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German Tax and Legal News

COVID-19: Measures regarding Short-time work and short-time work compensation

Against the background of the consequences of the COVID 19 pandemic, which are already being felt on the German market, employers must make use of all available options to minimize personnel costs and ensure liquidity. This is where the use of short-time work compensation can help.

As part of the packages of measures adopted to mitigate the consequences of the COVID 19 pandemic, the regulations on short-time working have been made more flexible and adapted to the new requirements. Entrepreneurs affected by the consequences of the COVID 19 pandemic should promptly examine appropriate options and submit applications.

Starting position
Against the background of the consequences of the COVID 19 pandemic, which are already being felt on the German market, employers must examine and, if necessary, make use of all existing possibilities for minimizing personnel costs and maintaining liquidity. Depending on the industry in which employers are active, minimizing personnel costs can be crucial in order to secure liquidity and thus avoid even worse consequences for the company and its employees. A very relevant component in this context is the renewed and extended short-time working arrangement announced by the German government as part of its so-called 4-pillar "bazooka".

If employees are unable to perform their work, or are unable to perform it in full, because the employer has no or only limited needs, remuneration must continue to be paid to the employees in accordance with § 615 of the German Civil Code (BGB); the employer generally bears the operating risk. By introducing short-time work, employers can reduce the working hours and remuneration of employees by up to 100% and have up to 100% of the remuneration and social security contributions compensated by the public sector. This limits the business risk that is basically borne by the employer.

Step 1: Introduction of short-time work
The employer is not entitled to introduce short-time work unilaterally with respect to the employees; this requires a basis under labor law as a first step. Such a basis may result from the employment contract, a shop agreement or collective bargaining regulations.

If there is a works council but no collective bargaining agreement, a shop agreement takes precedence over individual agreements with the employees. If there is no works council and (still) no basis in an employment contract, a supplement to the employment contract can be agreed with the employees concerned.

A certain amount of time must be allowed for the conclusion of corresponding shop agreements or supplementary agreements to the employment contract. In particular, the conclusion of shop agreements requires rapid action against the background of the ever-increasing absence of works council members from the workplace and the associated problems in establishing a quorum for the conclusion of a shop agreement.

Step 2: Notification of absence from work to the responsible employment agency
On the basis of the legal foundation for the short-time work und employment law (collective bargaining agreement, works agreement or employment contract), the employer must in the second step report the loss of working hours to the competent employment agency, which will then confirm the loss of working hours if the prerequisites are met. According to § 95 SGB III, the decisive prerequisite for short-time work benefits is that a considerable loss of working hours with loss of remuneration is given. In this respect, a materiality threshold must be observed in § 96, Subsection 1, Sentence 1, No. 4, SGB III. In principle, one third of the employees employed in the enterprise or part of the enterprise must be affected by a loss of

earnings of more than 10 % of their monthly gross salary in each case. However, in order to support employees and companies in connection with the COVID-19 19 pandemic, the Bundestag decided on 13 March 2020 to grant relief in this respect, which is to apply for a limited period retroactively from 1 March 2020. In this context, the materiality threshold will be lowered to the extent that only 10% of the employees employed in the company or part of the company must be affected by a loss of earnings of more than 10% of their monthly gross salary.

In addition, the materiality of a loss of working hours according to § 96, Subsection 1, SGB III, requires that the loss of working hours is due to economic reasons (e.g. decline in orders) or an unavoidable event (e.g. closure ordered by the authorities) for which the employer is not responsible.

Furthermore, the considerable loss of work must be temporary and unavoidable. According to § 96, Subsection 4, Sentence 1, SGB III, a loss of working hours is unavoidable if all reasonable precautions have been taken in a company to prevent the occurrence of the loss of working hours. Loss of working hours is avoidable, e.g. pursuant to § 96.4 sentence 2 no. 2 of the Third Book of the Code of Social Law, insofar as it can be wholly or partly prevented by granting paid holiday, provided that employees' priority holiday wishes do not conflict with the granting of holiday. At present, the employment agencies do not burden the employers with the task of discussing conflicting holiday wishes with each individual employee, but as a rule only assume an inevitability if existing holiday plans are modified. However, in order to prevent a flood of vacation days after the end of the short-time work phase, an attempt should be made to grant at least part of the vacation (e.g. remaining vacation from the previous year that has not expired) before the introduction of short-time work. Pursuant to § 96, Subsection 4, Sentence 2, No. 3, SGB III, the use of working time credits has priority over short-time work. As a result of the amendment of the law in connection with the COVID-19 pandemic, it should be possible to waive the build-up of negative working time balances in full or in part prior to payment of the short-time working compensation (section 96 (4) sentence 2 no. 3 of the SGB III).

According to § 99 SGB III, the employer must report the loss of working hours in writing or electronically to the employment agency in whose district the business is located. In particular, the notification must substantiate that a considerable loss of working hours exists and that the operational requirements for the KUG are fulfilled. The relevant forms are available on the homepage of the employment agency and should, depending on the complexity of the matter, be accompanied by an explanatory letter and/or a personal address to the responsible clerk.

Step 3: Applying for short-time working allowance at the responsible employment agency

As a rule, the short-time allowance is paid at the earliest from the calendar month in which the notification of the loss of working hours is received by the respective competent employment agency. If the loss of working hours is due to an unavoidable event (e.g. an official plant closure), the notification is deemed to have been made for the corresponding calendar month (in which the unavoidable event occurs) if it is made without delay.

The payment of short-time work compensation must then be applied for separately. The application must be submitted within a preclusive period of three months (§ 325, Subsection 3, SGB III). The period begins at the end of the calendar month in which the days of short-time work lie. If the relevant period of short-time work extends beyond the end of more than one calendar month, the period uniformly begins only at the end of the last calendar month for which the application for short-time work was made.

The maximum reference period of the short-time work is currently twelve months; however, it is possible that this period may be extended to a maximum of 24 months by statutory order. The amount of the short-time work allowance is limited to a maximum of 60 (employees without children) or 67% (employees with children) of the difference between the net remuneration actually owed and the net remuneration paid within the applicable contribution assessment limits. As a result of the amendment to the law in connection with the COVID-19 Pandemic, the basic social security contributions to be borne by the employer are also to be paid by the employment agency in future.

The short-time allowance is typically advanced by the employer, who then has the benefits reimbursed by the relevant employment agency. However, advance payment by the employer is not mandatory. The common payroll systems usually have functions - which can be added if necessary - for calculating the short-time work allowance. According to the statements of the

employment agency, the reimbursement is usually made within 15 calendar days. It remains to be seen whether this is also the case in view of the large number of inquiries in connection with the COVID-19 pandemic.

Finally, it is not unusual for the employer - on the basis of a collective bargaining agreement, a shop agreement and an employment contract provision - to pay an allowance or top-up in addition to any reduced remuneration owed and the short-time working allowance. Such a supplement does not reduce the short-time allowance if there is still a loss of remuneration.

Result
Depending on the extent to which working hours are reduced, short-time compensation can cover a high proportion of the employer's personnel costs and therefore offers a good and socially acceptable way of minimizing personnel costs and securing liquidity.

If employees are in official quarantine or if official measures have been ordered against employers, employers should, in addition to applying for short-time work compensation, also examine the possibilities of applying for compensation under the Protection against Infection Act, since the benefits from short-time work compensation fall short of the benefits under the Protection against Infection Act.

Finally, employers should take precautions now for the period after the COVID-19 pandemic and plan any necessary restructuring measures in the medium term. In this respect, it is particularly important to consider the (further) qualification of personnel, at best using the government aid available for this purpose, and - if unavoidable - the reduction or relocation of personnel.

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