Coronavirus/COVID-19 - FAQs on Short-Time Work

(Status 29 May 2020)

- taking into consideration all new statutory and administrative regulations -

Your contacts

Jörn Kuhn
Partner, Attorney - Labor Law
Telephone: +49 221 2091 349
E-mail: joern.kuhn@oppenhoff.eu

Isabel Hexel
Partner, Attorney - Labor Law
Telephone: +49 221 2091 348
E-mail: isabel.hexel@oppenhoff.eu

Oppenhoff & Partner
Rechtsanwälte Steuerberater mbB
Konrad-Adenauer-Ufer 23
Telephone: +49 (0) 221 2091 0
Telefax: +49 (0) 221 2091 333
E-mail: info@oppenhoff.eu

Table of Contents

1. What is short-time work and what is short-time work compensation?

1.1 Short-time work

Short-time work is generally understood to be a temporary reduction in the normal working hours due to a loss of work. It can consist of just a proportionate reduction in working hours or lead to a temporary complete cessation of work (so-called zero short-time work) and is regularly associated with a reduction in pay.

The introduction of short-time work is therefore a frequently used instrument to overcome short-term crises. Since short-time work interferes with the reciprocal main obligations of the employment relationship, its introduction requires a special legal basis.

1.2 Short-time work compensation

Short-time work compensation is a compensation payment granted by the employment agency to employees affected by a temporary loss of work under the conditions of §§ 95 et seq. of the German Social Code Book III [*Sozialgesetzbuch III - SGB III*] in order to compensate for the loss of earnings of employees, to avoid terminations for operational reasons and thus to stabilize the employment relationships and the business that has fallen into crisis.

2. What conditions have to be met before employers can order short-time work?

Employers are not entitled to introduce short-time work unilaterally without a corresponding legal basis. Since employees are basically entitled to employment during the term of their employment relationships, employers require a special legal basis under collective or individual law in order to introduce short-time work - i.e. in the employment contract, in a shop agreement or in a collective bargaining agreement.

2.1 Collective bargaining agreement

Some collective agreements provide that the employer may introduce short-time work under certain more precisely defined conditions and in observance of the co-determination rights of the works council.

If the relevant collective bargaining agreement contains a specific notice period for ordering or introducing short-time work, a shop agreement which disregards this notice period is (partially) invalid.

The consequence of disregarding the collective bargaining regulation is that the introduction of short-time work is generally not deemed to have been agreed at the business until after the end of the notice period and the employer is therefore in default of acceptance for the period before expiry of the notice period pursuant to § 615 German Civil Code [*Bürgerliches Gesetzbuch, BGB*], and thus remains obliged to continue to pay full remuneration.

As a rule, the comprehensive application of the collective bargaining regulations to all employees is achieved by means of a shop agreement.

2.2 Shop agreement

If a works council has been formed at the business, short-time work must be introduced within the framework of a shop agreement. In this respect, the works council has a mandatory right of co-determination pursuant to § 87 (1) No. 3 German Shop Constitution Act [*Betriebsverfassungsgesetz - BetrVG*].

However, the corona crisis can already cause problems for works councils which, if comprised of many members, are no longer willing or allowed to meet due to the risk of infection, a closure of the business by the authorities or even possible lockdowns. The BetrVG stipulates that works council meetings are not open to the public and that resolutions must be adopted by a majority of those present, i.e. an obligation to be present exists. This precludes the use of telephone and video conferences or the adoption of resolutions by circular voting procedure. Employers' associations and trade unions have also recognized this problem in the meantime and are campaigning for the abolition of the obligation to personally attend works council meetings - at least for a limited period during the corona crisis - and have asked the German Federal Ministry of Labor and Social Affairs [*Bundesministerium für Arbeit und Soziales - BMAS*] to make it legally possible to use technical facilities such as telephone or video conferences for works council meetings. So far, however, there is no law that allows an exception to the obligation to be present.

2.3 Employment contract

At businesses without a works council and without the relevant collective bargaining agreements, the introduction of short-time work requires an individual contractual basis. If and to the extent the existing employment contracts already contain a corresponding provision that is effective under GTC law, the unilateral order of short-time work can be based on this. However, strict requirements have to be met for the validity of such clauses that authorize the employer to unilaterally introduce short-time work. Frequently, however, employment contracts do not even contain a provision on the unilateral ordering of short-time work. In this case, the consent of the individual employee to short-time work is required, e.g. by means of a corresponding amendment agreement. Since many employment contracts contain a written form requirement for the conclusion of amendment agreements, such amendment agreement should be concluded in writing in order to counter the risk that employees will subsequently invoke the invalidity of the introduction of short-time work, in which case the requirement for receiving short-time work compensation would no longer be met (i.e. it would have to be paid back) and the employer would also have to bear the full wage for default of acceptance pursuant to § 615 BGB.

If employees do not agree to the introduction of short-time work, there is a strong case for the employer being able to validly introduce short-time work by way of a termination pending a change of contract. In exceptional cases, even an extraordinary notice of termination pending a change of contract can come into consideration.

3. Can short-time work also be ordered just for individual departments/areas?

The department of a business is also considered to be a business for purposes of the provisions on short-time work compensation. This makes it possible to grant short-time work compensation in just parts of a business, e.g. in the event of a loss of work in just one department of a business (e.g. administration, production).

A business department is deemed to be the grouping of employees equipped with the technical means to form a closed working group, which for objective reasons is separated from the rest of the business in terms of its organization (in particular with its own management) and which pursues its own operational purpose - also an auxiliary purpose.

According to the previous practice of the employment agency, the decisive factor is the enterprise’s organization as a whole.

4. Can individual employees be exempted from a short-time work regulation?

If the workload is limited, then the reduction has to be distributed evenly. When and on which weekdays specific work assignments are to be carried out may have to be discussed with the works council for shift planning purposes where the business needs to ensure, for example, that the office is occupied at certain times every day.

It is perfectly permissible to exempt certain "key players" in a business/business department from short-time work, insofar as this is objectively justified. In our view, such justification exists in case of business managers/production managers who are required to ensure that operations run smoothly. The same applies to workers with special qualifications who are required to carry out the work. In case of such an agreement, the business partners must observe the principles of justice and equity set forth in § 75 (1) BetrVG.

5. Do temporary workers previously have to be released from work in order to avoid short-time work for a company's own employees?

In order to ensure that the loss of work pursuant to § 96 (4) sentence 1 SGB III is unavoidable, the business must do everything in its power to reduce or eliminate the loss of work before and during the period of the work loss. This includes in particular internal relocations, clean-up or repair work and production to build up stock, switching to other component suppliers or the improvement of work organization. However, in this context, the economic reasonableness for the company also has to be taken into consideration.

However, if temporary workers and the company's own employees are employed in different departments in the same business, the company will not be able to refer to the possibility of first releasing the temporary workers in order to use its own employees at these workplaces to avoid short-time work. In this respect, the instructions of the German Employment Agency on short-time work compensation explicitly stipulate that the release of temporary workers employed in the business which is on short-time is not necessary to avoid the introduction of short-time work. The use of temporary workers during a period of short-time work should nevertheless be closely monitored.

6. Can overtime still be ordered during short-time work? Does credit on working time accounts first have to be reduced and (residual) vacation taken before short-time work can start?

Overtime during short-time work should be avoided as a matter of principle, because if overtime is incurred this could be an indicator that there is no loss of work after all and thus that the short-time work compensation being paid on grounds of the loss of work is being unjustly received. Naturally, this has to be avoided.

However, it is acknowledged that employers can nevertheless order overtime in exceptional cases in spite of the short-time work (with it being understood that the co-determination rights of the works council pursuant to § 87 (1) No. 2, 3, BetrVG must be observed in this respect) if orders and work with a high degree of urgency are received. Existing flexitime frameworks can also continue to be exploited.

In order to receive short-time work compensation, the loss of work also has to be "unavoidable". For this reason, credit balances on working time accounts, which the employer is permitted to use, first have to be reduced before short-time work can be commenced. However, on grounds of the German Ordinance Facilitating Short-Time Work [*Kurzarbeitergeldverordnung - KugV*] dated 23 March 2020, unlike before, working time accounts no longer have to be brought into the minus before short-time working compensation can be applied for.

Furthermore, in order to avoid the loss of work, any remaining vacation is to be granted in whole or in part, provided that priority wishes of the employees do not prevent the granting of such vacation. In this case, any remaining vacation entitlement from the previous year must be taken before going into short-time work, i.e. the employer must schedule the vacation period before the start of short-time work. If the business already has a vacation plan for the current vacation year in which the employees have entered all their vacation wishes and which has already been approved, then from the employer's point of view there is no longer any "free" vacation which can be utilized before starting short-time work. If, on the other hand, vacation is still freely available, the employer can initially unilaterally schedule the vacation in order to avoid short-time work. However, if the employees then object to the unilateral scheduling of vacation, the utilization of these vacation days is no longer possible because of the priority of the vacation wishes. In this case, however, the employer has done everything possible to avoid the loss of work. This therefore needs to be suitably documented in order to be able to provide the employment agency, upon request, with proof that it could not be avoided by granting vacation. It would not be advisable to urge employees to "postpone" their holidays to a period after the end of short-time work, where possible. In this case, namely, the employment agency could assume an abusive vacation planning.

7. Can employees participate in regular information events or works meetings despite being on zero short-time work? Can employees on zero short-time work take part in compulsory training?

Zero short-time work fundamentally means that the employees affected by this may no longer perform activities for the employer which under "normal circumstances" would be considered part of their work duties as opposed to their free-time activities. Since participation in information events organized by the employer or in other work-related events is not regularly considered to be part of the employee's free-time, zero short-time work should preclude an obligation for employees to participate in information events or events equivalent to these. However, in order not to be held responsible for improperly excluding these employees from information, the employer should also inform employees who are on zero short-time work at regular intervals about information events, for example by e-mail or post. However, they may be exempted from participating in information events or also in works meetings. However, it should then be stressed that any voluntary participation is not considered working time.

The provision of training during zero short-time work is also regarded as work. It is therefore not advisable to oblige employees to take part in training courses despite zero short-time work and to postpone this until after zero short-time work period has ended.

8. What are the legal consequences of ordering short-time work?

The lawful introduction of short-time work leads to a suspension of the main performance obligations under the employment relationship. The employee is wholly or partially released from the obligation to perform work, but at the same time loses his corresponding right to remuneration. Hence, through the introduction of short-time work the employment relationship is not terminated, rather only the obligation to work and pay wages is suspended in whole or in part. However, all secondary obligations arising from the employment relationship remain unchanged.

9. What conditions must be met in order to be entitled to short-time work compensation?

Short-time work compensation can be applied for if a reduction in working hours at the business has been agreed between the employer and employee or works council and this is associated with a considerable loss of work with a loss of earnings.

In this case, employees are entitled to short-time work compensation pursuant to §§ 95 et seq. SGB III if:

- there is a **considerable loss of work with a loss of earnings**, which is due to **economic reasons** or an **inevitable event** and is only **temporary** and **unavoidable**,
- in the respective calendar month (entitlement period) **at least 10% of the employees working at the business or in the business department** are affected **by a loss of earnings of more than 10% of their monthly gross pay**,
- the **operational requirements** are met,
- the **personal requirements** for receiving short-time work compensation are met by the employee,
- **the employment agency has been notified** about the loss of work.

Since the loss of work is necessarily accompanied by a loss of pay, one must always check whether and to what extent pay claims already exist (e.g. German Maternity Protection Act [*Mutterschutzgesetz, MuSchG*], collective bargaining regulations, shop agreements or individual employment contracts), for if remuneration claims are due despite the existing loss of work, no short-time work compensation will be granted.

10. Is short-time work possible in case of quarantine or an official work prohibition?

In principle, the introduction of short-time work and the receipt of short-time work compensation is possible if a business experiences a considerable, temporary and unavoidable loss of work with a loss of earnings (e.g. due to the interruption of supply chains, etc.).

In the opinion of the BMAS, official quarantine orders or official business closures represent a loss of work caused by the authorities and thus an inevitable event, so that the granting of short-time work compensation is fundamentally possible.

11. What is classed as a significant loss of work in times of the corona pandemic?

A considerable loss of work within the meaning of § 96 SGB III exists if it is based on economic reasons or an inevitable event.

In principle, the only economic reasons that come into consideration are those external causes of the loss of work which have an impact on the business and over whose occurrence the business or its responsible officers have no influence. A significant loss of work due to a pandemic, in particular, e.g. due to a broken supply chain or a collapse in orders as a result of a recession, is deemed to be an external economic cause in this sense.

Possible inevitable events are a business closure or partial business closure due to an official order or caused by officially recognized measures as well as quarantine measures.

12. How is the quorum of 10% of the workforce calculated?

For the calculation of the quorum, which has now been reduced to 10% of the workforce on grounds of the German Ordinance Facilitating Short-Time Work of 23 March 2020, all employees working at the business or in the business department during the entitlement period

are to be counted. Employees incapable of working due to illness, employees on leaves of absence and employees sent on training courses as well as employees who have already been dismissed and released from their work duties (even if they do not receive short-time work compensation) are to be included in this calculation.

Trainees are not included in the calculation, however.

When calculating the quorum, figures are always rounded up.

13. How is the loss rate of 10% calculated for determining a considerable loss of work?

The loss of work is considerable if, in the respective calendar month (entitlement period), at least 10% of the employees (excluding trainees) actually employed at the business or in the business department each lose more than 10% of their monthly gross pay. This means that the difference between regular earnings and actual earnings must be greater than 10% in the entitlement period.

According to § 96 (1), sentence 1, No. 4, SGB III, the percentage of minimum lost earnings to be achieved is measured against the total number of "employees working at the business". If short-time work is to be ordered in a business department, the quota is calculated on the basis of the total number of employees working in the department in question.

Furthermore, the loss quota only has to exist at the time of the accounts settlement for the entire calendar month (entitlement period). It can therefore also apply if, due to changing workloads, there is no loss of earnings during individual weeks of the month, but a higher loss of earnings in others.

If the quorum of 10% of the workforce who have a loss of earnings of more than 10% is met, then even employees whose personal loss of earnings is less than 10% are also entitled to short-time work compensation.

There is no loss of earnings if, for example, short-time work has been introduced in disregard of the provisions of labor law and the short-time work ordered is consequently invalid, with the result that the employee does not lose his claim to remuneration (§ 615 BGB).

14. Who comes into consideration for short-time work? Who can receive short-time work compensation?

Any employee who continues employment that is subject to compulsory insurance after the start of the loss of work or who takes up employment for mandatory reasons or subsequent to the conclusion of a vocational training relationship may go into short-time work and thus receive short-time work compensation in the event of a loss of earnings due to reduced working hours.

An application for short-time work compensation can also be made for external managers if they are classed as employees once a status procedure has been carried out.

The following groups of persons are not eligible for short-time work compensation:

- Trainees,
- Employees whose employment contracts have already been terminated or end by cancellation agreement,
- Employees in further vocational training (full-time measure) with the receipt of benefits,
- Employees whose employment relationships are suspended (e.g. employees on parental leave),
- Persons in marginal employment,

- Employees who have reached the standard retirement age.

15. Can vocational trainees receive short-time work compensation?

Vocational trainees within the meaning of the German Vocational Training Act [*Berufsbildungsgesetz - BBiG*] are fundamentally unentitled to receive short-time work compensation pursuant to §§ 95 et seqq. SGB III (see above). Even if short-time work is introduced, the training needs to also be carried out in its full scope, if necessary by changing the training plan.

In the event that zero short-time work is introduced and the entire business is closed, and thus it is not possible to carry out any training at all, trainees are entitled to the continued payment of their training allowance during the first six weeks of the short-time work pursuant to § 19 (1) No. 2a BBiG.

If the period of short-time work lasts longer than six weeks due to the closure of the business because of the corona pandemic, trainees can also receive short-time work compensation.

16. How high is the short-time work compensation?

The short-time work compensation is calculated on the basis of the net loss of earnings. As a rule, the short-time working compensation amounts to 60% of the lump-sum net earnings lost. Employees who meet the conditions for the increased benefit rate in case of unemployment benefit (if they have a child or a child of their spouse/life partner living in the household) receive short-time work compensation amounting to 67% of the flat-rate net earnings lost.

On 20 May 2020, the Bundestag adopted by way of § 421c (2) SGB III, new version, an increase in the short-time work compensation in deviation from § 105 SGB III. Graduated according to the length of time in which the compensation is paid, employees are now entitled to up to 80 percent, and employees who meet the conditions for the increased benefit rate in case of unemployment benefit (parents) to up to 87 percent of the net difference in the period of entitlement - until 31 December 2020 at the longest. The graduation is as follows:

- As of the fourth month of compensation payment, the rate is increased to 70% or 77%.
- As of the seventh month of compensation payment, the rate is increased to 80% or 87%.

Only months with short-time work from March 2020 onwards are to be taken into account in the calculation of the compensation payment months.

Moreover, the increase in short-time work compensation only applies if the loss of working hours is more than 50%.

Only the flat-rate regular pay up to the income threshold of the pension insurance is used to calculate the short-time work compensation. This lies at EUR 6,900 for the west and EUR 6,450 for the east.

For the calculation of the short-time work compensation, the following table of the employment agency applies, which already shows the amount of the respective short-time work compensation depending on the benefit rate (1: 67% and 2: 60%): https://www.arbeitsagentur.de/datei/kug050-2016_ba014803.pdf.

In principle, the employer is free to top up the short-time work compensation with subsidies of up to 100% of the employee's pay. However, there are guidelines to be observed with regard to the social security contributions on top-up contributions, so we would recommend limiting the top-up (see question 14).

17. What costs have to be borne by the employer?

As long as there is no zero short-time work, the employer continues to pay the correspondingly reduced pay for the remaining working hours. The social security contributions on this are borne by the employee and the employer.

In all other respects, however, the so-called residual costs remain with the employer in the event of short-time work. These are, in particular, the shares of the social security contributions that are attributable to the lost hours. These are fundamentally borne solely by the employer, cf. §§ 249 (2) SGB V, § 58 (1) sentence 2 SGB XI, § 168 (1) No. 1a SGB VI.

However, on the basis of the German Ordinance Facilitating Short-Time Work of 23 March 2020, the employer will be fully reimbursed by the employment agency for the social security contributions to be borne by it alone. If the employer pays contributions towards the short-time work compensation ("top-up amounts"), according to § 1 (1) No. 8 German Ordinance on the Assessment of Employers' Contributions as Work Remuneration under Social Security Law [*Verordnung über die sozialversicherungsrechtliche Beurteilung von Zuwendungen des Arbeitgebers als Arbeitsentgelt, SvEV]*) these are not part of the remuneration upon which social security contributions have to be paid, provided that they do not exceed 80% of the difference between the regular pay and the actual pay according to § 106 SGB III together with the short-time work compensation.

18. How high is the continued payment of remuneration during short-time work in the event of illness?

If an employee falls ill and is unable to work before the start of short-time work, it is not the short-time work but the incapacity to work due to illness that is the cause of the loss of work. Conversely, it follows from § 98 , (2) SGB III, that no short-time work compensation is to be paid in this case. During the continued payment of remuneration in case of illness, the employee continues to receives the normal remuneration for the remaining working hours (Sec. 4 (3) German Act on the Continued Payment of Remuneration in Case of Illness [*Entgeltfortzahlungsgesetz - EFZG*]). For the period of the loss of work, the employee receives sickness benefit in accordance with § 47b (4) SGB V in the amount of the short-time work compensation. In the case of "zero" short-time work, the employee would thus exclusively receive sickness benefit.

If an employee falls ill on the day of the start or during the term of the short-time working period, he receives the normal continued payment of his remuneration in case of illness for the remaining hours of work in accordance with § 4 (3) EFZG. For the period of the loss of work, the employee receives short-time work compensation pursuant to § 98 (2) SGB III. In the case of "zero" short-time work, the employee would exclusively receive short-time work compensation.

After the end of the period in which the employee continues to receive his remuneration in case of illness, the employee will in all events receive sickness benefit pursuant to § 47 SGB V for the time of the remaining working hours as well as for the time of the loss of work on the basis of his regular pay before the illness.

19. How much is the remuneration during short-time work on public holidays, e.g. Easter Monday?

The employee does not receive short-time work compensation on public holidays, but a claim against his employer in the amount of the short-time work compensation he would have received had it not been a public holiday.

If the employee falls ill on a public holiday during the short-time work period, he acquires a claim to the continued payment of his remuneration in case of illness in accordance with § 3 or § 3a EFZG in the amount of the public holiday remuneration, which in this case is based on the short-time work compensation.

20. What provisions apply to vacations and how much is the remuneration during short-time work in case of vacations?

The amount of vacation pay during the short-time work period is calculated according to § 11 (1) sentence 1, 3 German Vacation Entitlement Act [*Bundesurlaubsgesetz, BUrlG*]. Accordingly, reductions in earnings that occur in the calculation period as a result of short-time work are not taken into account in the calculation of vacation pay. The remuneration of subsequent vacation is calculated as if the reduced work situation had not occurred.

If, prior to the introduction of short-time work, the employee is granted vacation for a period during which short-time work is reduced to zero after such vacation was granted, the performance-related success intended with the scheduling of the vacation (employee's exemption from the obligation to work for the duration of the vacation) cannot be achieved insofar as the obligation to work has already been eliminated by the introduced short-time work. It is therefore impossible to be released from the obligation to work by being granted vacation for the work-free days that are a result of the introduction of short-time work. In a nutshell: "zero" short-time work and vacation are mutually exclusive. If, for example, an employee has been granted 18 working days of vacation from April 1 to April 20, and if 6 working days are lost during this period due to zero short-time work on the basis of a shop agreement that came into force after the vacation was granted, the vacation claim lapses in the amount of 12 days due to the release from work on grounds of the vacation and in the amount of 6 days on grounds of subsequent impossibility, with it being understood that the employer remains obligated to grant substitute vacation in the amount of 6 days.

If the parties to the employment contract nevertheless schedule vacation during the short-time work period, they are simultaneously demonstrating that the loss of work was avoidable on such day, as it apparently would have been possible to avoid it by granting vacation according to the employee's wishes. The employment agency will therefore not grant short-time work compensation for the period of vacation during short-time work. In practice, therefore, employees are to be removed from short-time work for the duration of their vacation. It is irrelevant here whether vacation is granted first and then short-time work is ordered or vice versa.

In contrast to "zero" short-time work, the vacation claim can still be fulfilled in case of a loss of work of just hours per day due to short-time work. To be borne in mind is the fact that the vacation claim is based on time-off from work on full days, regardless of how many hours the employee would only have had to work on that day due to short-time work. The employee therefore always has to take a full day's leave even if working hours are reduced as a result of short-time work, as the granting of half days' leave or vacation by the hour is not permitted. In this constellation, the vacation pay is calculated on the basis of the full-time salary, since § 11 (1) sentence 3 BUrlG clearly stipulates that reductions in pay due to short-time work are not taken into account in the calculation period for calculating the vacation pay. As a result, the employee also receives the full salary for the full day of vacation that he must take.

21. What are the duties of the employer?

The employer must calculate the amount of the short-time work compensation (free of charge) and disburse it (§ 320 (1) sentence 2, SGB III). It functions as the paying agent of the employment agency insofar.

The short-time compensation is disbursed retroactively for the period for which it was applied.

The employer is under no obligation to advance the short-time work compensation; however, as soon as the short-time work compensation has been disbursed to the employer by the employment agency, the employer is obliged to pass it on to the employees without undue delay.

Frequently, however, the employer makes advance payments and pays the short-time work compensation without having already received payment from the employment agency. This is typically also demanded by the responsible works council. Furthermore, one should also bear in mind that, due to the large number of applications submitted, payment of the short-time work compensation will probably take longer than the 15-day period previously considered normal. Employers should therefore carry out a liquidity check before deciding on advancing the short-time work compensation. If the employer makes advance payments and pays the short-time work compensation without having already received payment from the employment agency, the employee should assign his claim to short-time work compensation to the employer.

22. How long is short-time work compensation paid?

The short-time work compensation is paid for the loss of work during the so-called compensation payment period (§ 104 SGB III). It is paid at the earliest from the calendar month in which the notification of the loss of work was received by the employment agency.

The maximum statutory compensation payment period is twelve months (§ 104 (1) SGB III). However, it may be extended to 24 months by statutory ordinance.

With the Ordinance on the Period of Entitlement to Short-Time Work Compensation [*Kurzarbeitergeldbezugsdauerverordnung – KugBeV*], the Federal Ministry of Labor and Social Affairs extended the period of entitlement to short-time work compensation for employees whose claim to short-time work compensation arose before 31 December 2019 beyond the period of entitlement pursuant to § 104 (1) sentence 1 SGB III to up to 21 months, but at the longest until 31 December 2020.

For employers who are already on short-time work, the following must also be taken into account: Pursuant to § 104 (3) SGB III, a new short-time work compensation payment period begins when three months have elapsed since the last calendar month in which short-time work compensation was paid. This provision is intended to ensure that short-time work compensation is only granted in economically viable enterprises. During the three-month waiting period the employee does not have to have worked full time, i.e. it suffices that no short-time work compensation was paid. However, employers may be able to apply for a bridging loan for the three months needing to be bridged.

23. What does the employer have to do to ensure that employees are paid short-time work compensation?

The employer first has to check whether there is a valid legal basis for introducing and ordering short-time work. If there is no such basis, the employer first has to create one (see paragraph 2). As ultima ratio, an extraordinary termination pending a change of contract, alternatively an ordinary termination pending a change of contract, can also be considered.

If there is a valid legal basis for introducing short-time work, the employer must notify the loss of work to the employment agency. The application form can be found here: https://www.arbeitsagentur.de/datei/anzeige-kug101_ba013134.pdf. Once the employment agency has examined the requirements, it then issues an approval notice.

The employer then has to file a benefit application for payment of the short-time work compensation. The corresponding application form can be found here: https://www.arbeitsagentur.de/datei/antrag-kug107_ba015344.pdf. The application is to be submitted to the competent employment agency within a cut-off period of three months. The competent authority is the employment agency in whose district the payroll accounting office responsible for the employer is located. It should also be noted that the benefit application has to be re-submitted for each month in which short-time work compensation is to be granted.

The employment agency issues a benefit notice in response to the benefit application, on the basis of which the short-time work compensation is paid.

After the end of the short-time work compensation payment period, a final examination is usually carried out by the employment agency for the settled short-time work compensation payment period within seven months. The outcome of the final examination leads to a final decision on the eligibility criteria for the receipt of short-time work compensation, which is communicated in writing. This is intended to ensure that the benefit case is brought to a legally secure conclusion. If the authority subsequently determines that the conditions for the receipt of short-time work compensation were not met after all, it is still able to revoke the approval notice. In this case, the employer is liable for the repayment of the unduly paid amount. Joint and several liability with the employee exists only if the employee himself has created the cause for the annulment of the decision.

24. What about secondary employment during short-time work?

Remuneration or income from other employment and self-employment or employment activities as an assisting family member which are only taken up during the period in which the short-time work compensation is received are fully credited against the claim to short-time work compensation, in that the actual pay also has to be increased by this (gross) remuneration/income during the entitlement period. This also applies to remuneration from a marginal secondary employment or activity. The other employment or activity must have been taken up during the period in which the short-time work compensation is received.

According to the envisaged new regulation of § 421c SGB III, however, jobs in key sectors and professions (e.g. medical care, chemists, food retail and manufacture) taken up in the period from 1 April 2020 to 31 October 2020 while receiving short-time work compensation shall not be credited against the actual pay and are therefore not taken into account in the calculation of short-time work compensation. With the Social Protection Package II adopted by the Bundestag on 20 May 2020 and published in the German Federal Gazette [*Bundesgesetzblatt*] on 28 May 2020, § 421c SGB III, new version, was extended to all jobs that have been taken up, even those not that are not in key sectors. The regulation is effective for a limited period until 31 December 2020.

Income from secondary employment or activities that already existed before the start of short-time work shall not be taken into account, since the precise purpose of short-time work compensation is to secure the standard of living. The date for determining the commencement of the employment or employment activity is the date of contract conclusion.

Employees are therefore obliged to provide written proof of the amount of their secondary income. This written proof must be enclosed with the concrete benefit application by the

employer when applying for the short-time work compensation and must already be accounted for by the employer when calculating the actual pay. Particularly during short-time work, therefore, employees are required to notify the employer of any and all secondary employment, as the employer is obliged to provide correct and complete information when applying for short-time work compensation for the employees concerned.

25. What is the situation with wage garnishments when employees are receiving short-time work compensation?

Employees' claims to short-time work compensation can be garnished, pledged and transferred (assigned) within the framework of §§ 53 and 54 SGB I as income from employment. However, an already existing wage garnishment does not automatically also extend to the claim to short-time work compensation. If the employee's creditor initially only garnished the employee's income, it first has to apply for a new garnishment order which explicitly seizes the short-time work compensation. This order is to be served on the employer as the so-called third-party debtor.

However, before stopping payments to creditors of the employee, the employer should check whether the existing garnishment orders already cover all salaries and other benefits paid by the employer. In such case, this also covers short-time work compensation and the payments to the respective creditors cannot be suspended.

26. How does the receipt of short-time work compensation or loss of earnings due to the corona pandemic affect the requirements for receiving parental benefits?

In order to prevent a disadvantage to expectant parents who have lost earnings or who are no longer able to meet the requirements for receiving parental benefit due to the corona pandemic, the Bundestag adopted on 20 May 2020 a special regulation on parental leave during the corona pandemic by way of the Act for Parental Benefit Measures occasioned by the Covid19 Pandemic [*Gesetz zur Maßnahmen im Elterngeld aus Anlass der Covid-19-Pandemie*] (Bundestag printed paper 19/18698).

According to this, a parent employed in a key sector may apply to postpone the receipt of parental benefit for the period from 1 March 2020 to 31 December 2020. He must then claim the benefits for the postponed months of life by 30 June 2021 at the latest.

The Act also provides that, upon application, the calendar months in which the eligible parent had a lower income from employment due to the corona pandemic, and can provide credible evidence of this, shall not be taken into account for the determination of income in the period from 1 March to 31 December 2020 for purposes of calculating the parental benefit.

The income owed to the entitled person in the period of entitlement to substitute his work remuneration which has been lost after the birth of the child due to the Covid 19 pandemic (in particular short-time work compensation) is disregarded in the calculation of the amount of the parental benefit for the period from 1 March to 31 December 2020. In this respect, the monthly parental benefit is at most as high as the amount of parental benefit that would be owed to the parent if the entitled person were to have had or had no loss of income due to the pandemic.