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LaborLawMagazine

The online magazine for labor law in companies

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Prof. Dr.
Thomas Wegerich
Editor
Labor Law Magazine

Dear Readers,

Unusual times lead to unusual articles. Prof. Dr. Bruno Mascello does not write on a topic related to labor law but on “20 points to reflect on”. Do not miss his ideas and thoughts on how Covid-19 will change the legal market.

Remote work is part of the new normal these days. But there will be a way back to the offices. Dr. Albrecht Muser describes what employer and employees have to obey when returning to what used to be “normal” just a few months ago.

In Germany, short-time work is a powerful means to prevent mass dismissals as a possible and frightening consequence of the Corona crisis. Shinta Zafiraki and Sumejja Handzo have all the details regarding opportunities and risks by using this instrument.

Sincerely yours,

Thomas Wegerich

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20 points to reflect on

What is the next normal in the legal market and here to stay after Covid-19?

By Prof. Dr. Bruno Mascello, LL.M.



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A few months ago, I foresaw 10 trends in the legal market, not expecting it would already be time to assess whether Covid-19 had caused me to change these predictions (see, e.g., Deutscher Anwalt-Spiegel, Ausgabe 1, 08/01/2020 and 09/01/2019; Business Law Magazine of 27/02/2020 and 01/03/2018; HSG-Blog of 06/02/2020).

Today, we are all witnesses to a worldwide experiment triggered by a virus which in the end will have contributed much more to (digital) transformation in the legal market than any other development, CEO or digitalization and innovation officer before. Will there be a hysteresis after the hysteria, will this cause sustainable changes and shifts with different expectations and preferences of customers and employees, or is it just a temporary nuisance to be overcome like a runny nose or cough?

Without any doubt, Covid-19 is relevant to the legal market and its developments. It has not only caused a health crisis and had social and political effects, but will very likely turn into a financial crisis as well. The latter directly impacts the legal market and the various legal service providers. Some of the relevant points to reflect on are the following:

1. **Companies focus on cost-cutting exercises:** Working on the bottom-line is the most effective short-term measure to help stem immediate bleeding. It will be applied across the board to all business units and functions without any exceptions. Legal departments need to show that they are good corporate citizens, effective

budget managers and contributors to the success and survival of their companies.

2. **Revenue of law firms is lost forever:** The real economy has been hit dramatically, and along with it the service sector. Considering that a country like Switzerland generates three quarters of its added value in the services sector, this certainly also impacts law firms and legal service providers. Legal services are considered to be services and not goods, i.e. whatever is not consumed at the time will not be additionally consumed later. Exceptions may certainly apply (e.g., last wills, divorces); however, some of the litigations are already settled or may not be possible anymore, and any Covid-19-related new ones will not compensate for the loss.
3. **Loss of customers:** Small and medium-sized law firms depend on SME customers. Many of the small enterprises may not survive the time during the crisis or the subsequent recession and may not spend their liquidity on legal services. Depending on how long the crisis lasts, big companies may shut their doors as well.
4. **Law firms disappear:** Law firms are no better than cottage industries: as cash-based organisations they do not own any assets, they have not accumulated any financial reserves to carry them through stormy times, and their stock in mandates lasts for a few weeks only. The pipeline dries up quickly, and this may force some law firms to close. Big Law may profit in the short term since in VUCA times, CEOs may “rush to brands” – this as a precaution in case they are blamed for having

made the wrong decisions during the crisis. Strong brands are more likely to survive since they sell additional value (call it “insurance protection”).

5. **Layoffs and salary pressure:** If revenue is lost, cost control will become key. Law firm partner income will be reduced, or partners will be requested to inject capital to preserve liquidity, while salary cuts for associates and a reduced size of workforces through furlough or layoffs are also to be expected, with timely billing and cash collection becoming more important.
6. **Review of business model and strategy:** This is the moment where business models and strategies need to show their durability, and if they fail, to be reviewed and changed.
7. **Push for digitalization:** The entire world has gone online: customers, providers, universities and even courts. Technology is being used more often and in a much better way. Some companies and law firms have been taken by surprise and discovered that they are not ready for remote work, use no VPN connections and have no business continuity plans. Virtual meetings and exchanges will become normal – remember those horrible conference calls with dozens of participants. They have suddenly disappeared with the advent of video call apps!
8. **Push for legal tech:** Because of the extent to which technology has helped us through this crisis, it may be embraced more readily in the future and not be perceived as a threat any more. Legal Tech companies



Without any doubt, Covid-19 is relevant to the legal market and its developments.

have gained a convincing additional USP for their sales pitches, and customers are more willing to combine human capital and technology.

9. **Acceptance of new work:** With the push to online, new working models like remote work, flexitime and

coworking have proved to function even without strict in-office face time. Unless an organization relies on paper, it will be difficult for employers to deny their employees the opportunity of working from home at least some of the time. The working environment and leadership style need to adapt as well. Finally, this

opens up opportunities to recruit from less expensive regions or to allow part-time work, in particular for +50 lawyers or parents.

10. **Consulting online is accepted:** Online consulting services will become much more acceptable and not be felt to be unfamiliar anymore.

Based on this, what are some consequences for the legal market?

11. **Increase of insourcing and pressure to resource:** To avoid layoffs in the legal department, outsourcing costs (e.g. law firms) will be reduced to the greatest extent possible. Tasks will be reassessed with regard to whether they should still be done by the legal department or by law firms, or whether new suppliers could do them more efficiently. Multi-sourcing concepts will be established to reduce cluster risks and increase risk diversification. Preferred providers will be willing and able to deliver more than “just” legal know-how (e.g., interdisciplinarity, international network, technology and process expertise, customer-centric business model).
12. **Accelerated price negotiations:** Service providers will be asked to reduce their costs and to provide free aid packages to show that they are serious about caring for their customers.
13. **Communication by leaders is key:** In a crisis you can show and prove that you are a real leader. You will

be capable, for better or worse. Be present and show that you are a thoughtful and effective communicator, that you can stay calm and rational, and that you can communicate clearly and honestly. Be sympathetic and empathetic.

14. **Customer focus is essential:** Today, you can also demonstrate real interest in caring for customers and their survival, which means switching from an inside-out to an outside-in view. The customer comes first, and lawyers should not act like ambulance-chasers if they believe in long-lasting acquisition efforts and sustainable relationships.

Post-Corona, we will not return to the previous equilibrium.

15. **Employee focus is vital:** How you handle the situation will have a lasting effect on current employees and also be acknowledged in the future recruitment market. Do you lay employees off quickly or are you considered to be a trusted employer who engages in a reasonable activity level, including fostering the training and education of associates?
16. **Procurement department gets appreciated:** The expert in cost-cutting exercises is no doubt the procurement department. Their role will become much more important and listened to, even in legal departments with a defensive attitude.

17. **Crisis as a selection tool:** A crisis operates like an acid test. In times of great urgency, it is about doing the right thing and providing plug-in legal solutions for serious business challenges. A crisis also forges reputations both good and bad, and the outcome will have a lasting impact. Lawyers can demonstrate they are risk and crisis managers who can be relied on and who help to carry the burden of uncertainty. Customers are much more sensitive in critical times and communication becomes a real differentiator. The much-trumpeted trust relationship is at stake and law firms run the risk that unsatisfied customers will “vote with their feet” and switch to a competitor. Depending on how lawyers act and behave, they will have the opportunity to win new customers or they risk losing existing ones, forever.

18. **“Make” has proven to be stronger:** Today, legal departments are forced to do more on their own (less outsourcing), to take more risks (no second-guessing) and to show they can do the work more quickly and for less money (efficiency gains). This effect will remain and not bounce back, as we already noticed after the financial crisis of 2008.

19. **New legal challenges:** In the short term there might be a shift from transaction business (besides clarifying clauses around MAC, force majeure and termination) to insolvency and restructuring. In the long term, the questioning of globalization and specialization, the critical assessment of remote supply chains and the move of production closer to the end user, the dependencies of cluster risks and the related vulnerability of

customers, may all lead to new legal questions to be solved by the lawyers. This will offer new opportunities for the legal market.

20. Time for innovation: One can of course first wait and see and then simply react. However, the present day is also an opportunity and a time to optimize and innovate, and to position oneself as a first mover in the market. A crisis has the potential to accelerate changes (e.g., standards ready for download, click accept agreements, online resolution procedures, access to justice, changing court procedures). And it may change behaviour patterns and break down long-lasting silos as well.

In a nutshell, change and the adoption of technology have been accelerated and proved to be fit for purpose. Since everyone was forced to cope with the new situation at once and since there were no real options to choose from or time to wait, it had to function and it required rapid learning, flexibility and agility. The way lawyers work and interact with their customers and how we use technology have already changed and will continue to change – as will the mindset, too. A lot of routine and familiarity have gone, much of it for good, making way for something new. Post-corona, we will not return to the previous equilibrium. ←

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Walking over a strong bridge to cross the deep economic valley

"Kurzarbeit" – Opportunities and risks for employers and employees

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In Germany, the number of applications for Kurzarbeitergeld due to the corona crisis has already far surpassed the number of applications during the financial crisis of 2008/2009.

Short-time work is “*our strong bridge to cross the deep economic valley*” according to Hubertus Heil, German Federal Minister of Labor. In Germany, the number of applications for *Kurzarbeitergeld* (short-time allowances) due to the corona crisis has already far surpassed the number of applications during the financial crisis of 2008/2009.

Kurzarbeit in a nutshell

Short-time work means a “temporary reduction of working hours due to loss of work, resulting in a reduction of remuneration accordingly.” It can, therefore, function as a tool to prevent dismissals in a critical situation.

Upon the employer's application, the Federal Employment Agency (FEA) will partially compensate the monetary loss employees experience with a short-time allowance, currently amounting to 60% of the loss of their net income (67% for employees with children).

To be eligible for short-time allowance, the following requirements (§ 95 SGB III) have to be met:

- Considerable loss of work with loss of remuneration;
- Operational requirements;
- Personal requirements; and
- The employer has notified the FEA of the loss of work

Generally, the duration of eligibility is limited to a period of 12 months and can be extended by statutory instrument to up to 24 months.

Easier access to *Kurzarbeitergeld* due to the coronavirus

The German government has issued statutory instruments relaxing the requirements for the short-time allowance, applicable for the period from 1 March to 31 December 2020, as follows:

- 10% of the workforce has their working hours cut by more than 10% (normal threshold 1/3 of the workforce);
- No more requirement to build up negative working time balances;

- Contract workers are also eligible for short-time allowance; and
- Social security contributions, which employers normally have to pay for their workforce, will be fully reimbursed by the FEA

Employer's risks for criminal liability

In mid-March, the German government forecasted around 2.35 million short-time workers for the year 2020 equaling a financial burden for the FEA of at least 10 billion euro.

The possibilities for abuse will most certainly keep prosecution authorities and criminal defense lawyers busy for a long time beyond corona times.

Special audit groups have already been formed with the Federal Employment Agencies across several Federal States in order to detect suspicious applications and to forward them to the Central Customs Office and to the Public Prosecutor's office.

Therefore, it might be worth taking a look at the following question:

What are the risks for criminal liability for employers?

If the information provided to the FEA by employers when applying for the short-time allowance is inaccurate or incomplete, this could constitute fraud, according to §

263 StGB (German Criminal Code), or - in case the application is rejected - attempted fraud.

The most relevant form of perpetration will probably occur when the statement regarding the reduced working hours on the application does not correspond with the actual hours worked (e.g. the employees continue to work full-time or to exceed the allowed reduced working time).

Employers could also commit subsidy fraud if the short-time allowance is classified as "subsidy" in the sense of § 264 Section 8 StGB, incurring a maximum penalty of imprisonment of up to 5 years.

"On the topic of fraud, there is even an increased risk of committing subsidy fraud, as subsidy fraud does not require an intent at the time of filing the application. According to § 264 Section 5 StGB, a careless (*"leichtfertig"*) declaration of facts, which turn out to be incorrect, can be sufficient to commit subsidy fraud.

Employees who are aware of the circumstances can easily become liable for accessory to fraud or accessory to subsidy fraud by having provided their consent to the short-time work, which is required for the employer to apply for the short-time allowance in the first place.

Furthermore, the abusive introduction of the short-time work scheme can also lead to the criminal liability of the employer due to withholding and embezzlement of wages (§ 266a StGB).

Impacts on the immigration status of foreign nationals

In order to employ foreign nationals in Germany, employers are under obligation to comply with rules stipulated by German Immigration and Labor Law. In practice this means that employers are obliged to keep an employee's copy of the identification document and the German work and residence permit WRP on file. The WRP is an official document and proof that a foreign national is permitted to work for a specific employer in a specific position in Germany. Each WRP entails certain requirements. Additionally, it is bound to the initially submitted personal and work-related information regarding the foreign national as well as the employer. Within the WRP Extension, the immigration office and FEA, who mostly cooperate within the immigration process, review whether this information is accurate. Here, the FEA mainly focuses on the question of whether the initially stated salary amount was truthfully paid to the employee. As sufficient proof of payment, the employee's payslips are requested and used in order to complete the compliance check.

Reduction of salary

As the implementation of short-time work leads to a reduction of the initially approved salary amount by a certain percentage, there is a crucial question: How will the immigration status of foreign nationals in Germany be impacted (regardless of whether an extension is required or not)?

In the circular letter dated 24 March 2020, which aimed to address the situation of the immigration offices across Germany which was caused by COVID-19, the Federal Ministry of the Interior gave explicit instructions regarding the impacts of short-time work in respect of a foreign national's WRP. Hereby, it is clearly emphasized that short-time work will not negatively affect the validity of the WRP, with the rationale being that a German employment contract is to be seen as a granting prerequisite in obtaining a WRP for which "the employment" constitutes the purpose of stay. This purpose of stay remains unchanged, despite the implementation of short-time work and a reduced salary, as long as the employment contract persists.

As sufficient proof of payment, the employee's payslips are requested and used in order to complete the compliance check.

Employees need to be very cautious at this point: Contrary to the implementation of short-time work, the termination of an employment, despite the COVID-19 crisis as cause of the same, constitutes the ending of the purpose of stay (if purpose of stay is "employment"). In contrast to a lot of other European countries, there is no protection of dismissal due to COVID-19 in Germany. Under these circumstances, the duration of stay in Germany might be shortened at the discretion of the immigration office, whereas foreign nationals holding a permanent residence

permit do not have to fear such consequences. The circular letter further expressly states that even the holders of permit types which are bound to a certain minimum salary threshold, for example EU Blue Card holders, will not have to fear the loss of their privileged immigration status in Germany.

In order to avoid any inconveniences when filing the extension application, we recommend notifying the immigration office about the implementation of short-time work and the receipt of a reduced salary as a consequence of it. Even though it is taken as a matter of course, the implementation of short-time work is required to be proven as equivalent to the COVID-19 crisis in order to be covered under the regulations mentioned in the circular letter.

Short-time allowance

The procurement of public funds generally leads to the expiration of the WRP. Consequently, the receipt of the short-time allowance appears to be another arguable aspect of short-time work. The Residence Act (*Aufenthaltsgesetz*) clearly differentiates between public funds and benefits based on personal contributions that do not jeopardise the validity of the WRP. As a benefit paid by the unemployment insurance based on payments of the employer and of the employee, the short-time allowance is not considered a public fund benefit and therefore does not put at risk the validity of the WRP. Despite the clarification of a huge amount of uncertainty on the extraordinary circumstances caused by the COVID-19 crisis, the

circular letter does not provide a clear answer on impacts of purchasing other public funds and repercussions on the current residence status of foreign nationals whose sustenance of livelihood might be endangered. Therefore, we highly recommend scrutinizing the possible negative impacts of receiving other public funds prior to applying for the same.

The COVID-19 crisis and the lockdown of the majority of the immigration authorities has decelerated the immigration of skilled foreign nationals to Germany and thwarted the efforts of the German government to address the huge lack of skilled workers. Nonetheless, certain foreign nationals travelling from an EU country to Germany will be allowed to cross the German border according to the EU Commission, aiming to grant the continued free movement of all workers in critical occupations, including both frontier workers and posted workers. (See more)

The Commission has also proposed a European instrument (SURE) supporting short-time work schemes and similar measures in the member states.

European comparison of systems of short-time work

Where does Germany stand in comparison to the short-time work schemes of other EU countries?

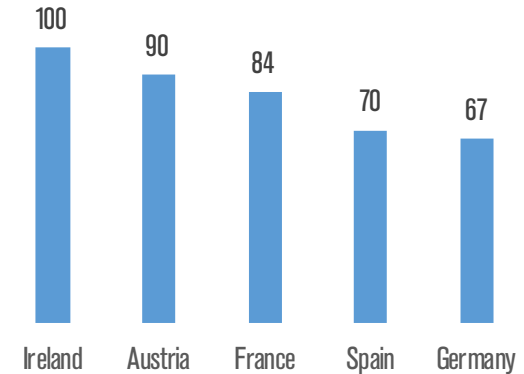
The possible duration of short-time work (from 3 months to 2 years) as well as the amount of the short-time allowance (from 60% to 100%) vary widely across Europe.

As the below infographic shows, Germany seems to be rather the latecomer in Europe, especially compared to Nordic countries (Denmark, Sweden), but also to the Netherlands or Ireland, where losses are compensated to 100%.

Further differences can be found in relation to employer contributions to the short-time-work allowance or dismissal protection. Many countries (for instance Austria, France, Spain, Netherlands, Denmark) have incorporated a protection against dismissal in their short-time-work system, which is not the case in Germany.

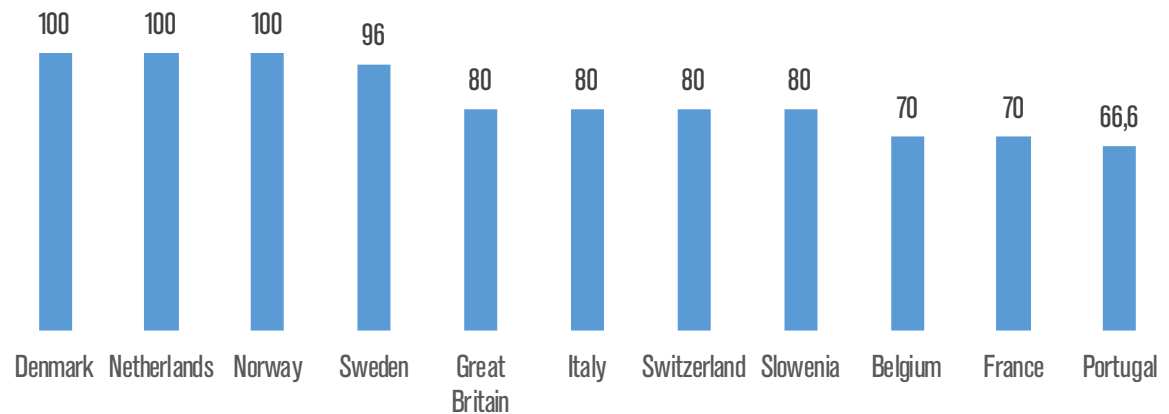
It therefore remains to be seen whether the current German bridge construction will be strong enough to withstand the load. [←](#)

Short-time work allowance in selected European countries as % of Gross Salary



Source: WSI Policy Brief No. 38, 04/2020

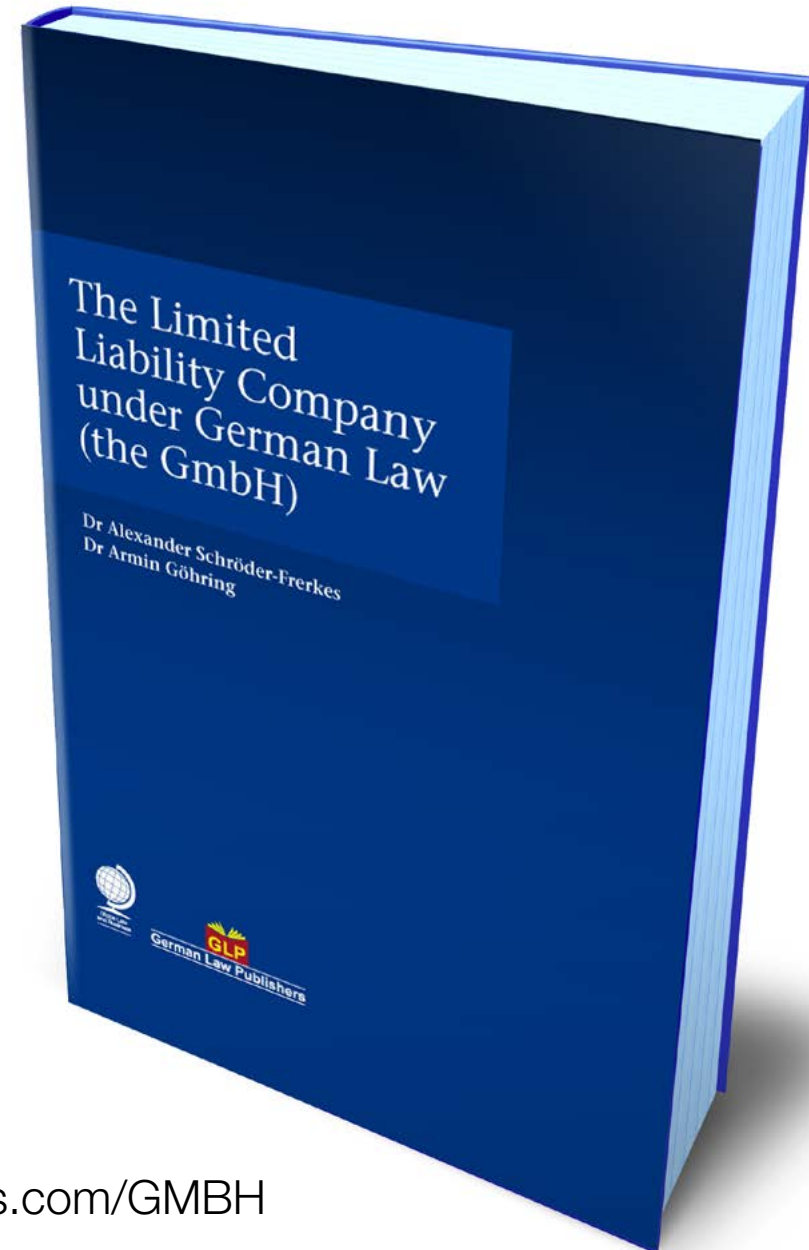
Short-time work allowance in selected European countries as % of Gross Salary



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COVID-19 and its consequences

Returning to the office after remote working: What to consider

By Dr. Albrecht Muser



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In many businesses employees have been asked to work remotely (also known as “working from home”) during the current COVID-19 pandemic.

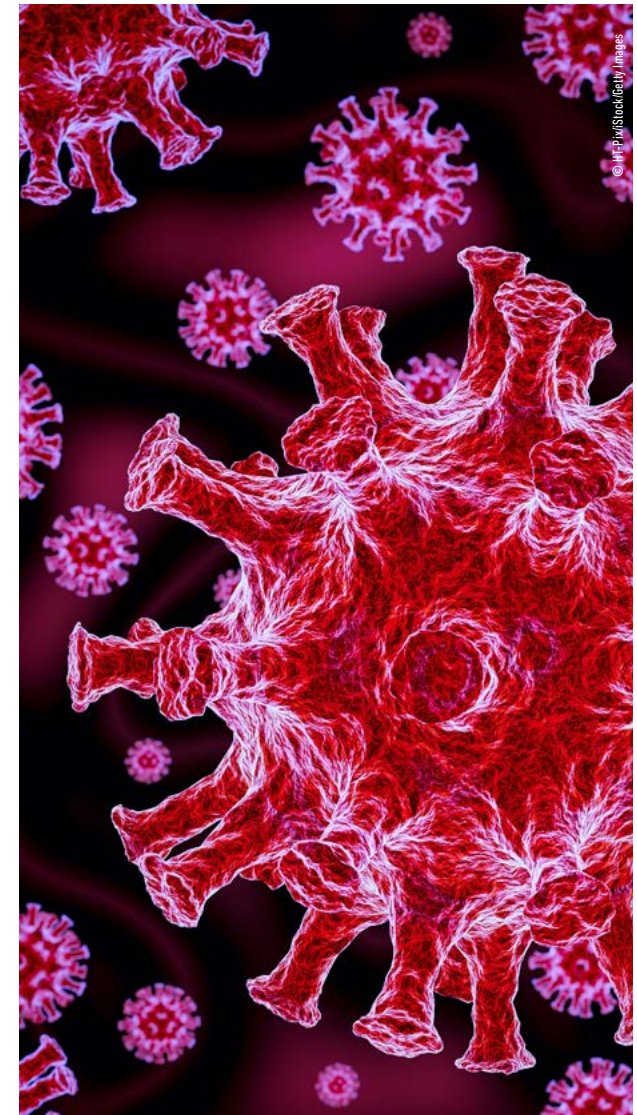
Depending on the nature of the work, business could potentially be continued with employees working from home instead of ceasing business activities entirely. Now, as the measures to contain COVID-19 are beginning to be eased, a return from remote work to the office is on the agenda in many businesses for many reasons, whether for the fact that many businesses still have a “presence culture”, due to cabin fever among the workforce, or other reasons.

From a labor law perspective, the question now arises as to which conditions the employer may order. Which conditions the employer may order its employees to return to the office and what protective measures have to be (or at least should be) taken in this context.

Remote work from a general labor law perspective

Except for particular positions (e.g. field sales agents, service technicians) the employees’ place of work usually is at the employer’s premises. This may either follow from a respective provision under the employment agreement or from a respective order by the employer based on his statutory authority under sec. 106 of the German Industrial Code (“*Gewerbeordnung*” – “*GewO*”).

As far as the employees now are obliged to perform their work activities away from the employer’s premises, (e.g.



The employer may basically instruct its employees to return from a preliminary home-working back into the office in the course of the current easing of the COVID-19 measures.

for reasons of health protection during the COVID-19 crisis), the employer may instruct the workforce to work from home for a preliminary period of time due to its aforementioned authority (an amendment to the employment contract is required only if employees shall henceforth work from home on a permanent basis, which cannot be instructed by order of the employer).

Especially in a situation such as the COVID-19 pandemic the employees are obliged to follow a respective decision and cannot refuse to work from home preliminarily (it can hardly be imagined that working from home is absolutely unbearable for a limited period of time).

On the other hand, employees are generally not entitled to work from home at their own discretion without the employer's consent. This only may be the case exceptionally, e.g. if it is unacceptable for the employee to work from the employer's premises for hygienic reasons, etc.. Apart from this, working from home requires the employer's express consent.

Except from a different place of work, working from home implies no alteration to the existing employment relationship between the parties. All applicable regulations under the employment contract, as well as under statutory regulations remain in force. This especially applies to regulations concerning working time, data protection, occupational safety or any co-determination rights of the works council. In addition, the employees even could claim a reimbursement of expenses as far as additional

as far as additional costs actually accrued by them (e.g. for additional communication lines, office supplies etc.). In order to avoid disagreements concerning these aspects, it seems useful to regulate them in a reasonable manner.

Return to the office from remote work

As far as working from home has been instructed by an employer's unilateral order, generally the termination of remote working and return to the office can also be instructed by such an order. Nevertheless such an order can only be regarded as permissible as far as a return seems reasonable from the employees' perspective. Against the background of COVID-19, this means that the employer must make sure that those reasons for which remote working was introduced (risk of infection etc.) no longer exist or are at least being mitigated. If remote working was introduced by a respective agreement amending the employment contract, the return to the office is subject to the specific regulations under the agreement. These may be particular conditions under which the employer may order the employee to return, or simply the expiry of the term for which remote working has been agreed to.

As far as these requirements are met, the employees are obliged to return and are not entitled to continue working from home. In particular, an entitlement to continue working from home under certain aspects of company practice (*"betriebliche Übung"*) cannot be acknowledged unless for very exceptional cases. In such cases, only dismissal with the option of altered conditions of employment could effect a termination of remote work.

Occupational health and safety – employers' duties

When the employer instructs its employees to return to the office, the employer is obliged to provide appropriate measures to ensure occupational health and safety. In the context of COVID-19 this means that the employer must at the very minimum take specific measures to reduce the employees' risk of infection with COVID-19.

With respect to COVID-19, it therefore is to be recommended that the employer undertakes a respective risk assessment (*"Gefährdungsbeurteilung"*) pursuant to the German Occupational Safety Act (*"Arbeitsschutzgesetz"*) and issues an action plan, taking into consideration the respective guideline which has been issued by the Federal Labor Ministry (the ["SARS-COV-2 Arbeitsschutzstandard"](#)).

This action plan, which is to be formulated by the employer in cooperation with the works council, the occupational health and safety specialist (*"Fachkraft für Arbeitssicherheit"*) and the occupational physician (*"Betriebsarzt"*) must contain particular technical, organizational and individual-related arrangements.

Regarding particular technical measures, the work spaces must be arranged with sufficient distance between employees, effective ventilation must be provided and physical meetings and business trips should be reduced as far as possible.

From an organizational point of view, for example, all work equipment is to be disinfected periodically, shift

work and respective working time schedules should be introduced in order to not have too many employees on site at the same time. Also, procedures which govern the handling of suspected cases of infection must be stipulated in particular.

Lastly, as regards individual-related measures, protective equipment such as masks must be distributed to the employees. In addition, the workforce must be informed appropriately about the protective measures and be trained respectively, and special arrangements for particularly endangered employees (e.g. people suffering from asthma) must be made.

Should the employer fail to follow the aforementioned guidelines and to take appropriate measures, the employees are entitled to refuse to return to the office. Furthermore, as far as damages occur due to the employer's failure to take appropriate steps, the employer may also be liable for damages.

Summary

As pointed out, the employer may generally instruct its employees to return from a preliminary remote work to the office in the course of the current easing of the COVID-19 measures. This however requires that the employer implements measures to ensure occupational health and safety according to the "SARS-COV-2-Arbeitsschutzstandard" issued by the Federal Labor Ministry. ←

ANZEIGE

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DATE!**

4. Dezember 2020

**Frankfurt School of
Finance & Management
Frankfurt am Main**

Inhouse Matters ist die plattformübergreifende Fach- und Networking-Veranstaltung der Produktfamilie Deutscher AnwaltSpiegel rund um den Themenbereich „Digitalisierung im Rechtsmarkt“. In Zusammenarbeit mit der Frankfurt School of Finance & Management bringen wir das gesamte Netzwerk unserer sieben Online-Magazine Deutscher AnwaltSpiegel, Business Law Magazine, Compliance Business, Dispute Resolution, e-Justice, Intellectual Property und Labor Law Magazine zusammen.

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Die Ausbreitung des Coronavirus hat innerhalb weniger Tage die Jahrespläne von uns allen zu Makulatur gemacht. Der Gesprächs- und Informationsbedarf ist in dieser für uns alle neuen Situation noch weiter gestiegen. Dies gilt angesichts der stets neu zu bewertenden Risiken und Volatilitäten im Rechtsmarkt insbesondere für alle Fragen rund um das operative Geschäft, strategische Entscheidungen und Entwicklungen sowie die sich daraus ergebenden Folgen für Ihr Business. Noch wissen wir alle nicht, wie lange die aktuelle Ausnahmesituation andauern wird und ab wann wieder reguläre Veranstaltungen stattfinden können. Unter der vorläufigen Annahme, dass sich die Lage zum Sommer hin stabilisieren wird, planen wir aktuell, das Netzwerkevent Inhouse Matters am 4. Dezember 2020 in Frankfurt am Main durchzuführen.

Chasing the unicorn...

... or how to argue gender discrimination due to unequal payment?

By Dr. Kathrin Bürger, LL.M. (New York)



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In July 2017, the Equal Pay Act was passed but a six-month waiting period was established before individuals could exercise any right under this Act. Now almost two years after the Act itself came into force, the first court decisions have been made. Owing to those, employees have a hard time proving discrimination in pay, although all measures provided for in the law are being used.

How to argue discrimination in accordance with the Transparency of Pay Act

This is where the dilemma lies: Employees who are under the impression that their (male) colleagues earn more money than they do, can request payment information from their employer. Such an information request should – in theory – allow employees to find out whether their colleagues earn more or less money. This is where the “but” comes in: employers only need to provide the information in relation to the median of the wage components. This means the salary, which separates the upper half from the lower half and should therefore not be confused with the average remuneration.

Let's assume such information brings to light the fact that the median is higher than what the employee who requested the information earns: the next logical and possible step would be to bring a lawsuit against the employer for comparable remuneration. The employee would then argue in court that the median is above his or her salary and therefore request an adjustment. Here the Higher Labor Court of Lower Saxony stated in its decision of August

1st, 2019 (5 Sa 196/19) that such information alone is not sufficient and dismissed the action entirely. The underlying reason was that the employee was unable to present a pay disadvantage. The legal basis for the adjustment of remuneration is controversial in case law and labor literature. The Higher Labor Court of Lower Saxony found that regardless of the legal foundation on which the claim for different remuneration was made (the Equal Pay Act itself does not provide for one), the employee needs to argue that, in accordance with the requirements of Section 22 of the General Equal Treatment Act, the information provided is sufficient to prove a discrimination due to gender. The court did not see this. The employee's salary was below the median, but this information alone was not sufficient to justify discrimination. The information also fails to show that the level of remuneration is based on the employee's gender – in this case, female. Nor is there any evidence based on mere information, even if the difference in remuneration were a significant amount. The very fact that colleagues earn 8% more is therefore not enough.

In another court decision (Higher Labor Court of Rhineland-Palatinate (11/10/2018 – 5 Sa 455/15) the court ruled that the employer meets his burden of proof for a lack of violation of the principal of gender discrimination, by showing that only non-gender-related reasons led to different remuneration. This was again an argument used by the Higher Labor Court of Lower Saxony. The employer had arguments in favor of differentiation within the remuneration and also managed to prove that the highest salary in such comparison group was earned by a female employee.



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In addition, employers must begin to set up a payment system so that transparent decisions can be taken on pay and increases in pay.

Remuneration under the median as an indication

Already during the implementation of the Equal Pay Act, labor law literature stated that the sole use of the information obtained from the inquiry into the employer cannot be sufficient to fulfil the burden of proof. The intention of the Equal Pay Act was, however, to use the information obtained and argue both a disadvantage in the difference in remuneration and discrimination. And therefore this is all the information the employee receives by using the instrument the Equal Pay Act provides.

If a court now rules that remuneration below the median alone is not sufficient to argue discrimination, it confirms at the same time that the Equal Pay Act does not live up to what it was intended to be. Thus, the outcome of the appeal already filed by the employee is expected to be a pioneering decision.

Consequences for employees

The underlying decision takes the bull by the horns. As now the court has decided that the mere difference in remuneration is not sufficient, it is not recommended that

employees bring in a lawsuit without further information to back up their argumentation. Therefore the employee needs to present further information to shift the burden of proof in his/her favor. Any additional information which shows evidence of discrimination would be helpful here. Once the burden has shifted to the employer, it has to be proven to the court that remuneration is not granted due to gender but due to non-discriminating factors.

Within an existing system, exceptions can be argued in one way or the other.

Consequences for employers

Whilst employers could now be under the impression that the potential danger which came along with the implementation of the Equal Pay Act has subsided, simply not replying to any information request made by the employees is not an answer. Employers playing dead and relying on the above-mentioned court ruling could therefore also be considered as an indication of discrimination. Therefore, information requests must be treated with care and respect for potential consequences resulting from them.

In addition, employers must begin to set up a payment system so that transparent decisions can be taken on pay and increases in pay. Within an existing system, exceptions can be argued in one way or the other. Case law allows for the rectification of distinctions made in the past if the employer shows that the ultimate goal is to eventually establish a non-discriminatory system. ←



Forfeiture clauses in employment contracts

New guidance from the Federal Labor Court

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According to the Federal Labor Court, changes in the law can also become relevant for employment agreements that were concluded (long) before a change in case law.

Forfeiture clauses are commonly used in German employment agreements. While under statutory law, claims will only become time-barred three years after the end of the year of their due date, forfeiture clauses are popular to limit the ability to exercise claims, in most cases to three months after the due date. They are therefore essential for avoiding long periods of legal uncertainty for both parties. Oftentimes, changes in case law pertaining to forfeiture clauses go unnoticed by employers. If forfeiture clauses are not updated regularly, they are considered null and void, often causing significant financial risks for employers.

Rationale of forfeiture clauses

In the vast majority of cases, forfeiture clauses in employment contracts are considered “general terms and conditions” and thus fall under statutory law which restricts their permissible content and wording. The validity of forfeiture clauses is therefore assessed in accordance with Sec. 305c and 307 to 310 of the German Civil Code (*BGB*) and falls within the scope of a so-called “content control”. One important element of the content control is the transparency requirement, which requires clauses to be formulated clearly, unambiguously and comprehensibly. The transparency requirement has been subject to many court decisions in the past years. Most recently, two new decisions have now further delineated the permissible content and wording for forfeiture clauses and require employers to review their standard employment agreement.

Clear instructions for the employee required

In the first decision (Federal Labor Court, decision of 3 December 2019 – Case No. 9 AZR 44/19), the employer used a forfeiture clause which required that a claim must be asserted in court within three months unless the other party “*rejects the claim or does not oppose it*”. The clause therefore also required immediate court action in case the other party remained silent, promised to fulfil the claim or did not oppose it. As a result, the claimant had to take legal court action immediately to prevent the claim from being excluded – irrespective of how the employer reacted to his claim. While the wording of the clause itself was clear and comprehensible, the obligation to take immediate legal action is not in line with what the law expects from an employee, in particular when the employer does not oppose the claim. Taking legal court action would seem inconsistent in such a case. Consequently, the Federal Labor Court ruled that the clause is invalid because it incorrectly reflects the legal situation. The court clarified that forfeiture clauses must provide clear instructions to the employee insofar as he does not have to assert his claim at court if the employer does not oppose it.

Exclusion of indispensable rights

Certain indispensable rights, such as the minimum wage right, must be expressly excluded from a forfeiture clause. Otherwise the entire clause is considered null and void. A special statutory regulation on minimum wages, namely an Ordinance on Mandatory Working Conditions for the

Nursing Care Sector (hereafter “*Care Regulation*”) was the subject of another recent decision of the Federal Labor Court on 22 October 2019 (Case No. 9 AZR 532/18). In this case, the employee did not assert his wage claim to the defendant employer in due time. The employer then argued, amongst other things, that the claim was now forfeited due to the forfeiture clause. The employee raised the argument that the forfeiture clause in his employment agreement did not exclude claims to minimum wage under the Care Regulation. Interestingly, the respective employee was not even working in the care sector but worked as a salesperson in the automotive industry. In view of that, the Federal Labor Court found that that the disputed clause was valid. It can therefore be concluded that it is not necessary to explicitly exempt each and every law providing for indispensable rights if the relevant law is not applicable to the present case.

The transparency requirement has been subject to many court decisions in the past years.

Nevertheless, for reasons of precaution, employers are best advised to either explicitly list indispensable rights by means of a non-exhaustive list (for example “*This forfeiture clause shall not apply to claims for minimum wages pursuant to the Minimum Wage Law Act, the Posting Workers Act, the Temporary Employment Act or other mandatory minimum working conditions under national law...*”) or include a blanket exception (for example “*This forfeiture clause shall not apply to claims which by law are excluded*”).

from this forfeiture clause.”). According to case law of the Federal Labor Court, such an approach satisfies the transparency requirement (decision dated 18 September 2018 – Case No. 9 AZR 162/18 para. 51).

How to avoid non-transparent clauses

Forfeiture clauses must be comprehensible to the average employee. First and foremost, this means that clear and preferably simple language should be used. The language must be consistent and should enable the employee to understand what is expected of him in order to prevent the claims from being forfeited. This also means that statements must not be contradictory in content, as well as that the clause does not impose a conduct on the employee which seems contradictory to common behavior.

Regular review of employment agreements necessary

Due to the fast-moving development of the Federal Labor Court's case law, a regular review of forfeiture clauses in standard employment agreements is recommended. Particular caution must be exercised if older agreements are changed at some point during the ongoing employment. According to the Federal Labor Court, changes in the law can also become relevant for employment agreements that were concluded (long) before a change in case law. If, for example, the employment agreement is amended in connection with a promotion or a salary increase, it is usually agreed that *“the remaining provisions of the employment*

agreement shall remain unaffected by this change”. By doing so, the parties have referred to the original contract in its entirety and the old agreement is transformed into a new one. However, new agreements have to comply with the most recent legal situation with the effect that there is a considerable risk that the forfeiture clause will be rendered invalid.

Employers are, therefore, well advised to conduct regular (annual) reviews of their standard employment and standard amendment agreements to ensure that all required changes are properly implemented. ←

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