



Coronavirus/COVID-19 - FAQs on how employers should deal with employees returning from vacation

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In times when a "**staycation**" or "**homeland vacation**" is on the agenda for many employees, some have nevertheless chosen to go on vacation abroad, including travel to corona risk areas.

As the school summer vacation draws to a close in the first few federal states and an increasing number of employees return to work, questions are more frequently being asked about how to deal with employees returning from vacation.

We have compiled below an overview of the most important questions in this context:

1. Who is obliged to take a test?

Since 8 August 2020, all travelers returning from a risk area are obliged to be tested for an infection with corona on the basis of the German Ordinance on the Test Obligation of Returning Travelers [*Verordnung zur Testpflicht von Einreisenden*] dated 6 August 2020. To this end, test centers have been set up at airports, railway stations and other easily accessible locations. To date, these tests have been free of charge for travelers.

Although a test obligation exists, it is not compulsory. Anyone who does not take a test despite a corresponding obligation to do so must go into 14 days' quarantine. Only persons who test negative can return to their normal life upon receipt of their test result. According to the most recent plans of the state and federal states, it will only be possible to prematurely end the 14 days' quarantine at the earliest as of the fifth day after returning into the country; this rule is to apply as of 1 October 2020. This enables returning travelers to evade what is an otherwise unavoidable quarantine entirely in the current situation and, as of 1 October 2020, in all events from the fifth day onwards.

In addition, all returning travelers - including those from non-risk areas and regardless of whether they show symptoms of illness - have the opportunity to be tested for coronavirus SARS-CoV-2 within 72 hours of entering Germany, free of charge. However, this is going to change for travelers returning from non-risk areas as of 15 September 2020, from which date the test will no longer be offered free of charge. The question whether tests will still be free for travelers returning from risk areas is also currently still under review.

2. Is the employer allowed to prohibit employees from going on vacation to a risk area?

The employer is not entitled to prohibit employees from traveling to a risk area. The travel destination is basically a private affair of the employee and does not have to be communicated to the employer or agreed with him in advance. However, the employer can point out to the employee that if he is unable to comply with his duty to work after the end of his vacation, accepting subsequent quarantine obligations or an existing travel restriction, this may result in a loss of employment remuneration and possibly further sanctions under labor law (see also the answer to question 5).

3. Is the employer under any obligation to re-credit already approved vacation if the employee cannot use the vacation as planned because of a quarantine

requirement in the country of his vacation and wishes to 'cancel' his application for vacation for this reason?

The employer is not obliged to re-credit already approved vacation to an employee in the event that the employee is unable to spend the vacation as planned and therefore wishes to cancel it.

However, the situation is different if the employee falls ill during the approved and taken vacation. In this case, the period of incapacity for work, as certified by a medical certificate, is not deducted from his vacation entitlement. Periods of incapacity for work during a vacation do not constitute a fulfilment of the vacation claim, with the result that further vacation for the period of incapacity for work must be granted.

4. Is the employee entitled to the continued payment of his remuneration if he cannot (or no longer can) leave the vacation location due to an existing travel restriction?

If the employee is unable to resume his work in time after an approved and granted vacation, the employee fundamentally has no claim to remuneration according to the principle "no work, no pay".

This applies in particular if the employee has traveled to a risk area despite a travel warning from the Foreign Office and is no longer allowed to leave the vacation location (e.g. the hotel). In such case, it has to be assumed that the employee consciously accepted this risk, with the result that a claim to the continued payment of remuneration is excluded.

A claim for compensation under § 56 German Infection Protection Act [*Infektionsschutzgesetz - IfSG*] generally will not come into consideration as this does not involve an order by a German state authority.

5. Should the employer give special instructions to its employees before vacation is taken?

In principle, it is advisable to inform employees before they go on vacation about possible consequences, particularly with regard to quarantine obligations on returning from vacation in a risk area.

This information should contain a reference to the currently designated risk areas or to possible sources of information on risk areas. In addition, employees should be instructed that they are not entitled to employment remuneration during quarantine caused through travel to a risk area designated as such prior to the start of the vacation and – a concretization of the IfSG is being planned insofar – will also not have any claim to compensation for this loss of earnings.

It is also intended that, as of 1 October 2020, it will not be possible to prematurely end the binding 14 days' quarantine after returning from a risk area through submission of a negative test result until five days after returning into the country. If the employee is unable to work from home, he therefore also faces labor law consequences if he nevertheless travels to an area designated a risk area by the RKI "with his eyes wide open" and thus simultaneously readily accepts the fact that he will not be able to return to his workplace until at least five days after he re-enters the country.

6. Does the employer have a right to ask whether an employee has been in a risk area?

Yes, on grounds of its duty of care towards other employees and in order to ensure occupational safety in the company, the employer is fundamentally granted a right to ask whether an employee stayed in a corona risk area designated by the Foreign Office. This is also the case if the relevant federal state norm provides for exceptions from the obligation to go into subsequent quarantine, in particular the execution of a corona test.

With a view to the envisaged new regulation, pursuant to which travelers returning from risk areas automatically have to go into 14 days' self-isolation after re-entering Germany, in practice employees will notify their employers in any event in the majority of cases, since they will have to quarantine themselves from 1 October 2020 onwards for at least five days after returning from a risk area and will therefore have to notify their employers of their absence from work.

Since this notification can also be avoided by temporarily working from the home office—to the extent possible – or by taking vacation, the employer has a prevailing interest in being given this information, with the result that the claim to information should also continue to exist despite the envisaged new regulation.

7. What measures may the employer impose upon employees returning from risk areas?

The current situation is: Employees returning from vacation in a corona risk area are initially obliged under federal state provisions to go into domestic quarantine for 14 days immediately after re-entering the country. The quarantine obligation for travelers returning from risk areas does not apply if a negative corona test is presented, if such test was taken at most 48 hours prior to entering the country. The test can also be subsequently taken in Germany, albeit that in this case the quarantine rules initially have to be observed until receipt of a negative test result. Thus, employees might not be able to fulfil their employment duties until presentation of a negative test result.

Furthermore, since such an initial test merely reflects the momentary situation, many federal state ordinances even envisage the possibility of ordering a repeated test, which means that the quarantine rule might even apply until presentation of the second negative test result.

From 1 October 2020 the following shall apply: Travelers returning from risk areas are obliged to go into 14 days' quarantine without undue delay and taking a direct route to their own home. This self-isolation can be prematurely ended through a negative test result at the earliest as of the fifth day after their return.

If it is not possible for the employee to work from home, the employee is also not entitled to payment of his employment remuneration. Since it is impossible for the employee to perform his work and the employee is responsible for this impossibility, the employer is not obliged to continue to pay the employment remuneration.

Questionable to date was whether, in such case, a claim to compensation pursuant to § 56 (1) IfSG comes into consideration, in particular if the holidaymaker knowingly traveled to a risk area. Since, according to the explanatory memorandum of the draft law, § 56 IfSG concerns compensation on the grounds of equitable principles, any own fault on the part of the traveler returning from vacation will also have to be taken into consideration insofar as an expression of the principle of good faith.

Hence, if an employee has traveled to a risk area despite an existing travel warning and is therefore suspected of having become infected, he knowingly accepted his subsequent isolation. In this case, it would be unfair to have the general public bear the compensation costs.

For this reason, the understanding to date has been that compensation pursuant to § 56 IfSG was not a consideration. Although the Federal Ministry of Health initially stated at a press conference on 26 August 2020 that § 56 (1) IfSG allegedly also envisages a compensation claim for travelers who quite knowingly have traveled to a risk area, according to a statement by Chancellor Merkel and the minister presidents of the federal states according to the press conference on 27 August 2020, no compensation payment exists pursuant to the IfSG and a corresponding clarification of the IfSG is forthcoming.

The employer should therefore refuse to continue paying the salary of employees who knowingly traveled to an area identified by the RKI as being a risk area and who were subsequently unable to recommence work due to a quarantine order. On grounds of the differing media statements mentioned above, it also cannot be ruled out that employees in this constellation – at least until clarification of the IfSG – will seek a compensation claim for the loss of earnings. In this case, as a purely precautionary measure, an application could be made to the competent health authority for an advance in the presumable amount of a possibly existing compensation claim. If this authority does not pay compensation pursuant to § 56 (1) IfSG, the payment to the employee should also be refused.

As soon as an employee returning from a risk area submits a clearance certificate (negative attest) from a doctor and is thus able to return to the company and recommence work, he also is entitled to his salary again. If a health authority has officially ordered the continuation of the quarantine and a repeated test, the employee will not be able to recommence work until he has submitted the second negative attest.

Irrespective of this, the employer itself can, of course, also decide whether it wishes to allow the employee to return to the company upon submission of the first negative attest or, as a precautionary measure – where possible – to have the employee work for a further few days from his home office (see also the answer to question 8). If work from a home office is not possible, the employee must be paid his salary during such a release from work, e.g. for a further 7-day quarantine period.

8. Can the employer order the employee to work from home upon his return despite negative clearance?

If the employer sees a risk in having the employee return to his workplace in the company because of the high number of occupied workplaces at the company and the employee's possible infection at the vacation destination, then on the basis of an acknowledged extension of the employer's right to issue instructions in this case, it can be assumed that the employer can order the employee to work from home for at least a certain period of time (5 to 7 days). In this case, however, the employer cannot unilaterally order the employee to take time off (vacation or flexitime accounts).

In such a case, the extended right to instruct the employee to work from home cancels out requirements under the employment contract or co-determination law, because the employer has an increased interest vis-à-vis the employees here on grounds of its duty of care.

9. Can the employer order a second corona test immediately after the test upon entry into the country?

In principle, a single test should be sufficient. However, a second test is recommended after 5 to 7 days, as the first test is just a "snapshot of the momentary situation". The health authority can therefore even order repeated testing. For a second test purely at the employer's behest, the following must be observed:

- The health authorities often refuse the second test because the testing capacities are still limited.
- While the test is still free of charge on entry into the country, a second test, which is then carried out at the employer's request, has to be paid for and must be borne by the employer.
- The employer itself cannot order a second test. This constitutes an excessive intrusion into the employee's privacy. The employer can only offer to employees that they have themselves tested a second time and that the employer will bear the costs of the test.

10. What measures can the employer take in the case of employees who are not returning from a designated risk area, but who are suspected of being potentially infected?

Employees returning from vacation in a non-risk area are generally able to offer their work services. In this case, the employee is under no official obligation to go into quarantine.

If the employer nevertheless decides not to accept the employee's work performance and if no (amicable) arrangement can be found for work from home, the employer is generally in default of acceptance and still owes the continued payment of remuneration in accordance with § 615 sentence 1 German Civil Code [*Bürgerliches Gesetzbuch - BGB*].

However, if there are legitimate reasons for this in order to protect the health of other employees, the employer may unilaterally suspend the employee from work and refuse him access to the company premises. In this case, however, the reason cannot be confined to the employee's return from abroad, but must also include objective and factually sufficient reasons why an increased risk of infection is assumed. In this case, the employee's claim to work is superseded by overriding interests of the employer, but the employer still owes the remuneration pursuant to § 615 sentence 1 BGB.

If the release from work is based on a concrete suspicion of illness, the claim to remuneration is regularly upheld pursuant to § 616 BGB.

11. Does an employee who returns from a risk area and who is unable to work due to illness during the quarantine obligation have a claim to the continued payment of his salary?

If an employee becomes unable to work due to illness after returning from his recreational vacation, subject to the conditions of § 3 (1) German Act on the Continued Payment of Salary During Illness [*Entgeltfortzahlungsgesetz – EFZG*] he fundamentally is entitled to the continued payment of his salary. However, this is only the case if the employee's incapacity to work due to illness is the sole cause of the work hindrance and thus the loss of work performance by the employee (so-called "monocausality").

If an employer becomes unable to work during the compulsory 14-day quarantine phase, he would not be able to go to his workplace – assuming the work is not capable of being rendered in a home office – even if he were able to work. In this case, the employee’s incapacity to work due to illness is not the sole cause of the work hindrance, which means that he does not have a claim to the continued payment of his salary pursuant to § 3 (1) EFZG – lacking the “monocausality” of the work hindrance on grounds of illness.

If the employee has knowingly traveled to an area identified by the RKI as a risk area, he will also not be able to claim salary or compensation payments under German civil law or infection protection provisions (see also the answer to question 7). This is not the case, however, if he travels to a country which the RKI only officially declares as a risk area after he has commenced his vacation. In this case, namely, no fault can be attributed to the employee; however, this appraisal ultimately depends on the circumstances in the individual case.

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