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

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- taking into account all new statutory and administrative regulations on the relief of short-time work compensation -

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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. 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 25 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.

According to the technical directive on improvements for short-time work compensation, the employment agency will however refrain from demanding the introduction of vacation entitlements from the current vacation year until December 31, 2020 in order to avoid short-time work. But, if short-time work is only introduced towards the end of the calendar year, the employer will be requested to specify the date on which the remaining vacation entitlements will be granted in order to reduce the loss of work.

6. 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.

7. 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.

8. 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. The legal basis for this can be, e.g., authorizations from the German Disaster Protection Laws or the German Protection Against Infection Law.

9. 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.

According to the employment agency it is permissible that short-time work is even agreed for the past if the prerequisites were fulfilled. However, according to the employment agency's technical directive on improvements for short-time work compensation until 31 December 2020, this should not apply if the remuneration has already been accounted and paid for this retroactive period.

10. 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 25 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.

11. 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).

12. 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.

13. 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.

However, 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).

14. 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 25 March 2020, the employer will be fully reimbursed by the employment agency for the social security contributions to be borne by it alone for the lost hours in the period from 1 March 2020 to 31 December 2020. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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. This has not happened to date.

This is likely to be problematic for employers who are already in short-time work. For these, the following should be considered: 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.

20. 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. For companies that are already in short-time work, no new notification is required by the employment agency in accordance with the technical instruction for improvements to short-time work compensation until 31 December 2020.

Once the employment agency has examined the notification according to its plausibility and completeness, 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 (short application form for short-time work compensation and flat-rate reimbursement of social security contributions for recipients of short-time work compensation due to loss of work caused by the corona virus) can be found here:https://www.arbeitsagentur.de/datei/kurzantrag-kug-107_ba146383.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. However, according to the employment agency's technical instructions on improvements to short-time work compensation until 31 December 2020, the final audits will in any case be postponed until the crisis situation is resolved. 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.

21. 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 new regulation of § 421c SGB III, however, jobs in key sectors and professions (such as medical care, pharmacies, food trade and food production) in the period from 1 April 2020 to 31 October 2020 taken up 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.

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.