

# **COVID-19: Options for Employers in the Crisis**

April 15, 2020

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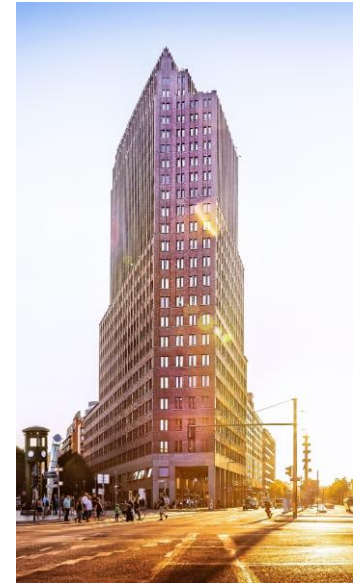
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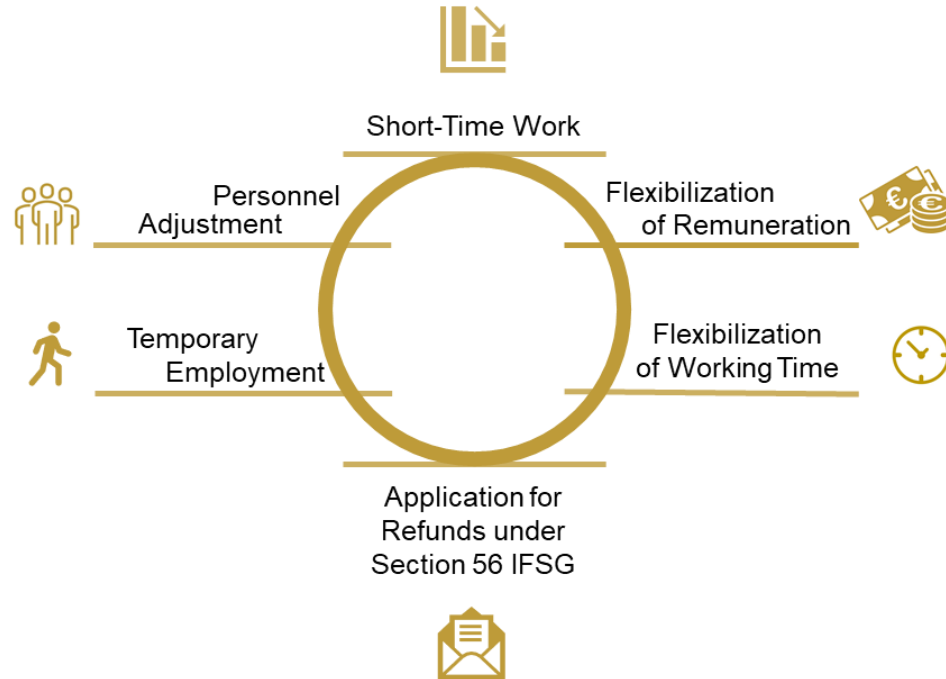
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Our experts for employment and labor law advise HR departments on strategic issues and support M&A transactions as well as complex workforce restructurings.



# Overview



# Short-Time Work



Reduction of working time and – correspondingly – of remuneration

Prerequisite: contractual basis (collective bargaining agreement (*Tarifvertrag*), works council agreement (*Betriebsvereinbarung*), agreement with each employee)

- Start and duration of short-time work
- Employees affected
- Scope of short-time work
- Working times

# Short-Time Work – Flexibility



- Important: transparent, clear provisions!
- Duration: depending on the assessment of the crisis, but rather longer than shorter - early termination possible, extension only by further agreement
- Employees affected: as a precaution, should include all potentially affected employees
- Scope of short-time work: recommended to include maximum reduction; more work results in increase in remuneration – should not be problematic
  - Observe notification periods
- Working time: if possible, specify the exact working time; otherwise, specify the parameters that determine the working time
  - Planning for the following week is important (to account for holidays, illness, etc.)

# Short-Time Work Subsidy – Requirements



Entitlement to short-time work subsidy (*Kurzarbeitergeld – KUG*) exists in case of

- Considerable loss of work with loss of pay
  - Closure of workplace or loss of work due to corona crisis
  - 10% of the workforce with at least 10% loss of earnings
- Fulfilment of personal requirements
  - Not given for mini-jobbers, dismissed employees, special rules for sick employees
- Notification of loss of working hours to the competent employment agency

# Short-Time Work Subsidy – Liability



Is the employer liable if subsidy is not granted?

- If incorrect or late application (+)
- If assumption of liability is explicitly included (+)
- If liability is expressly excluded?
  - Transparent regulation should be valid
  - **But:** approval by employees, works council possibly problematic
- If no provision on liability?

# Short-Time Work Subsidy – FAQ



Loss of work increases after notification of short-time work?

- Distinction between
  - Notification of short-time work - including information on the extent of the working time to be reduced (step 1)
  - Application for subsidy with detailed list of affected employees and exact loss (step 2)
- Step 1 is a prerequisite for step 2 - information must correspond
- If the work loss is higher than notified → new notification necessary
- Recommended: include maximum expected work reduction (*worst case*) from the beginning



# Short-Time Work Subsidy – FAQ



Short-time working allowance and incapacity to work:

- Decisive factor:
  - Illness before the introduction of short-time work: entitlement to sickness benefit in the amount of short-time work subsidy to be paid; employer can apply for reimbursement from the health insurance
  - Illness following the introduction of short-time work: entitlement to reduced remuneration and short-time work subsidy during the continued remuneration period

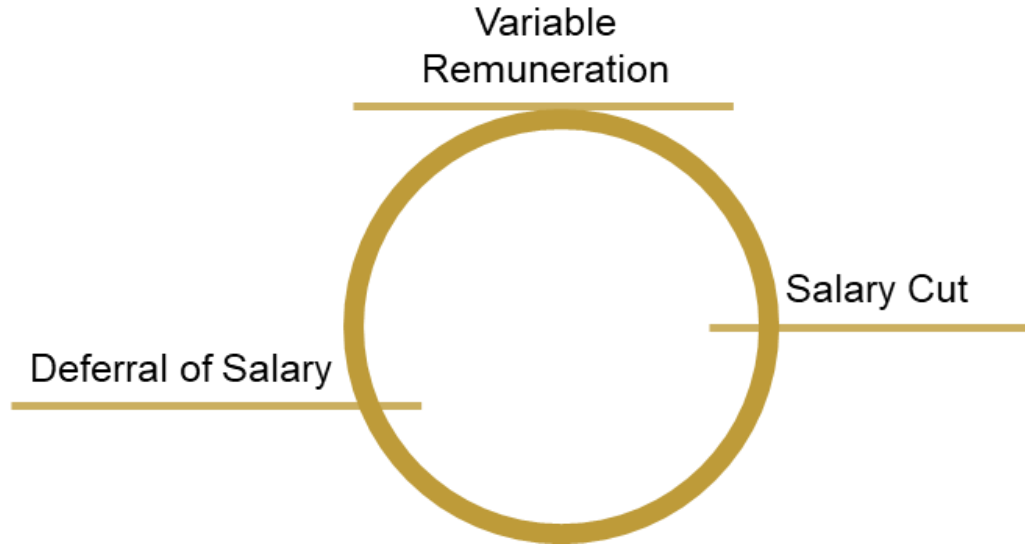
# Short-Time Work Subsidy – FAQ



## Short-time working allowance and vacation

- Leave from 2019 must be brought in before payment of subsidy
- Leave 2020 does not have to be taken as a condition for subsidy (special regulation of March 27, 2020)
- **But:** existing vacation plans must be maintained (no right of employees to return holiday)
- Remuneration during vacation is normal pay without reduction

# Making Remuneration More Flexible



# Variable Remuneration



## Effects on existing variable compensation systems

- Variable remuneration depends on economic targets / bonus pool is determined by company performance
  - Review of objectives / payments in light of the crisis
- Variable compensation is (also) dependent on personal goals, independent of the company's success
  - Review of the system as a whole and its economic impact
- If necessary, adaptation and renegotiation sensible / necessary
- Approval of works council / employees generally necessary (argument that changed circumstances require amendment?)
- Temporary limitation of a change for 2020 possible

# Variable Remuneration



- Conversion of fixed remuneration into variable pay possible
  - Any amount can be converted from fixed to flexible pay (observe minimum wage)
  - Fixed-term conversion possible
  - Employee consent required
  - Regulation by collective bargaining agreement possible for employees covered by such collective agreements
  - Regulation by works council agreement more complex
- Bonus of EUR 1,500 can be paid tax-free and without social security contributions if paid in addition to the remuneration already agreed and owed

# Salary Cut



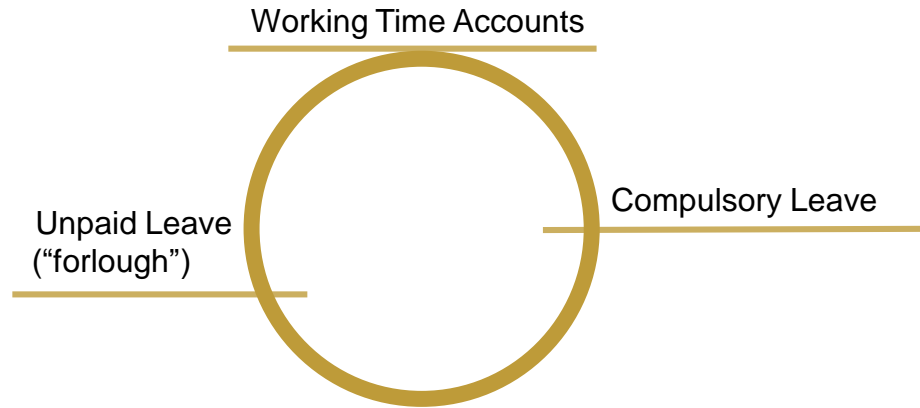
- Especially for employees above the income threshold (without entitlement to short-time work subsidy)
- Clear and transparent agreement necessary
- Retro-active salary cut (at the end of the month)
  - Social security contributions on full remuneration remain due
- Salary cut for the future
  - Social security contributions may be reduced accordingly

# Deferral of Salary



- Entitlement to salary arises in full
- Date of payment of part of salary is postponed (no conditions for payment)
- Clear agreement necessary, especially – what happens in case of termination of employment before due date?
- Social security contributions on full remuneration remain due
  - **But:** deferral of contributions for March / April 2020 possible (according to *GKV-Spitzenverband*)

# Flexibilization of Working Hours





# Working Time Accounts



- Reduce positive balances
  - Necessary for short-time work subsidy
  - Within the framework of the existing company regulations
    - If working time accounts for employee flexibility, then no reduction for subsidy necessary
    - **But:** Still sensible?

# Working Time Accounts



- Build up negative balances
  - Due to special regulation not necessary for short-time work subsidy until December 31, 2020
  - **But:** possible within the framework of existing company regulations
  - If negative balances may sense operationally – negotiate a new agreement?

# Compulsory Leave



- Can employees be ordered to take annual leave?
  - May avoid a lot of untaken vacation claims after return from the crisis
  - In principle possible, unless employees have opposing holiday plans
  - Employees must express opposing holiday plans, otherwise compulsory leave applies
  - In case of opposing holiday plans, these must be weighed against urgent operational concerns
  - In any case: good communication important

# Unpaid Leave („forlough“)



- Preferred model in other countries - e.g. 1 week of unpaid leave per month
- Can be implemented in Germany as short-time work (e.g. 75%)
- For employees without entitlement to short-time work subsidy:
  - Reduction of monthly working time by one week
  - Reduction of remuneration accordingly
- Agreement necessary
- If short-time work subsidy applies, then no work is allowed during time-off



# Refund Pursuant to § 56 IFSG

Right to compensation for salary:

- For quarantine-related prohibition to work (para. 1)
  - Amount: 100% of the salary loss for six weeks
- As a result of the closure of school / kindergarten (para. 1a) - newly introduced on March 27, 2020
  - No other reasonable possibility of childcare
  - Amount: 67% of loss of salary for six weeks, maximum EUR 2,016 per month
  - No compensation if other options, e.g. short-time work, reduction of time balance
- Payment to employees by employer, possibility to apply for advance payment
  - Berlin: applications go to the Senate Department of Finance

# Employee Leasing



Possibility of employee leasing without a permit:

- For employers in the same industry sector, to avoid short-time work or dismissals, if provided for in a collective bargaining agreement (rare)
- If only occasionally done and employees are not hired / employed for the purpose of leasing

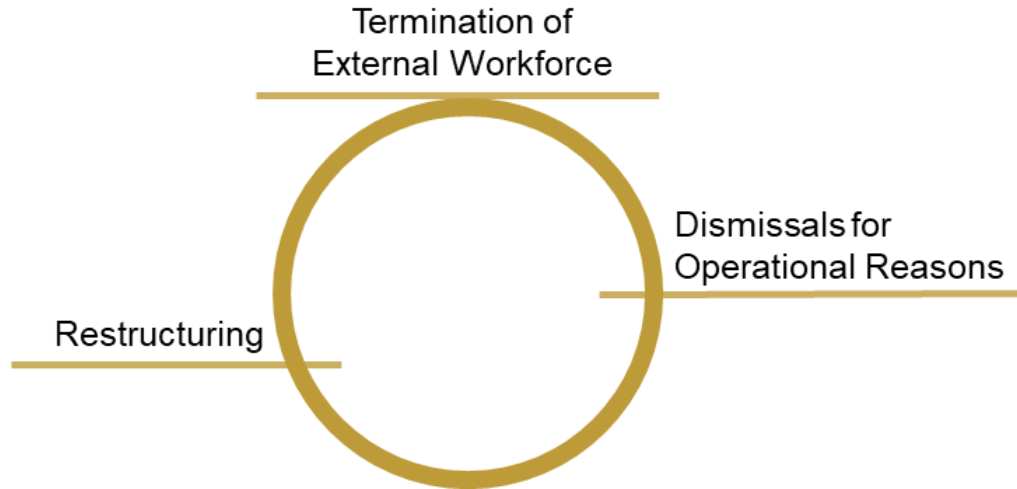
# Employee Leasing



Further options for employers with less than 50 employees: § 1a AÜG

- To avoid short-time work / redundancies
- Employees were not hired for the purpose of leasing
- Up to the duration of 12 months
- Written notification to the Federal Employment Agency
- **Attention:** German Act on Employee Leasing still applies in all other respects, in particular the principle of equal treatment / equal pay

# Personnel Measures





# Termination of External Workforce



- Observance of the contractual notice periods
- No protection against dismissal
- **But:** external workforce members could claim bogus self-employment
  - Risk of an employment relationship
  - Substantial back payments of social security contributions
  - Potentially fines / criminal liability

# Dismissals for Operational Reasons



- Also possible during short-time work
- **But:** necessary to justify why a loss of work previously considered temporary is now classified as a permanent loss of work
  - Increased burden of proof
  - Risks: invalidity of the termination / possible repayment of the subsidy
- Entitlement to subsidy for the employee ends upon receipt of the notice of termination, signing of a termination agreement
  - Full salary or in any case salary in the amount of the subsidy to be paid by employer

# Dismissals for Operational Reasons



- Termination of employees who do not agree to short-time work?
  - Prohibition of retaliation (§ 612a BGB) and social selection (§ 1 KSchG) must still be observed
- Works council agreements on short-time work often contain provisions on job security (§ 102 para. 6 of the Works Council Constitution Act):
  - Terminations require the consent of the works council
  - If consent is refused, reconciliation board decides: time factor!

# Restructuring




- Review of personnel planning and, if necessary, adjustment of the organization
- Hiring freeze
  - Check whether employment contracts can be terminated before the start of work
  - Otherwise: termination possible observing (probationary) notice period as of the start of work
- Companies with works council
  - Information and consultation on personnel planning (§ 92 BetrVG)
  - In case of restructuring - negotiation of reconciliation of interests and social plan
  - Problematic: negotiation without presence meetings but draft legislation exists

# Conclusion and Outlook

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- We currently experience works councils and the workforce as mainly showing solidarity and being cooperative
- However: a lot happens under high time pressure
- Precise and transparent agreements necessary to avoid future claims from employees

A low-angle, upward-looking photograph of several tall skyscrapers against a bright blue sky filled with scattered white clouds. The buildings are seen from the bottom corners, creating a sense of height and scale. The central focus is a large, bold, black text overlay.

**Please feel free to  
contact us if you have  
any questions!**



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