

UPDATE: Employment Law Pack "Coronavirus"

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1. Which businesses need to close, and which may continue to operate as normal?

On Sunday, 15 March 2020, the Austrian Federal Act relating to Provisional Measures for Preventing the Spread of COVID-19 (the COVID-19 Measures Act) was passed into law. On the basis of this Act, on the same day the Social Affairs Minister enacted two significant ordinances for employers and employees: by Ordinance published in the Federal Law Gazette (BGBl. II No. 98/2020), entering public places was prohibited unless exceptional circumstances exist (e.g. meeting basic essential needs of everyday life, or if required for work purposes). In fact, while the Ordinance prohibits entering public places, people are however allowed to access their place of work if a one-metre distance can be maintained from other employees. A further Ordinance (BGBl. II No. 96/2020) also specifies the businesses to which entry is permitted into the customer areas for the purpose of purchasing goods and services.

Based on the above two Ordinances, business operations may be divided into three categories: (1) Businesses which must be completely closed; (2) Businesses which must remain partially closed; and (3) Businesses which may remain open in unchanged form. The first category for instance comprises restaurants, which must close completely with effect from 17 March 2020. The second category includes businesses which must close their customer areas, but which additionally have a back office, warehouse or production facility. The third category comprises businesses with a customer area which fall under the condition of exceptional circumstances and which may therefore continue to remain open as normal, such as pharmacies, grocery stores, and banks.

2. Where and how are employees required to work?

Based on the above categorization (three categories), it is now possible to determine whether employees are required to continue working. Employees in category 1 businesses may not and are not required to work at their usual place of employment. If their work cannot be undertaken remotely (such as in the case of waiters, retailers), these employees are not required to work for the duration of the crisis measures. The legal position is equally clear in the case of workers in category 3 business operations, who are required to continue working as normal at their place of work. However, with category 2 businesses, there is a division of the workforce: employees who were working in the customer area may not and are not required to work at their usual place of work. Where teleworking is not possible, then for the duration of the crisis measures, these employees are not required to work. With regard to other workers in business operations falling under category 2, a distinction must be made as to whether their presence on site is **necessary** for work purposes. Here, based on the intention of the legislator to restrict social contact to a minimum, a strict criterion must be applied. This is the case not only in relation to the assessment of which employees may be deployed on site, but also with regard to the number of such employees. In relation to production workers, in so far as production has not been stopped, presence at work is in any event required. This also applies with regard to warehouse workers provided, in view of the closure of customer areas, they may still be usefully engaged (e.g. inventories, organization of means of production and products). Back-office workers may only be deployed on site if their work cannot be undertaken via teleworking. However, employers must **guarantee** the aforementioned minimum distance of one metre.

3. Do employees have the right to continued payment of wages or salary if they are not permitted to work?

If a business is affected by official closure under Section 20 of the Austrian Epidemics Act, then under the special terms of Section 32 of the Act, employers are under a duty to continue paying employees their wages or salary for the duration of business closure. However, employers may in such instance have a claim to redress against the federal government, but they must raise such a claim with the district administrative authority in whose area the official crisis measures were implemented within a period of six weeks with effect from the date such measures are lifted, failing which any claim will be forfeited.

Important: The COVID-19 Measures Act expressly makes clear that ordinances enacted on the basis of the Act are not to be qualified as measures within the meaning of the Epidemics Act (Section 4 (2)). In such cases, therefore, neither does the specific operative circumstance of continued salary or wage payment as set out in Section 32 of

the Epidemics Act apply, nor the possibility of a recourse claim against the Austrian federal government. These legal consequences expressly require an official measure under the terms of the Epidemics Act, i.e. if, for instance, a business or an individual employee is officially placed under quarantine.

If closure of a business is not ordered under the terms of the Epidemics Act, but the business however remains closed due to federal government measures or official prohibitions on entry under the new provisions of the COVID-19 Measures Act, Section 32 of the Epidemics Act will not apply, and employers are not required to make continued payment of salary or wages based on this provision. In such instances, the general risk provision contained in Section 1155 of the Austrian General Civil Code (ABGB) applies: depending on risk categorization under employment law, the pecuniary loss is incurred either by the employer (continued wage/salary payment to non-working employees in the event of a local disruption) or by the employee (no continuation of wage/salary payment despite willingness to work in the context of widespread disruption/force majeure). If a business is forced to remain closed de facto due to the Covid-19 pandemic, since there exist no options for continuing business operations, force majeure must be assumed under the terms of Section 1155 of the General Civil Code. Ultimately, therefore, in such cases, an employer is not obliged to continue making wage or salary payments. As for when precisely a business is required to be closed, and when such closure is undertaken more on a precautionary basis, this is a difficult distinction to make in an individual case. An agreement on short-time working (see Section 5 below), as approved by the social partners, represents one possibility of temporarily closing a business without being encumbered with a potential risk of being required to make full wage/salary payment or, on the part of employees, suffering the loss of all pay. The new concept of "corona short-time working" created by the social partners makes it possible for the work obligation to be set to zero for a specific period of short-time working. At the same time, for this period, employers will receive short-time working benefit in the form of a short-time working subsidy from the *Arbeitsmarktservice* (AMS).

4. Special childcare periods

If, on the basis of official measures, schools and childcare facilities are closed either partially or entirely, employers may grant a paid special childcare period for the supervision of children by their employees for a period of up to three weeks, where the children involved are under the age of 14. During this period, employees will continue to draw their pay and in return, employers will receive payment from the federal government of one third of the wage or salary paid to the employee during this special childcare period. This remuneration is capped at the level of the monthly assessment ceiling, and must be claimed from the competent tax authority within six weeks from the date on which the official measures are lifted.

A special childcare period requires that employees are not able to work because they are looking after their child. Therefore, it must be possible for them to go to work, despite the restrictions imposed by the COVID-19 measures. If, therefore, a business is entirely closed, such as for instance in the catering industry, such a claim will not apply.

In addition, the special childcare period will only apply if an employee no longer has a paid claim to exemption from work in order to look after a child. This obviously means that such workers will no longer have a claim to time off in a context of continued wage or salary payment. For this reason, other forms of paid time off from work (such as, for instance under Section 8 (3) of the Austrian Employees Act (*Angestelltengesetz*)) must be used up before a special childcare period can be granted.

Furthermore, claiming has been limited to those employees not engaged in a key or frontline profession. Employees in these sectors would therefore not be granted a special childcare period. Whether this is then also to apply if schools and childcare facilities completely close, is questionable.

5. Short-time working

Social partners have enabled an **expanded short-time working scheme**. Within a reference period which may initially last a maximum of three months, working hours may be reduced to an average of 10% – 90% of previous working hours. In this context, short-time working may also be structured such that no work at all is undertaken for a while. Furthermore, an arrangement must also be made whereby, prior to commencing short-time work or during short-time work, "expired holiday" from previous holiday years as well as time credits must be used up. The short-time working model must be approved by the AMS, and here, a rapid approval process (within 48 hours) has been promised. Further details are as follows:

What is short-time working?

Short-time working enables reduction of working hours within a company in a context of temporary economic difficulties. Reduced working time also means "reduction" of an employee's wage/salary entitlement. This loss of pay is largely offset by both the short-time working benefit provided by the employer which is then refunded by the short-time work subsidy provided by the AMS.

The preconditions for approving a short-time work subsidy have been adjusted to the present situation surrounding coronavirus (Covid-19). The most important change is this: **The basic possibility of short-time working and the short-time working subsidy in the context of economic difficulties arising from coronavirus (Covid-19) has been anchored in statute.**

Framework conditions:

- There must be a reason for short-time working (due to economic difficulties): The economic difficulties which make short-time working necessary must be set out in writing, with reasons, in an application for short-time working. Currently, according to the indications given by the social partners, a comparatively short explanation – Covid-19 and consequential measures – will be sufficient.
- Short-time working must be agreed within a company: in companies with a works council, a works council agreement is required, and in companies which do not have a works council, there must be an agreement signed by all employees. The social partners have drawn up specimen agreements for this purpose.
- **An application must be made for short-time working in order for a short-time working subsidy to be granted by the AMS in accordance with Section 37 b/c of the AMS Act (AMSG):** The application - which seeks granting of a short-time working subsidy in accordance with the terms of Sections 37 b and/or c of the AMS Act – for a short-time working subsidy must be submitted to the AMS together with the agreement and submission of reasons.
- **Short-time working must be approved:** A company's signed agreement along the lines of the agreement proposed by the social partners must be submitted to the AMS jointly with the AMS application form and statement of reasons in respect of economic difficulties (AMS account, e-mail). The AMS will review the documents forwarded and pass them on to the social partners (trade union, Austrian Federal Economic Chamber (WKO)), which will either approve or reject the application; a consultation appointment may be arranged. The social partners have newly introduced the rapid processing of applications; once an agreement is ready for signature, it will be signed by the social partners within 48 hours.

Key points:

- **Duration:** At present, short-time working can be agreed for a maximum period of three months and be extended on a one-off basis by three further months.
- **Reduced working hours:** The reduced standard working hours must on average be between 10% and 90% of standard working hours as agreed under collective working arrangements. A new aspect of this is that it may temporarily also be set at zero. Thus, for instance, in the context of a short-time working period of six weeks, it may be set at 0% for five weeks, i.e. no work will take place, and for one week at 60%. Another important point to note is that, in some sectors of business, the agreement on short-time work may also include the admissibility of overtime.
- **Using up holiday and time credits:** Before and during short-time working expired holiday, i.e. holiday from previous holiday years, and time credits, must be used up. Holiday from the current holiday year will be retained. Only if short-time working is extended beyond three months must three weeks' holiday from the current holiday year initially also be used up. The basis for calculating holiday pay will be working hours prior to short-time working. The general rules will apply to agreements on holiday and time credits.
- **Dismissals/Duty of retention:** During short-time working, the number of employees in a business must be maintained at the same level. This means that dismissals are only possible if a departing employee is replaced by another. Following the end of short-time working, there exists a one-month period in which positions must be retained; employees may only be dismissed following expiry of this retention period.
- **Amount of short-time working subsidy:** To compensate for their standard working hours lost, employees will be entitled to short-time working benefit from their employer. This means that their remaining (reduced) working hours will be contractually remunerated. Added to this will be short-time working benefit. This will be reimbursed in full to employers by the AMS in the form of the short-time working subsidy. The end result of this is that employees will receive the following percentage of the net pay which they received prior to commencing short-time working (net reimbursement rate):
 - 80% net reimbursement rate if, prior to introduction of short-time working, gross pay was over EUR 2,685; or
 - 85% where gross pay is between EUR 1,700 and EUR 2,685; or

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- 90% where gross pay is below EUR 1,700.
- **Social insurance contributions:** Social insurance contributions generally must be paid as if working hours had not been reduced. But: In accordance with the agreement made by the social partners, the AMS will assume the employer's resulting additional costs with effect from the first month.

6. Other working-time models aimed at overcoming the crisis

Notwithstanding the short-time working scheme, there are however also other options for getting through the coming weeks, for instance through a **modification of flexitime schemes or schemes for averaging working hours**.

We would be pleased to support you in selecting the appropriate arrangement and implementing the necessary steps (for instance coordination with the AMS).

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