orders a quarantine measure for an employee?**

The employer must generally continue to pay remuneration for six weeks in accordance with section 56 German Protection Against Infection Act. However, there is a claim for reimbursement against the authority. The twelve-month period for asserting the claim (section 56 (11) German Protection Against Infection Act), starting three months after the end of isolation, is to be observed. After expiry of this time limit, the claim for reimbursement lapses.

4. **Does the employer have to continue to pay remuneration if an official order is issued to close the establishment?**

Even in this case, the employer is still obliged to pay remuneration to its employees. However, it is possible to apply for short-time work “zero” (Kurzarbeit “Null”) and reduce personnel costs. In view of the necessary lead time, the actual practicability of this possibility remains to be seen. However, simplification has been provided by way of the government regulation to simplify short-time work as of 25 March 2020 which may also take account of this case. Please read our FAQ on short-time work on this.

5. **Does the employer have to continue to pay remuneration if the employee is absent from work due to the need for childcare?**

Please see our FAQ regarding claims of parents where childcare is required as a result of the pandemic.

E. **Alternative to paid release from the duty to work**

1. **May the employer unilaterally order employees to take leave?**

The employer may order the period of leave as long as the employee has not (yet) expressed any requests for leave. If the employee complies with the employer's instruction and subsequently takes leave, the employee's entitlement to leave is fulfilled.
If the employee does not agree with the period ordered by the employer, he can contest the erroneous concretisation and refuse to accept providing that the employer does not ask him to make his requests for leave (as required by section 7 German Federal Leave Act (Bundesurlaubsgesetz)). If the employer has already granted leave for a particular period of time, the employer must comply with this specification.

2. **Is the employee allowed to unilaterally postpone/cancel leave?**

   In the same way that the employer cannot unilaterally revoke leave already granted and cannot recall the employee (exceptions are extreme cases, e.g. if the establishment would otherwise grind to a halt), the employee cannot postpone or cancel leave granted without the employer's consent.

3. **May the employer unilaterally instruct employees to work from home in the form of teleworking?**

   Working from home in the form of teleworking requires an agreement between employee and employer as well as a fixed telework station with furniture and means of telecommunication/PC. It should not be confused with “mobile working” which means working from anywhere. The employer's right to issue instructions does not include any competence to unilaterally order an activity at a fixed telework station. In this case, employee and employer must therefore agree on a (temporary) activity.

4. **May the employer unilaterally instruct employees to work from home in the form of “mobile working”?**

   Mobile working includes all types of mobile activity at a non-fixed (tele) workstation and can therefore also be carried out from home. If the place of work is not specifically defined in the employment contract, the instruction to perform work from any chosen place should be covered by the employer's right to give instructions. However, all other requirements under public law, especially data protection, must be observed.

5. **May the employer offset a period of time during which an employee is released from the duty to work against overtime collected or deduct hours from the working time account?**

   The right to unilaterally order the reduction of overtime in the case of a “coronavirus leave of absence” depends on the contractual or works agreements. However, where there are no agreements to the contrary and overtime must be worked on the instructions of the employer, the corresponding instruction to reduce overtime is also covered by the employer's right to issue instructions.
If there is a works council and the working time system (e.g. flexitime, flexible working hours, confidential working hours, etc.) is regulated in a works agreement, the employer's possibilities for offsetting extra hours are normally set out in the works agreement. If there are no provisions in such works agreements or if they are ambiguous, it would make sense to agree on a supplement with the works council which provides for the possibility of reducing extra hours in connection with the coronavirus. With such an amendment, the employer would also preserve the works council's codetermination right pursuant to section 87 (1) no. 3 German Works Constitution Act (Betriebsverfassungsgesetz). However, the works council does not have a codetermination right in accordance with section 87 (1) no. 3 German Works Constitution Act for ordering the reduction of overtime alone. The cessation of overtime is not a reduction in, but a return to regular operational working hours. The codetermination right only applies if the regular operational working time is extended or shortened (Federal Labor Court 25. October 1977 – 1 AZR 452/74).

F. What to do if there is a risk of closure of business?

May the employer obtain a leave of absence by ordering company holidays?

If the entire business needs to be shut down temporarily, company holidays could be a solution. The introduction of company holidays is permissible if urgent operational concerns prevent consideration of individual leave requests of employees (section 7 (1) sentence 1 German Federal Leave Act). The current situation with the coronavirus could justify such an approach, even if not to the extent of the entire annual leave and only if the employee has not already been granted his entire annual leave at another time. However, the legal situation is open in this respect as there is only very old case law from the time before the German Federal Leave Act came into force. If there is a works council in the company, it is only possible to arrange company holidays in a works agreement. The employer must then involve the works council in the introduction of company holidays (section 87 (1) no. 5 German Federal Leave Act).

G. How can the work of the works council be secured without the members being subject to an unnecessary risk of infection?

German works council constitution law provides in sections 29 et seq. German Works Constitution Act the basis of established case law for members of the works council to be present at works council meetings. It is a prerequisite which must be met for resolutions to be validly adopted. The Federal Employment Minister Hubertus Heil instructed the works council in what is known as a “Ministerial Declaration” of 20 March 2020 to
make use of video or telephone conferences for their meetings and, instead of handwritten signatures on attendance lists, to confirm attendance by informing the chairperson of the works council in text form, e.g. by email. He has expressly pointed out that resolutions adopted in such meetings must be regarded as being valid providing that the principle of non-public disclosure is complied with. However, this “Ministerial Declaration” is not binding for courts. Therefore, a certain uncertainty remains that such resolutions are regarded as invalid.

In order to ensure final legal certainty for resolutions passed by means of video and telephone conferencing during this period, a new section 129 German Works Constitution Act has been introduced in the meantime. According to this, resolutions adopted by video and telephone conference since 1 March 2020 shall be regarded as (retroactively) valid, if it is ensured that third parties were not able or cannot take note of the contents of the meeting.

H. Can operations which are particularly busy as a result of the coronavirus pandemic work more than usual?

The German Working Hours Act (Arbeitszeitgesetz) provides for a maximum number of 48 working hours per week. It provides for a prohibition on work on Sundays and at night as well as a duty of the employer to allow the employees to take breaks. The German Working Hours Act provides for exemptions from these provisions for certain professional groups. However, even these are not sufficient in some sectors at present to meet the workload required as a result of the pandemic.

From the legislator's point of view, this is critical in the areas of public safety and order, in health care and nursing care, in the provision of services of general interest and in enterprises that ensure the supply of the population with existential goods, especially in the food retail trade and transport industry. For these sectors, the so-called “Social Protection Package” therefore stipulates that the Federal Ministry of Labor and Social Affairs, in agreement with the Federal Ministry of Health, may issue ordinances that permit deviations from the normal standards of the Working Hours Act in accordance with the newly introduced Sec. 14 (4) Working Hours Act. For all other sectors, the Working Hours Act continues to apply.

On the basis of this regulation, the COVID-19 Working Hours Ordinance came into force on 7 April 2020. According to this regulation – limited until 30 June 2020 –

- the daily working time may be extended to up to twelve hours if this cannot be averted by “foresighted organisational measures” including new hires;
• the daily rest period may be reduced by up to two hours, whereby a minimum rest period of nine hours must be observed;

• work may also be carried out on Sundays and public holidays, provided that the work cannot be carried out on working days,

if this is necessary for the maintenance of the respective industry.

Furthermore, all these measures are only permissible if they are subsequently compensated for.

The legal ordinance defines the activities to which this applies (see section 1 (2)). These essentially result from the four groups of cases mentioned in section 4 (4) Working Hours Act (public safety and order, health care and nursing care, services of general interest and enterprises that ensure the supply of the population with existential goods). Of particular interest is which is meant by “enterprises that ensure the supply of the population with existential goods”. This includes activities in the production, packaging including filling, commissioning, delivery to entrepreneurs, loading and unloading and placing in storage of

• goods of daily use,

• pharmaceuticals, medical devices and other goods customary in pharmacies as well as aids,

• products used to contain, control and manage the COVID-19 epidemic,

• substances, materials, containers and packaging materials required for the manufacture and transport of the goods, means and products referred to in the previous points.

(Last updated: 27 January 2021)