

Claims of parents where childcare is required as a result of the pandemic

Working parents have been facing numerous issues with insufficient childcare since the beginning of the coronavirus pandemic: initially, daycare centres and schools closed in spring 2020. For the most part parents had to look after their children themselves. Once daycare centres reopened, more and more children were placed in quarantine because teachers, nursery teachers or another child in the class or group had tested positive for coronavirus. Again, it was up to parents to care for their children. When December came, due to the high number of cases, the Christmas holidays were either brought forward and extended or, depending on the German federal state concerned, compulsory school attendance was just suspended so that children could stay at home. As an incentive, the parents concerned were promised "paid leave". At the beginning of January 2021, most federal states decided to close schools completely again; in the remaining federal states, compulsory attendance remained suspended. Daycare centres remain open in many places (although certainly not everywhere), but appeals are being made to parents to care for their children at home.

For all these situations, parents are granted an entitlement to 67 % of their net income in parallel to the short-time allowance (*Kurzarbeitergeld*) under section 56(1a) German Protection Against Infection Act (IfSG) (newly created at the beginning of the pandemic and then continuously expanded).¹ You can read more about this entitlement and the prerequisites for this in Chapter I of these FAQs.

In addition, a new section 45(2a) German Social Code V (SGB V) was added with retroactive effect from 5 January 2021 to help parents with childcare issues.² This section first increases the child sickness benefit, also referred to as "child sick days", from 10 to 20 days (twice as many days for single parents) and secondly establishes that this benefit is not only payable when a child is sick, but also when parents have to care for their children at home during the current coronavirus period because schools and daycare centres are closed or face-to-face

¹ German Act for the Protection of the Population in the Event of an Epidemic Situation of National Significance (Federal Gazette 2020, no. 14, p. 590, see Article 1 no. 7); Third German Act for the Protection of the Population in the Event of an Epidemic Situation of National Significance (Federal Gazette 2020, No. 52, p. 2404, see Article 1 no. 20); German Act on a One-Time Special Payment by Reason of the COVID-19 Pandemic to Recipients of Civil Service Salary and Military Pay (Federal Gazette 2020, no. 65, pp. 3136, 3137, see Article 4a).

² German Act Amending the German Act against Restraints of Competition for a Focused, Proactive and Digital Competition Law 4.0 and Other Competition Law Provisions (GWB Digitisation Act), (Federal Gazette 2021, no. 1, pp. 28 et seq., see Article 8).

learning has been suspended. Please see Chapter II of these FAQs for all of the information on this.

I. The claim to compensation under section 56 (1a) German Protection Against Infection Act

1. What changes did the introduction of section 56 (1a) German Protection Against Infection Act bring about?

By amending the German Protection Against Infection Act, the legislator responded to the uncertainties surrounding the issue of how to deal with employees who cannot work due to pandemic-related school and daycare centre closures or because their child, who does not have Covid-19 himself or herself, has been placed in quarantine. The problem arises from the fact that employees who do not work generally do not receive any remuneration from their employers unless there is a legal obligation to continue to pay remuneration. It was not possible to establish such an obligation for all cases where childcare is required as a result of the pandemic.

One of the declared aims of the legislator³ was to eliminate this legal uncertainty for working parents and to mitigate the expected loss of earnings.

2. What provisions previously applied in the case of quarantine, school and daycare centre closures and the other cases mentioned in section 56 (1a) German Protection Against Infection Act?

Whether an employee is entitled to continued payment of remuneration as a result of having to care for a child as a result of the pandemic depends on why the care is necessary:

- If a child is placed in quarantine, this can be because the child actually has Covid-19. In this case the caring parent generally (as is usual when caring for a sick child) receives continued payment of remuneration from the employer under section 616 German Civil Code (*BGB*), if the prerequisites for this provision are met, or nursing sickness benefit under section 45 German Social Code V if they have statutory health insurance.
- However, a child can also be placed in quarantine if the child is only what is referred to as a "first-degree contact" (e.g. because a classmate or teacher is ill) and is therefore not actually ill himself or herself. In such cases section 45 German Social

³ See Explanatory Memorandum to the Bill for the Cabinet matter, Datasheet No: 19/15052, p. 28.

Code V in its previous form does not apply and it was unclear and controversial whether and, if so, for how long the employer had an obligation to continue to pay remuneration in accordance with section 616 German Civil Code in these cases. There was agreement in this regard that the continued payment of remuneration pursuant to section 616 German Civil Code would only have to be paid for a few days in such cases, if at all. The additional problem was that, in many cases, section 616 German Civil Code was excluded on the basis individual or collective agreements. Section 56(1a) German Protection Against Infection Act is intended to close this gap in the law.

- The same also applies to the cases concerning school or daycare centre closures and (extended) holidays. Section 56(1a) German Protection Against Infection Act is intended to close the gap in the law in this respect too.
- Parents were not entitled to claim continued payment of remuneration if only compulsory attendance was suspended: in such cases the children may go to school; however, an appeal is being made to the parents to keep their children at home. Parents therefore have a choice meaning that continued payment of remuneration under section 616 German Civil Code is ruled out. Section 56(1a) German Protection Against Infection Act is intended to close the gap in the law in this respect too.

3. Which prerequisites must be met for there to be a claim to compensation?

There is a claim to compensation under section 56(1a) German Protection Against Infection Act if:

- a) daycare centres or schools are closed/subject to a prohibition of entry or a child is placed in quarantine or the competent authority orders or extends school or company holidays on grounds of protection against infection or compulsory school attendance is suspended (see question 7 below),
- b) the child requiring care is under 12 years of age or disabled and dependent on assistance (see question 8),
- c) the care is provided by the working guardians or foster parents,
- d) there is no other possibility of care being provided by a third party (see question 9 - 11),
- e) a loss of earnings results from the need to provide such care (see question 12) and

f) the daycare or school would not be closed anyway due to the school holidays (see question 13).

4. How much is the compensation claim?

Pursuant to the new sentence 2 inserted into subsection 2, the compensation claim is 67 % of the net loss of earnings suffered (increased benefit rate pursuant to section 105 no. 1 German Social Code III (*SGB III*)) as in the case of short-time allowance, but is limited to a maximum of EUR 2,016 per month.

5. Can the employer make top-up payments/contributions?

Pursuant to section 56(8) no. 1 German Protection Against Infection Act, the employer may make top-up payments meaning that the employer may top up the compensation similar to the way it can in the case of short-time allowance. If the top-up and the compensation paid exceeds the loss of earnings, however, the excess amount is set off against the compensation claim.

6. How long is the compensation claim paid for?

The compensation claim is now paid for a maximum of 20 weeks.

If the care period is interrupted for a period of time, for example because gainful employment is (temporarily) resumed or as a result of a closure period due to holidays, the claim period is also interrupted for the same amount of time.

7. What must be the legal basis for the child's childcare requirement?

In order for there to be a claim to compensation under section 56(1a) sentence 1 German Protection Against Infection Act, working parents must be prevented from pursuing their professional activities because childcare centres or schools are temporarily closed or subject to a prohibition of entry by order of the authorities on the basis of the German Protection Against Infection Act.

The same applies if a child is refused entry to such a facility due to "*Absonderung*" (i.e. "self-isolation") within the meaning of section 30 German Protection Against Infection Act, meaning that he/she is placed in quarantine. As a rule, the legal basis will be sections 28(1), 28a German Protection Against Infection Act, section 32 German Protection Against Infection Act (as was the case with the previous general decrees and legal ordinances on school and daycare centre closures).

Furthermore, it is also sufficient for holidays to have been ordered or extended due to the pandemic situation or for compulsory school attendance to have been suspended and for children to not attend school as a result. It should be noted in this context that section 56 (1a) German Protection Against Infection Act only deals with the suspension of compulsory school attendance. This therefore means that, to the extent that parents of pre-school children comply with the appeal being made of them to look after their children at home, compensation under the German Protection Against Infection Act is ruled out.

8. Who is entitled to claim compensation?

Working guardians of children who have not yet reached the age of 12 or are disabled and therefore require assistance. A guardian is a person who is entitled to care for the person of a child in the sense described above in accordance with section 1631 German Civil Code. In cases where the child became a member of the household on the basis of full-time foster care pursuant to section 33 German Social Code XIII (*SGB XIII*), the foster parents are entitled to claim compensation instead of the guardians.

The fact that self-employed persons are also covered by the new regulation results from the fact that the law now refers to "working guardians" and the Recommendation by the Health Committee also expressly includes self-employed persons (Parliamentary Paper No. 19/18156, p. 3).

9. What does "no other reasonable care options" mean?

The compensation claim according to section 56(1a) sentence 1 German Protection Against Infection Act requires there to be no other reasonable care options available for the child during the period during which the facilities are closed or may not be entered or during which the child is in quarantine.

For example, there is deemed to be such a reasonable care option if there is a right to "emergency care" at the daycare centre or school, the other parent is available or other family members/relatives can take care of the child or, in the case of siblings, several children and are willing to do so. Childcare by siblings is likely to be considered reasonable only if the child providing the care has reached the age of 16. Persons in "at risk" groups for the infection or contagious diseases, the prevention or spreading of which is supposed to be avoided by way of the competent authorities temporarily closing the childcare facilities or schools or prohibiting entry are not deemed to be "reasonable care options" within the meaning of this provision.

Whether there are other reasonable care options during leave already planned by the employee remains unanswered. There is much to suggest that there is no (proportional) claim to the compensation during this period because one parent is actually able to care for the child. The Federal Ministry of Health also supports the idea that leave already planned should be taken prior to claiming compensation (FAQs of the Federal Ministry of Health regarding section 56 German Protection Against Infection Act, question 32). Please see question 13 below for further information on school holidays).

10. Is working from home "another reasonable care option"?

To the extent that the employee can work from home, there is a possibility, in principle, of caring for the child at home. However, the option to work from home does not automatically exclude a claim on the basis of section 56(1a) German Protection Against Infection Act because whether it is reasonably possible for the employee to look after or care for the child whilst working from home must first be clarified. The Federal Ministry of Health has made it clear that this must be decided on a case-by-case basis and must be denied if, for example, several (small) children or a child with high care needs (such as a child with disabilities) needs to be cared for whilst working from home (FAQs of the Federal Ministry of Health regarding section 56 German Protection Against Infection Act, question 31).

11. Can the employer check that it is true that there is "no other reasonable care option"?

Pursuant to section 56 (1a) sentence 2 German Protection Against Infection Act, persons eligible for the claim must demonstrate towards the competent authority, or when requested to do so by the employer towards the employer, that there is no other reasonable care option or, if applicable, to what extent there is no other reasonable care option. This includes, for example, demonstrating that there is no right to "emergency care" and that no other caregivers (e.g. friends, relatives) are available. Information on the claim to short-time allowance or regarding working time credit accounts are known to the employer filing the application anyway.

12. When is the employee deemed to suffer a "loss of earnings"?

There is only a claim to compensation if the closure, the prohibition on entering schools and childcare facilities or the quarantine or suspension of compulsory attendance are the sole cause of a loss of earnings.

This does not apply, for example, if and to the extent that the working parent already has a right to stay away from work on the basis of other statutory or operational reasons

or on the basis of reasons arising from collective bargaining agreements or individual contracts whilst continuing to receive their remuneration or consideration equivalent in amount to the remuneration. If there are such legal options, these must be used. This is the case, for example, if the working parent entitled to care for the child still has working time credit. This must be used up first. As is the case with regard to the prerequisites for short-time allowance, credit on working time accounts ("overtime") must be used up first. This presumably also applies to any outstanding leave entitlement from the previous year. On the other hand, it will most likely not be possible to force persons entitled to care for a child to use up their entire annual leave for the current year for childcare before they are allowed to claim compensation under the German Protection Against Infection Act (see FAQs of the Federal Ministry of Health regarding section 56 German Protection Against Infection Act, question 32).

According to the wording of the Act, there ought to also be a compensation claim if the employee is only able to perform some of his/her duties owing to the need to provide childcare. Compensation could then be claimed for the part of the earnings lost.

13. What does the exclusion "not during school holidays" mean?

According to section 56(1a) sentence 3 German Protection Against Infection Act, there is no claim to compensation where a closure takes place during a period during which schools are closed anyway for school holidays determined by federal state law. The periods during which schools are closed for holidays interrupt the claim period. The maximum term for which compensation can be claimed is 20 weeks. However, according to the Federal Ministry of Health, any periods during which the child would normally be in school holiday care at school (e.g. after-school care, open full-day care or similar) or in a pre-school daycare centre are not deemed to be holiday periods; the exclusion provided for by section 56(1a) sentence 3 German Protection Against Infection Act therefore does not apply to such periods (see FAQs of the Federal Ministry of Health regarding section 56 German Protection Against Infection Act, question 14).

14. Who pays out the compensation?

The employee has a claim to compensation against the state. However, the employer acts as the payment agent of the state and makes an advance payment on the compensation (section 56(5) sentence 1 German Protection Against Infection Act).

The amounts paid out are reimbursed to the employer once it has made an application to the competent authority (section 56(5) sentence 2 German Protection Against Infection Act). Reimbursements are only made further to an application made by the employer or

by the employee where the employer has not made an advance payment (section 56(5) sentence 3 German Protection Against Infection Act).

15. What is the procedure for reimbursing the employer for the compensation payments?

a) Competent authority

The authorities competent for granting the compensation are the authorities determined on the basis of the law of the respective German federal state (section 54 German Protection Against Infection Act). The German federal states have regulated the competencies as follows:

German federal state/region	Authority/authorities
Baden-Württemberg	Government ministries (<i>Regierungspräsidium</i>)
Bavaria	District Governments (<i>Bezirksregierungen</i>)
Berlin	Governmental Administration for Finance (<i>Senatsverwaltung für Finanzen</i>)
Brandenburg	State Office for Occupational Safety, Consumer Protection, and Health (<i>Landesamt für Arbeitsschutz, Verbraucherschutz und Gesundheit</i>)
Bremen	Regulatory Office Bremen (<i>Ordnungsamt Bremen</i>)
Bremerhaven	Citizen Centre and Regulatory Office Bremerhaven (<i>Bürger- und Ordnungsamt Bremerhaven</i>)
Hamburg	Altona District Office (<i>Bezirksamt Altona</i>)
Hesse	Health Authorities (<i>Gesundheitsämter</i>)
Mecklenburg Western Pomerania	State Office for Health and Social Affairs M-V (<i>Landesamt für Gesundheit und Soziales M-V</i>)

German federal state/region	Authority/authorities
Lower Saxony	District (<i>Landkreis</i>), independent town (<i>kreisfreie Stadt</i>) or the region of Hanover
North Rhine-Westphalia – Rhineland	Rhineland State Authority (<i>Landschaftsverband Rheinland</i>)
North Rhine-Westphalia – Westphalia Lippe	Westphalia Lippe State Authority (<i>Landschaftsverband Westfalen Lippe</i>)
Rhineland-Palatinate	State Office for Social Services, Young People, and Pensions (<i>Landesamt für Soziales, Jugend und Versorgung</i>)
Saarland	Ministry for Social Affairs, Health, Women, and Family (<i>Ministerium für Soziales, Gesundheit, Frauen und Familie</i>)
Saxony	State Authority (<i>Landesdirektion Sachsen</i>)
Saxony-Anhalt	State Administration Office (<i>Landesverwaltungsamt</i>)
Schleswig-Holstein	State Authority for Social Affairs (<i>Landesamt für soziale Dienste</i>)
Thuringia	State Administration Office (<i>Landesverwaltungsamt</i>)

b) Are reimbursement forms available?

Applications for reimbursements must be submitted to the competent authorities as a matter of principle. A corresponding reimbursement form is provided on the websites of most of the authorities.

In addition, it is possible to file applications for reimbursement centrally via the website <https://ifsg-online.de>. The states of Baden-Württemberg, Brandenburg, Bremen, Hesse, Mecklenburg Western Pomerania, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony-Anhalt and Schleswig-Holstein are participating in the online application programme.

c) Is filing an application subject to a time limit?

According to section 56(11) German Protection Against Infection Act, the employer is required to submit an application under section 56 (3) German Protection Against Infection Act within a period of 12 months after the end of the child's isolation period or the end of the temporary closure of the facilities or the period during which they were subject to a prohibition of entry.

16. Is there also a claim to compensation while short-time allowance is being paid or short hours (*Kurzarbeit*) are being implemented?

According to the explanatory notes on the legislation, there is no claim to compensation if the working hours of guardians are reduced to zero due to an order of short-time work. This is because guardians who do not have to work can look after their children themselves during this time. If short-time work has only led to a reduction of working hours and not to a complete suspension of the duty to work, the claim is subject to "*Legalzession*" in accordance with section 56(9) German Protection Against Infection Act. "*Legalzession*" means the transfer of a claim by operation of law without the need for a special legal transaction. According to section 56(9) German Protection Against Infection Act, the entitlement to short-time allowance is assigned to the Federal Employment Agency. This means that the two benefits (short-time allowance and compensation under the German Protection Against Infection Act) cannot be claimed simultaneously for the same loss of earnings.

17. How does section 56(1a) German Protection Against Infection Act relate to the provision in section 616 German Civil Code?

There are many indications that the employer does not have to continue paying remuneration for the first few days in accordance with section 616 German Civil Code and that the period of up to 20 weeks under section 56(1) German Protection Against Infection Act then follows this. Instead, the provisions laid down in section 56(1a) German Protection Against Infection Act ought to apply directly as soon as a school or childcare facility is closed or quarantine is imposed because the child is qualified as a "first-degree contact" and there is a need for the child to be cared for. Section 616 German Civil Code therefore seems to be being overridden by section 56(1) German Protection Against Infection Act. This would make sense, especially because it is the prevailing view that there is no entitlement under section 616 German Civil Code at all if the inability to work goes on for too long (longer than five to ten days). Furthermore, in our opinion, the legislative intent to create a clear and harmonised legal situation after the uncertainties in connection with dealing with pandemic-related closures of schools and childcare facilities also supports this view.

This intention to achieve clarity would not be achieved if parallel application of these two provisions were to be allowed.

According to the German Federal Ministry of Health, however, this is not the case. Where section 616 German Civil Code is not excluded by a provision in an employment contract or collective agreement, it is initially to apply for a period of up to five days; only after this time does the claim to compensation under section 56(1a) German Protection Against Infection Act arise (see FAQs of the German Federal Ministry of Health regarding section 56 German Protection Against Infection Act, question 19). Currently, there are no court decisions that would clarify the relationship between section 616 German Civil Code and section 56 German Protection Against Infection Act.

18. Does the works council have a participation right?

In our view, the works council does not have a right to participate. This is neither an issue of working time distribution under section 87(1) no. 2 German Works Constitution Act (*BetrVG*), nor is the salary structure itself, as provided for by section 87(1) no. 10 German Works Constitution Act, affected by the compensation payment. From our point of view, there would even be good arguments in favour of the latter if the employer were to decide to increase the benefit equally which it is not obliged to do.

19. What applies if the employee's working capacity is urgently needed for operational reasons?

From the employer's point of view, the law unfortunately does not contain a provision stating that compelling operational reasons may be used to oppose the employee's request for childcare. If the statutory prerequisites are met, the new rules therefore have to be understood in such a way that the employee may take (unpaid) time off for childcare purposes if there are no alternative childcare options. In practice, however, flexible solutions can usually be found since both employers and employees have been cooperating well during the pandemic for the most part and have each other's interests in mind.

20. When does the entitlement end?

Once the childcare required as a result of the pandemic comes to an end (see question 7), the claim to compensation will also come to an end.

II. New child sickness benefit in accordance with section 45(2a) German Social Code V

1. What is the content of the new section 45(2a) German Social Code V?

According to section 45(2a) German Social Code V, the number of days for which child sickness benefit can be claimed is being doubled. These days can be used, as was the case in the past, to care for a sick child. Alternatively, they can be used when parents care for their children at home due to the coronavirus pandemic. From the employee's point of view, but also from the employer's, child sickness benefit has some advantages over the claim to compensation under section 56(1a) German Protection Against Infection Act.

With regard to the compensation claim under the German Protection Against Infection Act, parents complained that it is not very high (67 % of the net income). The fact that the claim is subject to various restrictions was also criticised. For example, section 56(1a) German Protection Against Infection Act applies if parents follow the appeals from politicians to take care of their school children at home when compulsory attendance is suspended, but not if parents do not take their children to their pre-school daycare centre. These and other gaps have now been closed by the new provision in section 45 German Social Code V. The broader scope of application of section 45(2a) German Social Code V is therefore intended to create an actual incentive for parents to take care of their children at home even though they would theoretically have access to the ("emergency") care offered by daycare centres and schools (see the questions below for the details).

2. What are the prerequisites for a claim under section 45(2a) German Social Code V?

There is a claim under section 45(2a) German Social Code V if:

- the child to be cared for has statutory health insurance, (see question 3); and
- the child is not older than 12 years of age or is disabled and dependent on assistance (question 3); and
- the applicant has statutory health insurance, (see question 3); and
- measures are taken by the competent authority to prevent the spread of infection or contagious diseases on the basis of the German Protection Against Infection Act that result in childcare being required for a child (referred to as here as "childcare required as a result of the pandemic") (see question 4), and

- no other person living in the household can supervise the child (questions 5-7), and
- the childcare required as a result of the pandemic has been appropriately demonstrated (question 8).

3. Who is entitled to claim the child sickness benefit?

It follows from section 45(1) German Social Code V that only working parents with statutory health insurance have a right to a claim. What is more, it only applies if the child to be cared for is under 12 years of age or is disabled and also has statutory health insurance himself or herself.

Privately insured parents, legal guardians of privately insured children or self-employed persons who have statutory health insurance but have excluded child sickness benefit in their insurance conditions must therefore refer to section 56(1a) German Protection Against Infection Act.

4. When is there "childcare required as a result of the pandemic" that gives rise to a claim to child sickness benefit?

There is a claim in the following cases, all of which must be for the purpose of "preventing the spread of infections or contagious diseases on the basis of the German Protection Against Infection Act":

- a) if daycare centres, schools or facilities for persons with disabilities are temporarily closed by the competent authority,
- b) or if they are subject to a general prohibition of entry,
- c) or if a child is prohibited from entering them due to quarantine (= isolation),
- d) or if the competent authority orders or extends school or company holidays on grounds of protection against infection,
- e) or if compulsory attendance is suspended at a school,
- f) or if access to childcare is restricted,
- g) or if the facility cannot be attended by the child due to an official recommendation.

In the cases mentioned under a) to e) there is also a right to compensation pursuant to section 56(1a) German Protection Against Infection Act as a matter of principle

meaning that the employed person can choose whether he or she would prefer to claim child sickness benefit or the compensation. In cases f) and g), it is not possible to receive compensation under the German Protection Against Infection Act.

5. Is it possible to receive child sickness benefit if alternative childcare is available?

To what extent the possibility of making use of alternative childcare options opposes the right to child sickness benefit depends on what alternative childcare options there are. If the child can be cared for by another person living in the same household, the right is excluded. This is clear from section 45(1) German Social Code V. This may be the case, for example, if an older sibling can care for the younger child. This certainly also applies to an employee whose spouse is currently not working or whose employment has been suspended, for example due to parental leave.

On the other hand, employees will most probably not be required to make use of emergency care in schools or daycare centres, unlike in the case of compensation on the basis of section 56(1a) German Protection Against Infection Act; this became clear from various statements made in the daily press, for example by Family Minister Giffey, in the course of the legislative process.

6. Does the employee have a claim despite having the option of working from home?

Compensation under section 56(1a) German Protection Against Infection Act is based on the assumption that parents working from home can normally care for their children at the same time. It is not clear from the wording of section 45(2a) German Social Code V whether the option of working from home also excludes a claim under section 45(2a) German Social Code V. However, in the explanatory notes on the legislation it is made clear that there is a claim regardless of whether or not the work owed can, in principle, also be done from home.⁴ This is also in line with the declared intention of Federal Minister of Health Spahn and Family Minister Giffey who took a stance to this effect in the daily press and on social media.

7. Must outstanding leave or working time credit be used up first?

According to statements by Federal Minister of Health Spahn and Family Minister Giffey, the claim to child sickness benefit is immediate even if outstanding leave has not been taken or working time credit has not been used up. This is another advantage

⁴ Decision-Recommendation to the Act Amending the German Act against Restraints of Competition for a Focused, Proactive and Digital Competition Law 4.0 and Other Competition Law Provisions (GWB Digitisation Act), Federal Government Printed Paper 19/25868, see Special Section on Article 8 (p. 124).

for employees compared with the compensation claim under the German Protection Against Infection Act. In the latter case, working time credit must be used up and leave, or at least an amount proportionate to the period of time concerned, must be taken first.

8. How can parents prove that they have a claim?

If a child is being cared for at home due to the pandemic, a certificate from the respective facility (school, nursery, daycare centre) is sufficient. According to the central organisation of the German statutory health insurance companies, the exact reasons, such as "pandemic-related closure" or "prohibition of entry", must be stated in the certificate. The Federal Ministry for Family Affairs has already provided daycare centres and schools with a simple sample certificate so that parents can apply to their health insurance companies for sick days in an unbureaucratic manner.⁵

In addition, some health insurance companies, such as Barmer⁶, already offer a sample form for parents which they can use to submit their application to their insurance company.

However, if the child is ill, a "Medical Certificate for Receipt of Sickness Benefit When a Child is Sick" is required – as always.

9. What is the amount of the claim for parents?

The child sickness benefit is calculated as usual: the employee receives up to 100 % of his or her net salary, up to a maximum of EUR 112.88 per calendar day (in 2021). However, the employee's contribution towards social insurance is deducted from the child sickness benefit calculated in this manner.

10. What is the maximum period for which child sickness benefit can be claimed?

The current entitlement doubles in 2021 from 10 to 20 days, and from 20 to 40 days per child for single parents, but to no more than a total of 45 and 90 days respectively for more than one child.

⁵ Available online at: [20210120-musterbescheinigung-data.pdf \(bmfsfj.de\)](https://www.bmfsfj.de/SharedDocs/DE/Presse/pm/2021/01/20210120-musterbescheinigung-data.pdf?__blob=publicationFile)

⁶ [BARMER - Antrag Pandemiebedingtes Kinderkrankengeld.](https://www.barmer.de/Service/Antrag-Pandemiebedingtes-Kinderkrankengeld)

11. Can parents only use the new, additional child sick days for childcare required as a result of the pandemic?

Parents may use all child sick days for childcare required as a result of the pandemic. However, if they do, they will not be entitled to any further child sick days if one of their children falls ill once the coronavirus-related restrictions have come to an end.

12. From when does the new provision apply?

The new provision was adopted by the German Federal Council (*Bundesrat*) in a special meeting on 18 January 2021 and then immediately signed by the Federal President and promulgated in the Federal Gazette. It came into force with retroactive effect from 5 January 2021. This means that parents can already receive child sickness benefit for the period from 5 January 2021 onwards if they were caring for their children at home due to the pandemic and were therefore unable to work.

13. May parents choose whether to claim compensation under the German Protection Against Infection Act or child sickness benefit?

It is our understanding that parents have a right to choose whether they claim compensation under the German Protection Against Infection Act or child sickness benefit. There is no compensation claim under section 56(1a) German Protection Against Infection Act if the employee has a claim to continued payment of remuneration but child sickness benefit is not a claim to continued payment of remuneration. Neither section 56(1a) German Protection Against Infection Act nor any considerations of the legislator yet provide that the child sickness benefit for child sick days must be used up first. However, it is not possible to claim both at the same time because section 45(2b) German Protection Against Infection Act makes it clear that the claim under section 56(1a) German Protection Against Infection Act is suspended for both parents for the period during which child sickness benefit pursuant to section 45(1) in conjunction with (2a) sentence 3 Social Code V is being claimed.

14. How does the child sickness benefit relate to the provision in section 616 German Civil Code?

First of all, the employer is under an obligation to continue to pay remuneration in accordance with section 616 German Civil Code to the extent that section 616 German Civil Code has not been excluded by way of a provision in the individual employment contract or in an applicable collective bargaining agreement. A claim to child sickness benefit applies only once the continued payment of remuneration has come to an end.

15. Is it more favourable for employers if employees claim child sickness benefit or compensation under section 56 (1a) German Protection Against Infection Act?

There is more legal certainty for employers if their employees claim child sickness benefit instead of compensation under section 56(1a) German Protection Against Infection Act because the child sickness benefit is paid directly to the employee by the health insurance company. By contrast, compensation under the German Protection Against Infection Act is "paid in advance" by the employer; the employer must then claim reimbursement from the competent authority. The employer therefore bears the cost risk should there be a dispute between the competent authority and the company as to whether there is a claim to compensation. Such differences of opinion are possible, for example if the employer is of the opinion that it is not reasonable to expect the employee to be able to provide childcare or even schooling alongside working from home but the competent body takes a different view.

16. What advice can be given to a company if a large number of its staff suddenly apply for child sickness benefit as a result of the pandemic?

As is the case in accordance with section 56(1a) German Protection Against Infection Act, the employer has no legal remedy if a large number of its staff suddenly apply for child sickness benefit as a result of the pandemic. Unlike, for example, in cases where an employee wishes to work part-time, the employer cannot reject this on grounds of operational needs. The employer must enter into a dialogue with its employees and try to come to an agreement by developing mutually viable solutions with them. For example, they could discuss whether it would be possible for some of the employees to arrange childcare during the first part of the week and some of them during the second part of the week. The employer can also discuss with the employee to what extent the other parent can take child sick days.

By PAG Employment and Pensions, CMS Germany

(Status: 25 January 2021)