

COVID-19: THE GERMAN INFECTIOUS DISEASES PROTECTION ACT - WHAT MAKES YOU STAY AT HOME

To Our Clients and Friends:

Public life in Germany – as most recently in many places in Europe and the U.S. – is coming to a halt. Even production plants in the automotive industry employers or sources of business for every seventh German workplace have shut down this week. All this is based on the provisions of scarcely known law that has never been applied in such a broad and vigorous way.

The Infectious Diseases Protection Act (*Infektionsschutzgesetz*, ‘IfSG’) provides the state^[1] with strong executive powers to prevent diseases, pathogens etc. from spreading. Such powers have already been made use of and might further be made use of in the near future due to the Coronavirus (COVID-19).

These measures now affect almost any businesses with regard to further operation, possible prohibitions of employing, and opening times. Here are the essentials you need to know about the IfSG to avoid risks and possibly predict further curtailment that may lie ahead:

1. General obligations under the IfSG

The IfSG primarily regulates the interaction between state institutions. It is further relevant to doctors, animal doctors and companies engaging in medical businesses as well as operators of community institutions or of collective accommodation units. Above all, it stipulates reporting obligations pursuant to sec. 6-10 of the IfSG, if a suspicion of or an actual incident of a disease/pathogen arises. In addition, the IfSG attributes special tasks of collecting, analyzing and distributing information on diseases and pathogens to the Robert Koch Institute, a Federal government agency in the field of medicine. COVID-19 has recently been added to the list of pathogens by way of an urgent executive regulation (*Eilverordnung*) of the Federal Ministry of Health (Sec. 6(1) n. 1 and sec. 15 of the IfSG).^[2]

2. Obligations upon administrative orders

The IfSG grants certain powers to the state administration for the purpose of preventing the further spreading of a pathogen such as COVID-19. Of particular relevance is sec. 28 of the IfSG which allows for certain “protective measures”.

- This provision particularly empowers the competent authority to prohibit or curtail events and gatherings, shut down swimming baths and other community facilities such as school and child daycares.^[3] Furthermore, people may be prohibited from leaving or entering certain locations, i.e. it arguably^[4] contains the legal basis of a curfew (Sec. 28(1) sentence 2 and 1 of the IfSG).

- The provision also contains a general clause for the competent authority to take necessary protective measures to prevent an infectious disease from spreading (Sec. 28(1) sentence 1 of the IfSG).[5]
- The law further permits ordering a quarantine (Sec. 30(1) sentence 2 of the IfSG).
- The competent authority may order an infected person, or a person suspected to be infected, to refrain from practicing in certain professions (Sec. 31 of the IfSG). According to sec. 56(1) and (5), the employer has to pay a compensation for six weeks but will be reimbursed by the state.

3. Risks in case of non-compliance

Non-compliance with legislative obligations of or administrative orders upon the IfSG can, depending on the particular infringement, be punished by an administrative fine, a criminal fine, or even by imprisonment. Above all, Sec. 75 of the IfSG sets out that intentional infringing upon an enforceable order pursuant to Sec. 28(1) sentence 2 of the IfSG can be punished by imprisonment up to two years (five years, if the perpetrator further spread the disease/the pathogen). In connection with sec. 30, 130 of the Act on Regulatory Offenses (*Gesetz über Ordnungswidrigkeiten*), a legal entity might be subjected to an administrative fine and a confiscation of the profit gained through the illegal act, if the perpetrator acted on its behalf.

4. Case Study Bavaria and Checklist to comply with the IfSG

Generally, to avoid running risks in connection with the IfSG, we strongly advise to strictly follow the general orders that have been made under sec. 28(1). Orders can vary from each of the Federal states and are published by them.[6] By way of illustration, the following rules will now have to be put in place for the State of Bavaria:

- Everybody is encouraged to reduce physical and social contacts with other people to an absolute minimum (save for members of your own household). A minimum distance to other people of at least 1.5 meters has to be kept wherever possible;[7]
- People may not leave their home, unless they have a good cause (exercising their profession, medical reasons, running errands for daily life etc.);[8]
- Nobody may visit certain places where people are taken care of who would particularly put in danger by COVID-19.[9]
- If you run a retail business, you have to shut down, unless your business is specifically allowed to carry on;[10]
- If your business concerns or includes leisure activities not strictly necessary for daily life, you need to stop it, too;[11]

- If you run a catering business, you are not permitted to operate further. If you sell take-away food or if you deliver food, you may however carry on to that extent.[12]
- If you are engaged in the medical business such as a hospital, a community institution, or a unit of collective accommodation, special provisions apply with regard to reporting (sec. 8(1) of the IfSG).

As the general orders are of a temporary nature and further measures may likely be taken soon, you should regularly update your respective policies implementing these orders. Because the situation is developing in a dynamic way, we recommend reviewing and updating the respective orders currently on a daily basis. Here is a checklist that we would recommend running to ensure prompt, but also sustainable, compliance with a dynamically changing landscape for businesses in these days:

- **Tone from the top.** Sensitize through senior management your entire organization by way of a general communication on the fact that each employee and third party engaging in business with the company must comply with the binding orders applicable from time to time.
- **Create a knowledge network.** Provide a contact that will be the resource for any information of the business relating to specific orders potentially applicable to your local work force or business.
- **Keep up to date.** Appoint a person to regularly (daily) check the applicable orders at all places where your business is operating.
- **Document your diligence.** Collect relevant orders for your business in a central data base to keep due record. There should be one source of truth for your business that is diligently kept and regularly updated.
- **Avoid silos.** Create a cross-functional group ensuring that the business leaders are aware of the local orders that are applicable in the relevant jurisdiction they cover.
- **Be efficient and nimble.** Provide a template to the business in which the business can easily update communicate new orders by way of an internal policy implementing the order to their respective work force and business partners when the situation changes.
- **Create a record.** Ensure that all such internal policies are centrally collected for record keeping purposes. If complaints arise later, you need to ensure you have a track record of your diligent efforts to comply with the law.
- **Communicate.** Have regular calls to reinforce the message and ensure that all local businesses comply with the respective orders and can raise questions. Document the questions on these calls and follow-up with answers.
- **Share knowledge.** Collect questions in a central list to see whether they raise topics of general interest or concern that require a more general approach.

- **Stay healthy and keep up your good spirits.** Encourage your employees to keep up with good practices that keep them healthy and to share experiences that helped maintaining good spirits in the team and their communities. It's a marathon, not a sprint.

This list is not exhaustive and does not aspire to cover all points, but it is a starting point for you to put an initial light organizational set-up around the day-to-day crisis management that we will be facing in the next few months.

[1] As it also is the general rule in Germany (*see* Articles 30, 83 of the German Federal Constitution), the executive powers under the IfSG lie with the Federal state governments (*see* Sec. 54 of the IfSG), unless the law specifically assigns tasks to the Federal level. Under the IfSG, the Federal Government and the Federal Ministry of Health may enact executive regulations such as the regulation that has included COVID-19 to the list of pathogens.

[2] Verordnung über die Ausdehnung der Meldepflicht nach § 6 Absatz 1 Satz 1 Nummer 1 und § 7 Absatz 1 Satz 1 des Infektionsschutzgesetzes auf Infektionen mit dem erstmals im Dezember 2019 in Wuhan/Volksrepublik China aufgetretenen neuartigen Coronavirus („2019-nCoV“), in force since February 1, 2020.

[3] For example, the Bavarian state government has issued such an administrative order on March 16, 2020.

[4] While some academics have recently raised doubt (see e.g. *Thiele*, Ausgangssperren wegen Corona - Im Katastrophenfall geht das, LTO online, March 20, 2020), the state administration appears to regard Sec. 28(1) sentence 1 and 2 of the IfSG as the applicable legal basis because the curfews imposed so far have been grounded on this provision.

[5] For example, the Bavarian Ministry of Health has issued such an administrative order on March 13, 2020. Based on this order, school lessons have been cancelled.

[6] *See*, by way of example, the website of the Bavarian Ministry of Health, <https://www.stmgp.bayern.de/> (in German, last visited March 20, 2020).

[7] Order n. 1 of the executive order of the Bavarian Ministry of Health dated March 20, 2020. Effective until April 3, 2020.

[8] Order n. 5 of the executive order of the Bavarian Ministry of Health dated March 20, 2020. Effective until April 3, 2020. Effective until April 3, 2020.

[9] N. 3 of the executive order of Bavarian Ministry of Health dated March 20, 2020. Effective until April 3, 2020.

[10] Pursuant to n. 4 of the executive order of the Bavarian Ministries of Health and of Family Affairs dated March 16, 2020, grocery trades, beverage markets, banks, pharmacies, drug stores, medical stores, opticians, hearing aid specialists, branches of *Deutsche Post AG*, pet supplies stores, building and garden supplies stores, gas stations, cleaners, and online trades are exempted. Further exceptions can be made upon application if deemed absolutely necessary to supply the population and justifiable under infectious diseases protection law. This part of the order has come into force on March 18, 2020 and is currently effective until March 30, 2020.

[11] Pursuant to n. 2 of the executive order of the Bavarian Ministries of Health and of Family Affairs dated March 16, 2020, in particular saunas, swimming baths, movie theaters, convention centers, clubs, bars, discos, gambling casinos, theaters, club rooms, brothels, museums, guided city tours, sports halls, sports fields, playgrounds, fitness centers, libraries, wellness centers, thermal baths, dancing schools, zoos, entertainment venues, further education centers, community colleges, music schools, and youth centers. This part of the order has come into force on March 17, 2020 and is currently effective until April 19, 2020.

[12] Order n. 2 of the executive order of the Bavarian government dated March 20, 2020. Such places include e.g. hospitals and retirements homes. Effective until April 3, 2020. The order includes exceptions for births, visits to children by close relatives, and imminent deaths.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

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