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COVID-19: SHORT-TERM REDUCTION OF PERSONNEL COSTS UNDER GERMAN LABOR LAW

To Our Clients and Friends:

The COVID-19 crisis is in full progress. Most companies are extremely burdened by the crisis and looking for easements. This newsletter shall give you an overview of various possibilities to reduce personnel costs in the short term under German law.

Next to a hiring freeze, which many companies have already implemented by now, using accrued overtime and vacation entitlement is the easiest and least intrusive option to respond to the situation. However, these measures do not directly reduce personnel costs.

Therefore, the following further measures should be considered:

A. Cut bonuses

Most bonus schemes have a clause, which allows the employer to reduce or entirely cut the bonus due to exceptional circumstances and/or financial distress. The COVID-19 crisis with its tremendous economic implications and government-induced shop closures^[1] can be regarded as such an exceptional circumstance. Therefore, reducing or cutting bonuses should be the first measure, which can protect employer liquidity.

B. Short-time work ("*Kurzarbeit*")

Another useful tool to counteract the initial drop in orders and labor surpluses is government-subsidized, short-time work, which already proved helpful during the 2008/2009 financial crisis. In a nutshell, short-time work means that the employer may reduce work time (even down to zero) and that, in the ultimate result, the state pays 60 %^[2] of the net^[3] income lost by the affected employees. After a limited period of short-time work (up to twelve months^[4]), the original schedule is taken up again, thereby retaining a skilled workforce.

In response to the COVID-19 crisis, the German Federal government has introduced facilitated conditions with regard to short-time work with retroactive effect from March 1, 2020. For at least the rest of the year, short-time money will be granted under the following requirements:

- At least 10% of employees^[5] suffer a loss of more than 10% of their remuneration due to an inevitable event (such as a state prohibition to temporarily operate one's business) or due to economic causes (e.g., reduced demand or limited supply of goods as a result of the crisis);

- The loss of work must be of a temporary nature and inevitable. The company must adopt measures to counteract the reduction of work (e.g., assigning other remaining tasks to employees, cutting accrued overtime, using remaining vacation days for 2019 and before);
- The loss of work must be notified to the employment agency and shown in a convincing fashion (*glaubhaft machen*); and
- The option of short-time work must be provided for either in individual agreements with the respective employees or collective agreement (*Tarifvertrag*) or company agreement (*Betriebsvereinbarung*).

Short-time work might become the predominant tool to tackle the economic impacts of the crisis throughout Europe. The European Union has recently set up a program to support short-time working schemes across Europe. This new instrument for temporary Support to mitigate Unemployment Risks in an Emergency (“SURE”) provides financial assistance in the form of loans of up to €100 billion to EU Member States.

C. Voluntary salary reduction

In addition to the measures named above, a voluntary reduction of the salary or parts of it can be considered to protect the company’s liquidity regarding personnel costs. Absent any collective agreements to that effect, such a step generally requires the consent of each affected employee. While such consent is usually very difficult to obtain under normal circumstances, we have seen cases in which companies used crises of different natures to create a common conviction among their workforce to facilitate such intrusive measures.

D. Reducing the workforce

Some companies will also consider reducing their workforce.

As a principle, German labor law is extremely strict with regard to dismissals. There are only limited acknowledged reasons for dismissals, and the employer has the burden of proof as to their existence, if the employee challenges the dismissal, which happens quite often. In particular, a mere reference to the “corona crisis” does not justify a dismissal.

A termination for operational reasons (*betriebsbedingte Kündigung*) requires a permanent loss of the possibility to employ further. The burden of proof lies with the employer. As the COVID-19 crisis is—hopefully—of a temporary nature, this requirement would be hard to be upheld in court. The burden of proof with regard to the final loss of the job is even increased if the employee to be dismissed is working on a short-work scheme which is, by its nature, an instrument for covering a temporary loss of work. Thus, while an ordinary dismissal during short-time work is generally conceivable, the reasons for a termination due to operational reasons must necessarily go beyond the reasons that were originally given to justify an application for (temporary) short-time work.[6]

Yet, the strict dismissal protection provisions in general do not apply to (i) small shops with less than ten employees and (ii) to employees in their first six months of employment.

[1] *See also*, <https://www.gibsondunn.com/covid-19-german-infectious-diseases-protection-act-what-makes-you-stay-at-home/> (last visited April 7, 2020).

[2] Sixty-seven percent, if the employee has at least one child. According to media reports, the coalition parties forming the German Federal government are allegedly considering to increase the short-time money. While one suggestion put forward by the Social Democrats contains a general increase of the percent share to 80% and 87% respectively, the Christian Democrats are said to favor a sort of minimum amount of short-time money targeted at low-income beneficiaries. For further details, *see* Frankfurter Allgemeine Zeitung, dated April 4, 2020.

[3] Social security contributions are compensated by the employment agency.

[4] The Federal Ministry of Labor may, by way of regulation, extend the maximum period to 24 months.

[5] To be able to file a motion for short-time money, it is sufficient that a company retains a single employee. Thus, also small businesses may profit from a short-time work scheme.

[6] *See* Federal Labor Court, Judgment of February 23, 2012, 2 AZR 548/10, para. 21 = NZA 2012, 852, 854 *et seq.*



Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in Germany.

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