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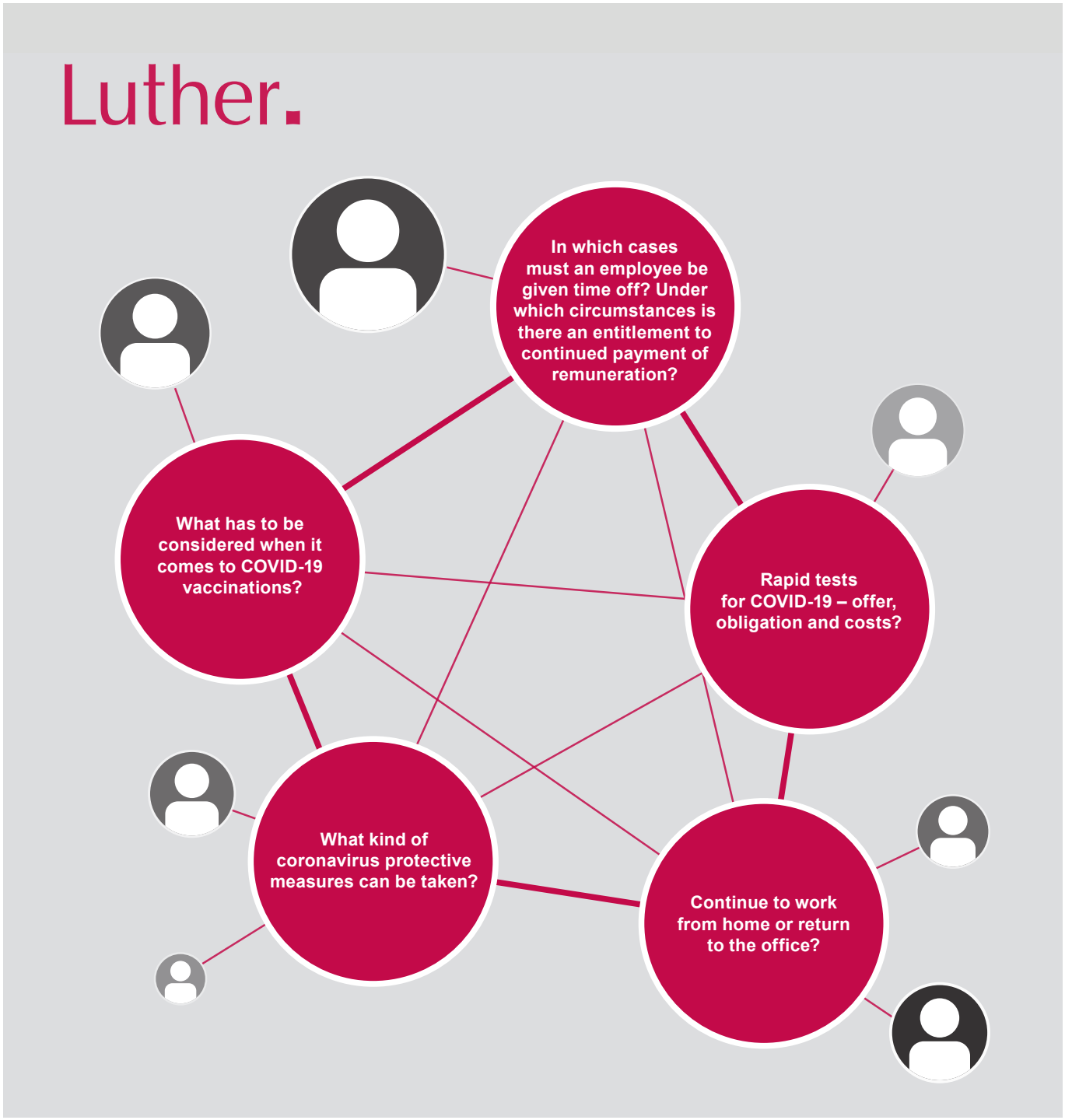

Special COVID-19 Newsletter

October 2021

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Contents

In which cases must an employee be given time off? Under which circumstances is there an entitlement to continued payment of remuneration?

Are employees, who want to be vaccinated, to be given time off from work with continued remuneration?

In general, doctors' and vaccination appointments need to be made outside working hours. Otherwise, the principle of "no work, no pay" enshrined in Section 326 (1) of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) applies with the effect that the entitlement to remuneration is extinguished for the period of absence. The situation is different if the visit to the doctor has to be made during working hours due to the circumstances of the individual case such as, for example, an appointment scheduled by the authorities. The provisions set out in Section 616 BGB would apply in this case and the entitlement to remuneration would remain unchanged.

In order to encourage the take-up of vaccinations by employees during the pandemic, a new Section 5 was added to the SARS-CoV-2 Occupational Health and Safety Ordinance (*SARS-Cov-2-Arbeitsschutzverordnung,* Corona-ArbSchV). This contains the obligation of the employer to allow its employees to be vaccinated during working hours. Even though the Ordinance does not explicitly state whether this leave is paid or unpaid, it is likely to be understood as meaning that this is time off during which the employer must pay for the lost work performance. However, there is heavy dispute among legal experts whether such a remuneration obligation can be effectively regulated within the framework of a simple ordinance.

Can the employer release an employee from work where it is proved that he or she has come into contact with an infected person? Is the employee entitled to continued remuneration for the time off?

In general, the employer is obliged to employ the employee in accordance with the contract (so-called employee's right to employment). It is only possible to release an employee from work if the employer's interest outweighs the employee's interest in employment, such as the employer's interest in protecting the other employees from the risk of infection. However, this means that there must be specific grounds to suspect that the employee has been infected. A verifiable direct contact with an infected person represents such a definite risk of infection that allows the employer's interests to prevail and entitles the employer to unilaterally release the employee from work.

In this case, the employee retains his or her regular entitlement to remuneration pursuant to Section 615 sentence 1 BGB. In the event of a pandemic, the following applies: if it can be proved that an employee is not infected and he or she offers to perform his or her work, the employer is obliged to pay the remuneration.

Can employers refuse continued payment of wages in the event of a COVID-19 illness, if the employee has declined a vaccination offer?

Any employee prevented from working due to illness is generally entitled to continued remuneration. This also applies to cases where employees have been infected with COVID-19 and show symptoms of the illness. However, the German Continued Payment of Wages and Salaries Act (*Entgeltfortzahlungsgesetz*, EFZG) links this entitlement to the requirement that this is through no fault of the employee. According to the established case law of the Federal Labour Court an employee acts culpably if he or she intentionally or particularly negligently violates the conduct to be expected from a reasonable person in his or her own interest (judgment of 18 March 2015, 10 AZR 99/14). Such a violation is to be assumed regarding accidents suffered when taking part in particularly dangerous types of sport or if the employee travels into a region with a high risk of infection as a tourist despite the German Federal Foreign Office having issued a travel warning. However, under current legislation, fault on the part of the employee within the meaning of Section 3 EFZG cannot be derived from the unwillingness of the employee to be vaccinated.

What impact does the order to quarantine at home have on the entitlement to continued payment of wages?

If a quarantine period is ordered by the authorities, one needs to make a distinction with respect to the employee's entitlement to continued payment of wages: whether, how much and from whom the employee receives money during the quarantine period depends, inter alia, on whether the latter is ill and unable to work, can work from home and recently whether he or she is vaccinated or has recovered.

If the employee is unable to work due to COVID-19, he or she continues to receive his or her wages under the usual arrangements for continued payment of wages in the event of illness, Section 3 EFZG. It is generally accepted that this does not change where self-isolation at home is ordered because of COVID-19.

However, if an employee is in quarantine only as a precaution due to the suspicion of a possible infection, the entitlement to continued payment of wages depends on whether the work performance owed can be rendered at the place of quarantine

or not. If working from home is possible, the employee is still required to perform his or her work and continues to receive his or her usual remuneration from the employer.

If working from home is not an option, the employee has a claim to compensation under the German Act on the Prevention of and Fight against Infectious Human Diseases (*Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen*, in short: Infection Protection Act or IfSG). Section 56 IfSG grants the employee compensation in the amount of the net pay, which is initially paid by the employer. The latter can in turn subsequently request reimbursement of the relevant amount from the competent authorities.

However, under Section 56 (1) sentence 4 IfSG, anyone who could have avoided quarantine by availing himself/herself of a publicly recommended vaccination does not qualify for compensation. The Federal Minister of Health and the ministers of health of the individual federal states decided by a majority on 22 September 2021 to end the payment of compensation to unvaccinated workers. They justify their decision with the fact that everyone now has the opportunity to be vaccinated. By 1 November 2021 at the latest, employees who have by choice not taken up a vaccination offer will therefore no longer receive any compensation for the loss of earnings suffered if they have to quarantine.

This does not include persons who cannot be vaccinated for medical reasons or in the event of vaccine breakthrough infections or new illnesses. These persons continue to have a claim to compensation.

Who bears the costs caused if an employee becomes unfit for work after being vaccinated because of a reaction to the vaccination?

Should an employee become incapacitated due to a reaction to the vaccination, he or she is entitled to continued payment of wages in the event of illness under the Continued Payment of Wages and Salaries Act. These payments are initially made by the employer, which can be subsequently reimbursed by the relevant health insurance fund to the extent insured, provided that the employer is a participant in the so-called U1 procedure under the Act on the compensation of expenses of the employer (*Aufwendungsausgleichsgesetz,* AAG).

Does the employee qualify for continued payment of wages, if he or she travels privately to a risk area and then has to self-isolate at home upon return (home quarantine)?

Since 1 August 2021 the new Ordinance on Coronavirus Entry Regulations (*Coronavirus-Einreiseverordnung,* CoronaEinreiseV) has applied to persons returning from a high-risk area or an area of variants of concern. Under this Ordinance, persons

who have entered Germany and have at any time within the last ten days prior to entry, stayed in an area which is classified as a high-risk area or area of variants of concern at the time of their entry are required to self-isolate at home immediately following entry for a period of ten to fourteen days. There is a possibility of free testing for high-risk areas and the duty to quarantine is no longer applicable to vaccinated and recovered persons.

If an employee travels knowingly to one of the countries subject to the duty to quarantine and has to subsequently self-isolate at home under CoronaEinreiseV, he or she is acting culpably within the meaning of the regulations concerning continued payment of wages. This gives rise to a self-inflicted, temporary inability to work within the meaning of Section 616 BGB and the entitlement to continued payment of wages therefore ceases to apply.

Furthermore, in this case, compensation for loss of earnings is also excluded under the German Infection Protection Act. For Section 56 (1) sentence 4 IfSG explicitly excludes a claim to compensation where quarantine could have been avoided by not departing on a trip to an area, which was already classified as a risk area at the time of departure. According to the wording of the Act a trip is considered to be avoidable, if there were no compelling and non-postponable reasons for taking the trip at the time of departure. Such reasons would include, for example, urgent medical treatment, official appointments or family emergencies such as a funeral.

However, the employee continues to be entitled to payment of wages, if he or she is able to work from home during the quarantine period.

The situation where the country to which the employee travelled is only classified as a risk area after his or her departure from Germany is treated somewhat differently. In such a case the employee has not acted culpably and would in principle temporarily be entitled

to continued payment of wages in accordance with Section 616 BGB. However, the entitlement to continued payment of wages under Section 616 BGB only applies if the inability to work also lasts for a relatively short period of time. If the inability to work lasts longer because of the quarantine, Section 56 IfSG applies and grants the employee a claim to compensation. There may be exceptions for unvaccinated persons (see above).

A current list of designated risk areas can be found on the website of Robert Koch Institute.

What has to be considered when it comes to COVID-19 vaccinations?

Can the employer inquire about the vaccination status of employees and request proof?

Yes, but only if it has a legal basis for this and a "legitimate interest". An employer may only request such information, if there is a justified, acceptable and legitimate interest in the answer for the employment relationship.

However, most employers will currently not have such a legal basis or legitimate interest. This holds true particularly because vaccination is currently not mandatory in Germany and the inquiry relates to sensitive health data, which is especially protected under data protection law.

A legal basis exists, for example, in the health care sector. Currently, the general rule is that healthcare facilities such as hospitals, dialysis clinics or medical practices can ask their employees about their vaccination status with regard to communicable diseases and may process personal data (Section 23a in conjunction with Section 23 (3) sentence 1 IfSG.) This also applied prior to the coronavirus pandemic and serves to protect patients from so-called nosocomial infections (e.g., infection of patients with "hospital germs"). The purpose of the provision of Section 23 IfSG is to facilitate the medical employer the data processing on vaccination and sero-status in relation to vaccine-preventable diseases of employees, ultimately for the protection of employees but also patients. Section 23a IfSG extends the scope to diseases that are not vaccine-preventable (such as COVID-19). It is important to state that this right to ask does not result in a vaccination obligation. Vaccination remains voluntary.

Most employers in other sectors do not currently have a legal basis for asking about the vaccination status and requesting proof. Within the framework of the 2021 Reconstruction Aid Act (*Aufbauhilfegesetz*, AufbhG 2021), Section 28a (3) and Section 36 (3) IfSG were also amended among other things (Entry into force: 15 September 2021). Section 36 (3) IfSG now stipulates that, in particular, the establishments stated in Section 36 (1) and (2) IfSG (e.g., homeless shelters, care homes, schools, day care centres) are allowed to ask about and record the vaccination status of their employees with regard to a COVID-19 vaccination.

"If, under Section 5 (1) sentence 1, the German Bundestag has determined that there is an epidemic situation of national significance and insofar as this is necessary to prevent the spread of the coronavirus illness 2019 (COVID-19), the employer may process personal data of an employee of the facilities and companies mentioned in paragraphs 1 and 2 regarding his or her vaccination or sero (recovery) status relating to the coronavirus illness 2019 (COVID-19) in order to decide on entering into an employment relationship or the manner of the employment. Furthermore, the provisions of the general data protection law shall apply."

We are of the opinion that it follows from the justified question of the employer about the vaccination and sero status under Sections 23, 23a and 36 IfSG that the employees must answer truthfully, i.e., there is no "right to lie".

Can employees be instructed by their employer to be vaccinated?

No, that is not covered by the right to give instructions pursuant to Section 106 sentence 1 of the German Industrial Code (*Gewerbeordnung*, GewO). Even healthcare facilities may not require their employees to be vaccinated in view of the previously mentioned Section 23a in conjunction with Section 23 (3) sentence 1 IfSG. They only have the right to ask questions and to process data.

There is already much disagreement as to whether a statutory duty to vaccinate would in fact be legally possible in Germany (Section 20 (6) IfSG contains in any event the power to issue a statutory ordinance). It follows from the above that, a fortiori, a duty to vaccinate would not be covered by the right to give instructions. Based on our legal assessment such a request from the employer would not be consistent with the exercise of reasonable discretion, as the decision to be vaccinated or not is primarily a personal decision. The general personality right and the right to physical integrity are affected.

As there is no duty to vaccinate and vaccination is not subject to the right to give instructions, such a request would be just as ineffective as a warning or notice of termination given on the basis of a "violation". The conclusion of a company agreement containing a mandatory duty to be vaccinated is also not permitted.

What relevance do recommendations of the Standing Committee on Vaccination (STIKO) have for employers?

As the employer is neither obliged to offer vaccinations nor can it request its employees to get vaccinated, the recommendations of STIKO are not relevant for employers.

STIKO is a democratic and legitimate form of the inclusion of external expertise, which is ensured by the relevant institutions, without itself being an independent federal agency. This means that STIKO "only" makes recommendations concerning vaccinations and other measures for the specific prophylaxis of communicable diseases and develops criteria for the distinction between a normal post-vaccinal reaction and a health impairment, the degree of which exceeds that of a normal post-vaccinal reaction (Section 20 (2), (2a) IfSG). The STIKO recommendations are therefore primarily guidelines with regard to the determination of public vaccination dates or recommendations without any direct legal effect or binding force. They do, however, have an effect, among other things, on the standard of liability under medical law.

Can the employer request that employees get a "booster shot" or follow-up vaccination?

No, the employer cannot request any vaccinations at all. Booster shots are currently only intended anyway for a limited group of people, namely so-called "vulnerable persons", for whom there is a weakened or quickly diminishing immune response six months after the (usual) second vaccination.

Is the employer obliged to make coronavirus vaccinations available? Who bears the costs for the vaccine?

The employer itself does not have to provide the vaccination. However, it has to allow employees to be vaccinated during working hours and, where necessary, has to support the company doctors in doing this. Employers also have to inform their employees about vaccination offers. Section 5 (1) of the SARS-CoV-2 Occupational Health and Safety Ordinance reads:

"*The employer has to allow the employee to be vaccinated against Coronavirus SARS-CoV-2 during working hours. The employer has to support the company doctors and inter-company services of company doctors, who carry out vaccinations on-site on the grounds of protecting the population, in terms of staff and organisation."*

The Ordinance does not provide for the costs to be borne by the employer. The costs of coronavirus vaccinations - irrespective of the insured status - are generally borne by the Federal Government under the Ordinance on the entitlement to vaccination against the SARS-CoV-2 coronavirus.

Can the employer promise its employees special bonuses in the event that they get vaccinated?

Yes, the employer can offer a "vaccination premium" as a reward in order to increase the willingness to be vaccinated. Such an incentive does not constitute a duty to be vaccinated and the employees continue to be responsible for registering voluntarily to be vaccinated and to receive a "vaccination premium".

On the other hand, the employer may not place its employees in a less favourable position or discipline them, if they lawfully refuse to provide information about their vaccination status. However, it seems that it cannot be de facto excluded that the workplace harmony could be disrupted, if employees feel disadvantaged in as much as they do not receive the premium.

If "vaccination premiums" are to be offered as a reward, it may be necessary to consider co-determination rights of the works council under Section 87 (1) nos. 7 and 10 of the German Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG).

Can the employer restrict access to company facilities for unvaccinated employees?

Employers have a duty of care towards their employees, which includes protection against infection. However, this does not mean that the employer may/must send its unvaccinated employees home on the basis of its duty of care. Although the employer can in principle bar its employees from its company premises based on its rights as the owner of the premises (domiciliary right), it must in principle appropriately employ its employees on the basis of the right to employment. Furthermore, Section 612a BGB provides for a prohibition of victimisation, under which the employer may not discriminate against an employee.

Whether unvaccinated employees may be sent home to work (as the milder measure) is unclear and is the subject of heated discussions as is a physical separation at the business establishment. The prohibition of victimisation also plays a role here. In cases of doubt, the employer will have to employ the employees at the company premises and, for example, order rapid tests prior to restricting access.

In any event the employees retain their entitlement to remuneration for default of acceptance reasons (Section 616 BGB), if, for example, the employer sends them home without it being possible for them to work from there.

By the way: If employees are unvaccinated and have to be quarantined, which would have been avoidable if they had been vaccinated, they are not entitled to compensation for their loss of working hours (Section 56 (1) sentence 3 IfSG), whereas vaccinated employees are (Section 56 (1) IfSG).

Can the employer assign alternative work based on the vaccination status?

The employer must employ the employee appropriately and under the terms of the employment contract. If there are activities within this framework that, at the intention of the employer, are to be only carried out by vaccinated employees (e.g., for the treatment of immunocompromised patients in hospitals), the employer may assign such tasks at its reasonable discretion (Section 106 sentence 1 GewO). If there is no possibility of transfer, but e.g. patient contact is and remains mandatory in the hospital, the medical question is decisive as to what extent an almost comparable level of protection can be achieved by means of personal protective equipment and tests.

Rapid tests for COVID-19 – offer, obligation and costs?

Are employers required to offer rapid coronavirus tests?

Yes, according to the most recent version of the Corona-ArbSchV, employers are required to offer employees a test at least twice a week. In general, this applies to all employees who are not working exclusively from home.

The test offers are to be dispensed with if the employer "ensures equivalent protection of employees through other appropriate protection measures or can prove an existing equivalent level of protection". According to the explanatory memorandum tests need not be provided for employees who can prove that they are fully vaccinated or for whom there is proof of a previous coronavirus SARS-CoV-2 infection suffered at least 28 days and a maximum of six months earlier.

However, it does not follow from the above that there is a right of the employer to information regarding the employees' vaccination status. If the test offer is restricted to employees who are neither vaccinated nor recovered, this may be communicated when providing the test. However, the employer has no way of exercising a monitoring function.

The Corona-ArbSchV is initially effective until 24 November 2021. A reliable forecast cannot be currently made - due to the delay in forming a government - for the period after this. Employers should, however, prepare for an extension of the mandatory test offers as a precaution.

Which coronavirus tests may the employer procure and distribute to its employees?

Under Corona-ArbSchV these must be tests that directly detect the Coronavirus SARS-CoV-2 pathogen and are approved by the Federal Institute for Drugs and Medical Devices (BfArM).

Pathogens can be detected by PCR tests or rapid antigen tests for professional or self-testing but not by antibody tests, which only show a past infection. Only the rapid antigen tests are suitable for distribution to employees for self-testing. A complete list of the approved tests can be found on BfArM's website.

There is also the option of appointing third parties, e.g., qualified service providers or recognised testing centres/sites to carry out the tests. It is important to ensure that only persons, who have the requisite training or knowledge and experience and have been instructed accordingly, carry out the tests. It is not sufficient to refer the employees to the free citizen testing facilities.

It is essential that proof of the procurement of tests or the appointment of third parties to conduct the tests be kept until 24 November 2021. Proof is to be provided in the event of an inspection carried out by the occupational health and safety authorities.

Are employees required to undergo the rapid tests offered by the employer?

The employee does not have a statutory obligation to undergo the tests offered by the employer. There is currently only a recommendation from the Federal Government that the offer of a test be taken up.

In individual cases, an obligation for the employee to be tested may arise from the ordinances and general decrees of the individual federal states. The obligations to be tested provided for therein are linked to longer holiday-related periods of absence (in North Rhine-Westphalia: absence of five working days) or to the area of activity (in North Rhine-Westphalia: care and medical facilities in particular) of the employees. Immunised, i.e., vaccinated or recovered, employees are partly exempt from the obligation to be tested.

Can the employer instruct employees to undergo (daily) rapid coronavirus tests?

The permissibility of mandatory, purely preventive coronavirus tests for employees is a highly contentious issue. If there is not a special legal regulation such as for nursing care facilities, an order issued by the employer is not necessarily covered by the right to give instructions.

In general, any instruction given by the employer must keep within the bounds of reasonable discretion, i.e., the employer's interests must not be unilaterally taken into account, but sufficient consideration should also be given to those of the employee. In relation to the obligation to test it must be considered that the employer has a duty of care for the entire workforce, especially with respect to risks

to life and health. However, when it comes to the employee, the tests are associated with an encroachment on the general personality right and (to a lesser extent) an encroachment on the right to physical integrity.

In our view, the following picture emerges from weighing up the mutual interests: An obligation to offer preventive tests requires that there be not an insignificant risk of infection in the workplace. The following criteria are decisive in this regard:

- working on site is essential (working from home is not an option);
- employee/customer contact cannot be avoided (a particularly important criterion in the case of contact with vulnerable people);
- other health and safety measures are inadequate (in particular: distancing, hygiene, masks, ventilation);
- the business establishment is located in a region with an increased risk of infection (the obligation to test should be linked to the 7-day incidence rate published by the Robert Koch Institute (RKI). The incidence rate of 100 mentioned in Section 28b IfSG is appropriate as a limit).

The frequency of the tests should be based on the RKI recommendations to carry out preventive tests at least two (but ideally three) times a week in a business establishment. However, a daily obligation to test that exceeds this will be inadmissible as a rule.

If a works council is set up in a business establishment, the employer can only decide to order obligatory testing with the involvement of the works council, which has a mandatory right of co-determination under Section 87 (1) no. 1 and 7 of the Works Constitution Act. The same limits that apply with regard to the employer's right to give instructions are to be adhered to in such a company agreement.

Less complicated is the handling of employees who show symptoms typically associated with COVID-19 (in particular cough, fever, cold, loss of smell and taste). In this case, the ordering of a coronavirus test is covered by the employer's right to give instructions. Insofar as only individual employees are instructed and a general rule is not established for the establishment, this is also possible without the involvement of the works council.

Does the employer have to bear the costs of the rapid coronavirus tests?

Yes, the tests are occupational health and safety measures, the costs of which have to be borne by the employer. The Corona-ArbSchV also stipulates explicitly that the tests must be free for the employees. It is provided for the costs to be borne by the state. However, insofar as the employer is eligible for bridging aid *Überbrückungshilfe III* or *Überbrückungshilfe III Plus*, the costs may be reimbursed as expenditure for hygiene measures.

An exception is made with regard to mandatory tests in care facilities. In this case, the costs are reimbursed by the nursing care insurance fund (*Pflegekasse*).

Are employees obliged to inform the employer of a positive test result?

In principle, the employee is not obliged to inform the employer of a diagnosis. There is also no explicit legal obligation for COVID-19. A positive test result therefore does not have to be communicated in every case.

If the employee has taken a test at the employer's premises and the test is positive, the employee will have to leave the premises immediately, either because of a relevant ordinance issued by the federal state or because of the employee's contractual duty of consideration. In order to prevent the spread of the virus in the workforce, the employee will in this case also have to inform the employer of the test result and any persons he has had contact with if otherwise a spread of the virus is to be feared. In this case, the employee's interest in secrecy will have to take second place to the employer's interest in preventing the spread of the virus in the company and thus fulfilling his duty of care towards the other employees.

In individual cases, the employee's duty of consideration may therefore, result in an obligation to inform the employer of a positive test result. In the individual case, the employee will also have to inform his contact persons in the company.

What kind of coronavirus protective measures can be taken?

Can the employer order the use of the "Corona-Warn-App" (official and open-source COVID-19 contact tracing app) on business smartphones?

We advise against issuing an order that requires that the Corona-Warn-App be used on business smartphones. Employees should seek a voluntary solution and only encourage employees to use the app, although, in our view, the employer can in principle order the installation and use of the Corona-Warn-App on a business smartphone. It is ultimately incumbent upon the employer to decide how company equipment is used and hence which apps and software are to be installed. However, there are already some voices in the legal literature that consider such an instruction to be ineffective from a data protection aspect.

Notwithstanding this, the right to give instructions does not in any event go as far as being able to instruct the employee to also use the app outside working hours. As this significantly restricts the benefits of the Corona-Warn-App, a voluntary solution is preferable on the whole.

If a decision is nevertheless made to order the use of the Corona-Warn-App, the works council's co-determination rights under Section 87 (1) no. 6, 7 BetrVG are to be taken into account.

Can the employer order the "2 G" or "3 G" rules to be implemented?

Under the current uniform federal regulations, an employer cannot order the "2 G" (vaccinated or recovered) or "3 G" (vaccinated, recovered or tested) rules to be implemented for the business establishment as a whole which would have the effect that employees may not enter the business establishment without a "2 G" or "3 G" certificate. The reason for this is that the employee has the contractual right to employment and, furthermore, there is not a statutory duty to get vaccinated nor, in principle, an obligation to be tested.

However, the employer may take the vaccination or recovery status of employees that is known to it into account in determining and implementing infection protection measures in the workplace. This is explicitly provided for in Section 2 (1) sentence 3 Corona-ArbSchV. See above with regard to the question as to whether the employer has a right to be informed of the vaccination or recovery status.

Corona-ArbSchV does not contain any provisions on the question as to which measures concerning the vaccination and recovery status may be considered and refers to the industry-specific guidance documents of the statutory accident insurance schemes for this purpose. There is also not a consistent trend in the literature regarding this question and particularly as to how extensive an adjustment to the occupational hygiene concept in favour of vaccinated and recovered employees is permitted. Measures that are contrary to the prohibition of victimisation set out in Section 612 a BGB are in any event not permitted. Taking into account the principle of equal treatment under labour law and compliance with the prohibition on victimisation, the following measures are discussed and are also conceivable from our point of view in individual cases:

- elimination of the requirement to wear a mask if all persons in a permanent team or work area are fully vaccinated or have recovered;
- restrictions on access for unvaccinated or recovered persons when using communal areas such as break rooms and canteens.

Under Corona-ArbSchV only the vaccinated and recovered status may be taken into account in determining infection control in the workplace. Conversely, the employer may not base its decision to relax the occupational health and safety measures on a negative test result of employees when determining infection prevention measures in the workplace. This is made clear by the Federal Ministry of Labour and Social Affairs in its FAQs regarding Corona-ArbSchV.

As a result, each occupational hygiene plan must be evaluated to determine whether the employer has taken the necessary infection protection measures based on the risk assessment. The TOP principle is to continue to be applied in determining such measures, i.e. technical measures (T) are to be reviewed with regard to their applicability before organisational measures (O) and these in turn before personal protective measures (P) and properly linked together (cf. Section 4 of the German Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (*Arbeitsschutzgesetz*, ArbSchG)).

A review of the industry-specific guidance documents and specific details can be found on the website of the umbrella organisation of the German statutory accident insurance schemes Deutsche Gesetzliche Unfallversicherung (DGUV).

Can the employer impose the "2 G" rules for areas open to the public?

Federal law does not provide for such a possibility. However, some ordinances issued by the federal states open up this possibility.

For example, the Hamburg ordinance for the containment of the spread of coronavirus SARS-CoV-2 (HmbSARS-CoV-2-EindämmungsVO), valid until 31 October 2021, provides that, in certain sectors, the employer can impose the "2 G" rules for areas open to the public, if it is ensured that only people who have a vaccination or recovery certificate or are under 18 years old are present at the business establishment, event or offer. Consequently, the "2 G" access model also applies to persons employed by or otherwise working at the business establishment, facility or event who gather with the public in the same premises or areas (cf. Section 10j (1) HmbSARS-CoV-2-EindämmungsVO).

In order to ensure that all employees, who gather in these areas, also satisfy these requirements, the employer may process personal data regarding the existence of a vaccination or recovery certificate or regarding their age. However, the provisions under general data protection legislation remain unaffected (cf. Section 10j (3) HmbSARS-CoV-2-EindämmungsVO).

Can an employee refuse to perform his or her work by refusing to serve unvaccinated customers or to treat patients or by staying away from work?

No. The employee continues to be obligated to render his or her contractually owed work. In principle, he or she has no right to withhold such work performance. If the employee withholds his or her work performance, the employer is not obliged to pay any remuneration for the work performance withheld. The employee can also be given a written warning for his or her unauthorised absence. If the employee stays away from work on a repeated and persistent basis, termination for reasons of conduct after an appropriate written warning may also be justified under certain circumstances.

However, in exceptional cases, the employee may refuse to perform his or her work, if the employer has not taken adequate protective measures and there is clear evidence of a not only temporary risk to health. The employee is entitled to remuneration in these cases despite withholding his or her work performance. However, this should only be the case if, firstly, the employer persistently refuses to implement the occupational hygiene policy in accordance with the provisions of the Corona-ArbSchV and, secondly, there are specific fears of lasting damage to health. In principle, this should not be assumed if the employee is to go on a business trip or to a business event or provide services to the employer's customers - in compliance with occupational hygiene measures. A right to withhold services would, however, be conceivable with regard to a business trip ordered by the employer to a country, for which the Federal Foreign Office has issued a travel warning.

Continue to work from home or return to the office?

Does an employee have the right to demand to work from home?

No, the German legislator has so far not (yet) codified the right of the employee to work from home. Subject to other provisions in the employment contract, the employer still determines the content, place, and time of the work performance at its reasonable discretion. Special regulations introduced because of the pandemic, under which working from home had to be offered, have expired. However, working from home can still represent an "appropriate organisational measure" to minimise contact in the workplace.

The legal basis for working from home could, however, change in the future. The draft bill for a Mobile Work Act (*Mobile Arbeit-Gesetz,* MAG) is currently being discussed. Although it does not contain a right to work from home, it does provide in the version of 14 January 2021 the right to have a discussion regarding the request of the employee to work from home. If the wish of the employee for regular mobile work is refused, the employer has to explain its negative decision in writing. If the employer fails to meet its obligations regarding such discussion and explanation, the arrangement would be concluded as initially requested by the employee for the period applied for (but for no longer than six months).

Although the employer would not be obliged to grant regular mobile work and this does not give the employee a "right to work from home", such a regulation would require the employer to deal with the requests of its employees in a thorough manner.

Furthermore, collective wage agreements and company agreements can govern any right of employees to carry out activities from the home and the general conditions for working from home or carrying out mobile work. In addition, such a right may result from individual contractual arrangements between employer and employee.

Exceptions to this can arise from the general rights and obligations of the parties to the employment contract, such as the employer's duty of care, which applies to the employment relationship. A right to work from home may also arise from the legal concept of past practice (*betriebliche Übung)* and, lastly, also from the principle of equal treatment. If the employer allows other employees to work from home, it can only refuse

mobile work for other employees, if sufficient objective reasons justify such unequal treatment.

Can the employer unilaterally order employees to return to the office?

In accordance with Section 611a BGB and Section 106 GewO, the employer decides on the content, place and time of the work performance at its own reasonable discretion. In the event that working from home has been agreed as a temporary solution during the pandemic, the employer is entitled at its reasonable discretion to recall the employee to work at the company's place of business. This also applies if no special arrangements were made against the backdrop of the coronavirus pandemic. If a permanent arrangement regarding working from home was agreed, it is not possible to effectively order such a return unilaterally - apart from a notice of dismissal pending a change of contract (*Änderungskündigung)*.

Can the employee demand to return to the office?

In principle, it remains the case that under Section 611a BGB and Section 106 GewO, the employer generally decides on the content, place and time of the work performance at its own reasonable discretion. However, an order given by the employer to work from home would impinge on the employee's private life and would therefore be ineffective. The employer does not have the power of disposition over the employee's private premises. Even the introduction of working from home requires the employee's consent. If no agreement was reached and the employee was nevertheless sent to work from home, the employer could rely on the argument during the height of the pandemic that it had to satisfy its incumbent duty of care to its employees, especially as it is likely that the majority of the employees would not have objected to this. However, in view of the current course of the pandemic, such a special situation no longer exists. Accordingly, employees may demand to return to the office.

What technical monitoring options does the employer have with regard to the working hours and work performance of its employees who work from home?

The employer is also entitled to monitor work performance in case of employees working from home in compliance with the applicable general conditions. These include, for example:

- review of log-in times;
- review of e-mail and Internet activity;
- review of storage activity;
- documentation of work steps.

A determination is to be made in each individual case as to whether the above-mentioned monitoring options may be applied. The measure must be proportionate and may not improperly infringe the employee's personal rights. However, there is a legitimate interest on the part of the employer to review whether the wage which is paid in exchange for work is adequate. Primarily, open monitoring options known to the employee have to be used. This can be done, for example, by requesting employees to document their work steps electronically.

Where the private use of the hardware and software provided is prohibited, the random checking of the data history of the Internet browser might be permissible. In this way, compliance with the prohibition as well as the actual work performed can be monitored on a selective basis. The same applies to the review of log-in times, even though it cannot yet be determined by means of just the log-in times whether the employee has also actually worked.

However, control measures that result in continuous and secret monitoring are usually not permitted and should only be allowed in exceptional cases - for example, where there is a suspicion of a serious, but not necessarily punishable, breach of duty that is based on concrete facts.

Last but not least, the introduction and application of technical equipment suitable for monitoring work performance and conduct is subject to the co-determination of the works council (Section 87 (1) number 6 BetrVG). If specific IT systems have already been introduced as technical equipment under the co-determination rules, it will be possible to derive the limits on their use for monitoring conduct and work performance, particularly with regard to employee appraisal options, from the company agreement.

What must the employer consider if it wishes to retain working from home on a permanent basis?

In the mutual interests of all parties concerned, the employer should specify the conditions for working from home in consultation with the employee, works council or as part of a collective wage agreement.

1. Expenses / travel costs

If the employee establishes a workstation at home, this regularly entails costs. If the employee himself or herself purchases work materials at his or her own expense, he or she is entitled to be reimbursed under Section 670 BGB. However, the prevailing opinion is that this can be excluded by way of agreement. Should the expenses incurred also be in the interest of the employee, e.g. if the office set up at home will also be used for private purposes, there is only an entitlement to the reimbursement of expenses if the employer's interest far outweighs that of the employee. In addition to equipment costs, incidental costs (heating, electricity, telephone etc.) are also incurred. Against this backdrop it is recommended that a monthly lump sum be agreed to cover these costs, waiving the right to assert further claims for the reimbursement of costs.

Where the employer and employee have determined that the home is the sole place of work, each journey to the permanent establishment represents a business trip. Accordingly, regular compensation must be paid for the journey time, unless otherwise agreed.

2. Data protection / business secrets

The general rules and standards apply to the protection of business data and data processing when working from home. The employer's data protection responsibilities under Article 4 number 7 of the EU General Data Protection Regulation (EU GDPR) remain unchanged in this case. The employer must therefore take appropriate steps to ensure that personal data is handled carefully, and business secrets are treated confidentially when work is performed in the home office. This may present a particular challenge for offices set up at home, as the employer is de facto not able to exert any influence over them. Accordingly, the employer is to ensure that each employee undertakes to protect data and business documents against third-party access.

3. Health and safety / accident insurance

The employer must also put in place health and safety measures in the home office. There is, for example, the obligation to also conduct a risk assessment there. In addition, instructions have to be carried out that cover, inter alia, coping with time and performance pressure, the equipment and lighting conditions or the correct sitting posture.

Under Section 2 (1) number of the German Social Code, Part VII (*Sozialgesetzbuch,* SGB) employees working from home are also covered by the statutory accident income scheme. However, it is sometimes difficult to determine whether an accident occurs in the course of an insured activity.

4. Access rights

Against the backdrop of the principle of the inviolability of the home as stipulated in Article 13 of the German Basic Law (*Grundgesetz*, GG), there is no legal right to enter the employee's home. Without the employee's consent the employer is unable to review whether the employee is fulfilling his or her obligations or to ensure that he or she is meeting his or her duty of care. It is therefore advisable to agree access rights in a home office agreement with a sufficiently long notice period based on concrete grounds and to obtain the consent of any third parties concerned. The unilateral termination of the arrangement to work from home by the employer in the event of the persistent refusal on the part of the employee to grant access is to be incorporated in the agreement.

5. Working abroad

A fair number of employees may come up with the idea of them being able to not only work from their home but also while holidaying abroad. However, a not merely temporary activity carried out abroad entails significant risks. Before authorising the performance of work abroad the general legal conditions of the host country must be clarified, particularly with regard to resident permits / work permits and the employment, social security and tax requirements and consequences. This may give rise to serious consequences, not only for the employee, but also for the employer. There is no right to work from abroad. If the employer permits the work abroad, an agreement should be concluded with the employee which defines the most important key points such as the scope of the activity, return on instruction or a time limit.

6. Co-determination of the works council

Working fully or partially from home or returning to the business establishment may qualify as a transfer under Section 99 (1) BetrVG. The works council is to be informed of every transfer. If the employee is to be compelled to return from the home office through a notice of dismissal pending a change of contract (*Änderungskündigung*), the works council is to be consulted under Section 102 BetrVG prior to the notice of dismissal being issued.

In addition, the works council's co-determination rights under Section 87 (1) number 14 BetrVG are to be taken into account

when designing the mobile work solution, when the work is performed using information and communications technology. The setting up or elimination of a relevant number of posts where employees are working from home may also constitute a change in operations within the meaning of Section 111 sentence 1 BetrVG. This would then have to be negotiated with the works council.

If the measure is linked to a relevant number of notices of dismissal pending a change of contract, the employer must fulfil its existing obligations to consult and inform under Section 17 (2) of the German Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG).

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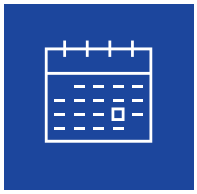
Events, publications and blog



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