



COVID-19 – Employer Briefing

The current developments concerning COVID-19 are presenting all companies with big challenges. This is also the case with regard to dealings with employees. We have selected some current issues below, for example how you as an employer can deal with negative impacts on work which are associated with school closures and people returning from holiday.

Childcare facilities/schools are closed! What happens now?

Firstly, it depends on whether provision is made in the employment contract and/or the collective bargaining agreement for short-term, unforeseeable impediments to performing work. Usually a period of a few days (with continued remuneration paid by the employer) is considered to be reasonable in light of § 616 of the German Civil Code (BGB).

This provision can be contractually overridden, however. Thus, it can be the case that this provision is not applicable, because something else has been agreed upon in the contract (up to and including an outcome where “This provision shall not apply”).

As parent, therefore, I may not stay at home, because my child’s school/childcare facility is closed. The employee is obliged to endeavour to arrange for the child to be taken care of by someone else.

In the event of a longer impediment (i.e. after c. 5 days), the risk that the principle of “no work, no pay” is borne solely by the employee. Thus, it is up to the employee to initiate a conversation with the employer and to explore together the various possibilities of an interim solution – for example whether paid holiday leave, unpaid holiday leave, time off after overtime worked, working from home are conceivable options. There is no statutory claim to working from home.

If a child is ill, there is a maximum period of 10 working days per child pursuant to the Act (§ 45 of the German Social Security Code V (SGB V)) – assuming that the other claim prerequisites are fulfilled.

What may/can/should an employer order?

A company coughing and sneezing etiquette:

- no coughing or sneezing into your hand, at most into the crook of your elbow
- good hand hygiene
- dispensing with physical contact
- increased disinfection of door handles which are used frequently.

If there is a works council, comply with the co-determination obligation in connection with such measures which arises from § 87 paragraph 1, number 1 and number 7 of the German Works Council Constitution Act (BetrVG)!

Can/may an employer order tests?

At most, contact-free fever screening might be permissible if there is no storage of the data; where applicable, more extensive measures if the employee has been exposed to particular infection risks. This is usually to be assumed if the employee was in a vulnerable region for which the German Foreign Office has issued a travel warning and/or which the Robert Koch Institute has classified as a risk region, and where the employee was present in locations with increased tourist and public traffic, such as airports and train stations.

Does an employer have the right to ask about symptoms of an illness (which is currently pandemic)?

Yes, but without storing the responses (see also § 26 of the German Data Protection Act (BDSG): fulfilment of protection obligations).

Can an employee refuse to work due to fear of infection?

In principle, an employee can do this, but that would then be a case of refusal to perform work (which releases the employer from the obligation to pay that employee). If, however, the employer has failed to take requisite protection measures, the employee has a retention right. If the employer has taken all the measures, but exceptionally – due to a special risk of infection – the employee cannot reasonably be expected to perform the work, the employer does not have to pay any remuneration (§ 275.3 in conjunction with § 326.1 BGB). The situation is different if there has been a proven case of illness. The obligation to take measures to ensure that the illness does not spread (e.g. instructing working remotely or more extensive restrictions) arising out of § 618 and § 619 BGB in conjunction with § 3 ff of the German Occupational Safety Act (ArbSchG) then follows from the employer's duty of care.

Can an employer order an employee to stay away from the workplace if there are symptoms of an illness? What consequence does that order have?

Ordering an employee to stay away from the workplace if there are symptoms of an illness is permissible.

If there is a suspicion of an illness, the employer can refuse to accept the offer of performing work (§ 297 BGB). However, ultimately this constitutes release from the obligation to perform work, with continued payment of remuneration (for the employee).

What is the relationship between a release from the obligation to perform work and the continued payment of remuneration?

If the employee is not ill themselves, there is also no suspicion of an illness, and if the employee is prepared to work, then the employer remains obliged to pay the remuneration (§ 615 BGB), even if the employer releases the employee from the obligation to perform work.

However, if there are serious indications that the employee is a “risk person” (e.g. due to having been in a region at risk, if the employee demonstrably had contact with an ill person), there is much to argue that in such cases the employer has no obligation to pay remuneration. But this has not been clarified finally!

What can an employer order? Consequences

- **Alternating working from home/mobile working** (employee can perform work externally using equipment issued to them): yes
- **Mandatory holiday leave:** impermissible
- **Company holiday period:** permissible in principle (comply with works council’s co-determination right)
- **Release from the obligation to perform** setting off time accumulated in time accounts: permissible
- **Short-time work:** permissible in compliance with the statutory prerequisites (corresponding clause in employment contract, in an employer/works council agreement, or in an applicable collective bargaining agreement).

Is it permissible to forbid business trips, participation in meetings and/or continued-education measures?

Yes.

Is it permissible to ordering business trips to risk areas?

Risk areas are those appraised as such by the Robert Koch Institute (https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/nCoV.html). Ordering a business trip to a region classified therein is impermissible.

Is it permissible to forbid private travel?

No. However, an employer has a right to ask whether travelling to a risk area is planned. In the event of travel to such an area and subsequent illness, however, there may not be any claim for continued payment of remuneration (if travelling to an area for which the German Foreign Office has issued a travel warning).






May an employer ask whether the employee was (on holiday) in an area affected?

As a matter of principle, an employer may ask whether employees were in a region for which the German Foreign Office has issued a travel warning due to the risk of infection and/or which has been classified by the Robert Koch Institute as a risk area. An employee must answer this question at least in the affirmative or in the negative.

An employee is unable to reach the place of work due to areas being blocked off/quarantined. Is there a claim for continued payment of remuneration?

It is impossible for that employee to perform the work. Thus, the employer’s remuneration obligation pursuant to § 326 paragraph 1, sentence 1 BGB ceases to apply: only the employee bears the so-called commute risk.

Your contact partners in the employment-law team would be pleased to answer your questions.

	<p>Michael Niermann Certified specialist for labour law (Fachanwalt für Arbeitsrecht) +49 211 8687 124 niermann@tigges.legal</p>		<p>Daniel Lüdemann, LL.M. Lawyer +49 211 8687 221 luedemann@tigges.legal</p>
	<p>Dr Georg Jaster Lawyer +49 211 8687 145 jaster@tigges.legal</p>		<p>Matthias Klagge, LL.M. Lawyer +49 211 8687 134 klagge@tigges.legal</p>
	<p>Christian Schon Lawyer +49 211 8687 284 schon@tigges.legal</p>	<p>TIGGES Rechtsanwälte und Steuerberater Partnerschaft mbB Zollhof 8 40221 Düsseldorf Germany © TIGGES Rechtsanwälte 2020 www.tigges.legal</p>	