LATHAM&WATKINS

Client Alert News Flash

Latham & Watkins Benefits, Compensation & Employment Practice March 16, 2020 | Number 2610

How Germany Is Addressing Short-Time Work in the COVID-19 Crisis

A new federal regulation provides initial guidance on the requirements for short-time work and receipt of short-time compensation.

Key Points:

- The regulation outlines requirements for:
  - The efficient introduction of short-time working
  - Receiving short-time working compensation
  - The duration and amount of the short-time working compensation

On 13 March 2020, the German Bundestag and Bundesrat passed a law (the so-called "Arbeit-von-Morgen Act," or "Work of Tomorrow Act") in an expedited procedure to temporarily improve the regulations for short-time working compensation in response to the COVID-19 crisis. The legislation aims to support the economy and labor market, based on the recognition that the COVID-19 crisis will result in considerable work absences.

Short-time work is the temporary reduction of working hours with a corresponding reduction in pay. Short-time work zero is the complete cessation of work. The purpose of short-time work is to temporarily relieve the company's financial burden by reducing personnel costs while maintaining jobs. The loss of remuneration of the employees is usually (partially) compensated by short-time work compensation from the employment agency.

The new law enables the German federal government to facilitate the receipt of short-time work benefits, as well as to extend the benefits by means of a temporary decree regulation that will come into effect retroactively as per 1 March 2020.

Essential requirements for short-time work and short-time compensation

The main prerequisites for the introduction of short-time working and the receipt of short-time compensation in accordance with the new legal situation are outlined below. However, until the above-mentioned decree regulation is enacted, the exact details of these requirements will not be completely clear.

Requirements for the efficient introduction of short-time working

An employer is not entitled to introduce short-time work unilaterally; rather, a legal basis is required. This legal basis can either be a collective agreement applicable in the company if it authorizes the introduction of short-time work, or a works agreement that must — at a minimum — regulate the start and duration of short-time work, the location and distribution of working time, and the selection of the employees affected. In companies without a works council, short-time work can also be introduced by individual agreement with the employees concerned. A change of notice of termination is also possible; however, the strict conditions of termination must be observed.

Requirements for receiving short-time working compensation

According to §§ 95 et seq. SGB III, there is a legal claim to short-time work compensation if:

- There is a considerable loss of work with loss of remuneration.
- The operational requirements are met.
- The personal requirements are met.
- The loss of work has been reported to the Federal Employment Agency.

Substantial loss of working hours with loss of pay

A substantial loss of working hours with loss of remuneration exists if the effectively introduced short-time work is based on economic reasons or an unavoidable event, is temporary and unavoidable and has a certain scope.

Economic reasons or an inevitable event

Loss of working hours due to COVID-19 is likely to be due to an inevitable event or for economic reasons. Accordingly, the Federal Employment Agency states on its homepage that companies in which there are temporary work absences due to COVID-19 can apply for short-time work compensation. This could be the case, for example, if deliveries are not made due to COVID-19 and working hours have to be reduced as a result, or if government protective measures ensure that the company is temporarily closed down.

Temporary work loss

The granting of short-time working compensation requires that only a temporary work loss exists — meaning, short-time working compensation can not be granted if the company is planning to close down. It must be foreseeable with a certain degree of probability that a return to full-time work can be expected after the longest possible period of receipt of short-time work compensation.

Inevitability of loss of working hours

The law requires an employer to have taken all reasonable precautions to prevent the occurrence of loss of working hours with loss of pay in the company — including the priority granting of vacation (especially residual vacation), to the extent that doing so does not conflict with the employees' priority vacation wishes.

In addition, companies must first release working time credit balances on the working time accounts that they hold. However, under the Arbeit-von-Morgen-Gesetz, companies should be able to completely or partially waive the accumulation of negative working time balances before paying the short-time working allowance.

Minimum scope of work loss

As a general rule, at least one third of the employees employed in the company (with more than 10% each) must be affected by the loss of working hours during the entitlement period. Under the Arbeit- von-Morgen-Gesetz, a company should be able to apply for short-time work compensation if the loss of working hours affects at least 10% of its employees.

Operational requirements

Companies do not have to meet any size requirements in order to benefit from short-time work compensation.

Companies also do not have to introduce short-time work to all employees; rather, they can introduce short-time work to only one individual department. In this case, the minimum amount of lost working hours must also only be present in the respective department of the company.

Personal requirements

The personal precondition for the granting of short-time working compensation is that the employees are in an employment relationship that is not subject to termination. Short-time work is therefore not considered as a means of bridging the period of notice following the announcement of redundancies for operational reasons.

Procedure for work loss indications and benefits claims

In order to benefit from short-time work compensation, an employer must submit a written notification of the loss of work to its local district employment agency. The notification form is available at *www.arbeitsagentur.de*. Employers can submit the signed form (together with other documents, including a statement by the works council) by fax or scan and send it by e-mail. The Federal Employment Agency must then immediately decide on the basic approval of short-time work compensation by means of a preliminary notice.

The employer must furthermore use a form, which can also be downloaded on *www.arbeitsagentur.de*, to apply monthly in arrears for the short-time work compensation to the local district employment agency that oversees the company's payroll accounting office. A cut-off period of three months applies for this application. The timing of the cut-off period begins at the end of the month for which the short-time work compensation is applied.

Short-time work compensation is paid at the earliest beginning in the calendar month in which the employment agency receives the notification of loss of work.

Duration and amount of the short-time work compensation

The statutory period of entitlement to short-time work compensation is a maximum of twelve months.

However, it is to be expected that the maximum reference period on the occasion of the COVID-19 crisis will be extended to 24 months by a decree regulation of the federal government.

The short-time allowance amounts to 67% of the net pay difference for employees who are obliged to support at least one child; the remaining employees receive 60% of the net pay difference.

Some collective agreements specify that the employer is obliged to top up the short-time work compensation. If the employer provides such top-up payments, these are not credited against the short-time work compensation.

Short-time work compensation is paid retroactively for the period for which it was requested. The payment is made to the employer; however, the employer is obliged to pass on the compensation to the employees without delay.

While receiving short-time work compensation, the employment relationship remains subject to compulsory insurance in all branches of social security. If there is no short-time work zero, the remuneration still received is liable for contributions according to the general regulations (that is, half of the contributions are paid by the employee and half by the employer). The employer pays 100% of the social insurance contributions on the fictitious remuneration for the lost hours. Under the Arbeit-von-Morgen Act, the social security contributions that the employer normally has to pay are to be partially or fully reimbursed by the Federal Employment Agency going forward.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Anne Kleffmann
anne.kleffmann@lw.com
+49.89.2080.3.8043
München

Dr. Tobias Leder
tobias.leder@lw.com
+49.89.2080.3.8000
München

You Might Also Be Interested In

EuGH verlangt systematische Aufzeichnung der Arbeitszeit

Latham & Watkins Benefits, Compensation & Employment Practice