

Info sheet



Short-time work and
short-time benefits
during the Corona
crisis

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INFO SHEET

Short-time work and short-time benefits during the corona crisis

The spread of coronavirus poses enormous challenges for the economy and the labour market. In order to support both employees and employers, the legal basis for easier access to short-time benefits was created in a fast-track procedure which is therefore in principle available immediately as a crisis response instrument.

The regulations come into force with **retroactive effect as of 1 March 2020**. However, only those who send the corresponding notification of loss of working hours to the relevant office of the Federal Employment Agency (Agentur für Arbeit) can receive short-time benefits.

In order to enable you to react promptly, we are enclosing the information and documents currently required in the present dynamic situation. The following areas are covered:

- » Labour law requirements and implementation of short-time work in employment contracts
- » Applying for short-time benefits
- » Payroll accounting during short-time work

I. Labour law requirements

1. What is short-time work?

Short-time work is a temporary reduction of the regular working hours customary at a company (if necessary, even down to 'zero hours'), for instance, due to delivery and production bottlenecks, loss of orders as a result of cancellations caused by coronavirus, along with a simultaneous reduction in remuneration and parallel entitlement to payment of short-time benefits by the Federal Employment Agency (*Bundesagentur für Arbeit*).

Short-time work is designed as an instrument to avoid involuntary dismissals.

2. Which steps under labour law must be taken into account during implementation?

The employer is not entitled to introduce short-time work unilaterally; special authorization for this is required, for instance, on the basis of

- » a collective agreement

- » a company agreement
- » the employment contract

a) In case of a collective agreement

If a collective agreement is applicable, the relevant provisions must be examined. The collective agreements in many industries contain special provisions for short-time work which relate to the introduction and design of this instrument in detail. The collective agreements mainly contain provisions for the following aspects:

- » Co-determination right of the works council
- » Scope of short-time work
- » Notification period
- » Salary reduction in cases of minor short-time work
- » Allowance and amount of allowance
- » Termination during short-time work

The regulations that apply to you can be found in the collective agreement applicable to your company.

b) In case of a works council

Works agreement for companies with a works council

If no collective agreement exists or if the collective agreement does not apply in the company, the employer is still not permitted to unilaterally order short-time work. This requires the co-determination of the works council which has a mandatory right of co-determination when short-time work is ordered. According to the case-law of the Federal Labor Court (BAG, Bundesarbeitsgericht), the works council even has a right of initiative and can suggest the introduction of short-time work and, if no agreement is reached, bring about a decision by the conciliation body on this issue.

The company agreement must contain the necessary provisions for the introduction, implementation and dura-

tion of short-time work. For further details, please refer to the model company agreement which we will be pleased to send to you on request. Please feel free to contact us if you have any questions.

c) In case of neither a collective agreement nor a works council

Employment contract

If neither a collective bargaining agreement applies nor a company agreement can be concluded because the company does not have a works council, the employer's authorization to order short-time work can only result from the employment contract. A distinction must be made here as to whether the employment contract already contains a provision for short-time work or whether a corresponding supplementary agreement must be concluded.

An anticipatory clause stipulates that, when the necessary legal requirements are met, the employer may order short-time work. If your employment contracts already contain anticipatory clauses, these should be checked in order to ascertain whether they comply with current labour law requirements because otherwise there would be a risk that these clauses are ineffective. We will be happy to advise you in your specific case.

If the employment contract does not contain a valid anticipatory clause or no such clause at all, the employer must conclude a supplementary agreement to the respective employment contract with the employees. This agreement will then stipulate that the employer is entitled to order short-time work in view of the acutely critical overall economic situation, which can range from a pro-rata work obligation to zero work.

There is a wide range of working time models, from zero short-time work to working hours of up to 90 %. Although identical rules for all employees are generally not necessary, the principle of equal treatment under labour law must be observed, i. e. employees who carry out comparable activities must not be arbitrarily treated differently. The relevant clause is subject to standard business term control and must hence be reasonable (section 307 (1) No. 1 of the German Civil Code (*BGB, Bürgerliches Gesetzbuch*). This is the case if the introduction of short-time work is linked to the above-described requirements and if these are sufficiently specific. A reasonable period of notice is, above all, required. A precise value is not clearly defined here, with three to four weeks being typically assumed. However, in light of the package of measures, a deadline of one week or notification with immediate effect might also be possible. According to current knowledge, this

appears to be the only way to apply with retroactive effect as of 1 March 2020. Further clarification can definitely be expected at this point.

Moreover, rules can also be laid down to determine whether or not the employee's leave time is to be used for short-time work or whether the employer pays an allowance for short-time work. In detail, however, the final form of the clause depends on the employer's specific circumstances.

If the employee does not sign the additional agreement, notice of termination with altered conditions of employment must be given in order to enforce the necessary amendments to the employment contract. Termination must be involuntary on the employer's part and all less severe means, including overtime reduction and short-time work, must have been exhausted beforehand. In this context, the notice periods for termination must be observed; the reduction of working hours and pay can then come into effect at the earliest at the end of the notice period and only become effective if notice of termination with altered conditions of employment is based on urgent operational needs and if other conditions are observed or if the employee does not take legal action against the notice of termination with altered conditions of employment within three weeks.

d) What other labour law aspects need to be considered in addition:

Termination

Short-time work does not rule out the possibility of dismissal for involuntary reasons if there is permanently no chance of continued employment for the employees concerned. If dismissal actually takes place, short-time work benefits are then no longer paid.

Side-line employment

If side-line employment commenced before short-time work, this has no effect on short-time benefits.

For side-line employment taken up during short-time work, full crediting of remuneration against short-time allowance is suspended (limited from 1 April to 31 December 2020).

The additional income remains exempt from crediting against short-time allowance if the sum of additional income plus any remaining actual remuneration, any top-up amount and short-time benefits does not exceed the target pay. In the case of marginal employment, i. e. so-called 450-euro-jobs, there is no crediting even above the level of target pay.

As an employer, you should therefore communicate this to the employees in the agreement on short-time work and/or oblige them to notify you in advance of any side-line employment.

Further professional training/qualification during short-time work

Employers have the option of being reimbursed half of the social security contributions minus the contribution to the employee qualification scheme for employees who attend qualification measures while receiving short-time work benefits. The prerequisite for reimbursement is participation in a continuing professional qualification measure (section 82 of Volume II of the Social Security Code (*SGB II, Sozialgesetzbuch (SGB) Zweites Buch (II)*), the duration of which amounts to at least 50 % of the lost working time. This scheme is limited until 31 July 2023.

During the period from 1 March to 31 December 2020, even 100% of the social insurance contributions for lost working time will be reimbursed.

Participation in professional qualification schemes must not prevent employees from returning to normal working hours. This means that it must be generally possible to adjust the timing of professional qualification measures to the complete or partial discontinuation of short-time work and such professional qualification measures must end when regular working hours are resumed. If the employer agrees and continues to release the employee from work, further qualification measures can also be continued beyond the end of short-time work.

II. Short-time benefits

1. How high are short-time benefits during the entitlement period?

» **1st to 3rd month: 60 % (67 % for employees with children)** of the net pay gap

If the loss of earnings due to the loss of work in the respective reference month amounts to at least 50 %, short-time-benefits will be increased according to the following schedule:

» **4th to 6th month: 70 % (77 % for employees with children)** of the net pay gap

» **7th month and beyond: 80 % (87 % for employees with children)** of the net pay gap.

It is not necessary for the reference months to constitute a coherent period. This increase is initially limited until 31 December 2020.

Short-time benefits will continue to be tax-exempt under Social Protection Package II. As a wage replacement benefit, however, short-time benefits are subject to the so-called taxation escalation clause under tax law.

The social security contributions which employers normally have to pay for their employees are fully reimbursed by the Federal Employment Agency.

Reference months will be taken into account from 1 March 2020.

The net remuneration difference relevant for determining short-time benefits is calculated as the difference between

- » the pay that would have been received without the loss of work during the entitlement period (maximum of EUR 6,900.00 gross) and
- » the pay actually earned during short-time work.

A computer program usually calculates the short-time benefits.

However, a table for calculating short-time benefits is also available at https://www.arbeitsagentur.de/datei/kug050-2016_ba014803.pdf.

The amount of short-time benefits is capped at a maximum amount of EUR 6,900.00 for gross monthly wages and salaries.

2. How long are short-time benefits paid? Is an extension, reduction possible?

The Federal Employment Agency pays short-time benefits for a maximum period of twelve months. Extension to up to 24 months can be applied for. In the case of Covid-19-related short-time work, the Federal Cabinet decided on 16 September 2020 to extend the period of entitlement to up to 24 months, but no longer than 31 December 2021. However, the legal basis has yet to be created.

3. Allowances/top-up payments by the employer to short-time benefits

If you pay an allowance to top up short-time benefits (= 'topping up short-time benefits'), for instance, on the basis of a collective agreement, no social security contributions or wage tax are payable in this respect. However, this is subject to the condition that the top-up amount together with short-time benefits does not exceed 80 % of the lost pay. This means that only employer allowances to short-time benefits of up to 80 % of the difference between the target pay and the actual pay are

tax-exempt and contribution-free. Any top-up payments in excess thereof are taxable and subject to social security contribution payments. According to the legislation in force at the time of the last update of this info sheet, tax exemption is limited to allowances paid for wage payment periods ending before 1 January 2021.

The tax-exempt employer allowances must be included in the amounts subject to the **taxation escalation clause**. The employer must enter the allowance amounts in the electronic wage tax statement for the calendar year 2020 under number 15.

4. Who receives short-time benefits?

a) Employer requirements

At least one employee must be employed by the company or the relevant department.

b) Considerable loss of work with loss of pay

A loss of work is deemed to be considerable if

- » it is based, as in the present case, on economic grounds or an unavoidable event (in this case coronavirus),
- » at least 10 % of employees are affected by loss of work. When calculating this threshold, the first step is to determine the number of employees in existing jobs on at least one day of the allowance period. This also includes marginally employed employees and women on maternity leave. This does not include trainees and employees whose employment relationship is suspended (for instance, due to parental leave) or who receive maintenance or transition payments, or outworkers. When determining the 10 % value, results may not be rounded.
- » Furthermore, the loss of work must be temporary and unavoidable. The reduction of overtime and the complete granting of 2019 leave is therefore mandatory for approval of short-time benefits even after amendment of the law. The only exception being that a negative working time account is no longer required.

c) Personal requirements:

Short-time benefits will be paid for each employee in a **job** that is **subject to social security contributions**.

Trainees too can receive short-time benefits. However, the employer should try to continue training at the

company. If short-time work for trainees is unavoidable despite this, the trainee is initially entitled to protection in the form of continued pay for a period of six weeks (section 19 (1) No. 2 of the Vocational Training Act (*BBiG, Berufsbildungsgesetz*)). Short-time benefits can be paid thereafter.

The directive issued by the Federal Employment Agency recommends that the competent body under the Vocational Training Act (for instance, the Chamber of Industry and Commerce, Chamber of Crafts), in coordination with the vocational guidance service, should be involved in the examination of whether short-time work is necessary for trainees.

Furthermore, short-time benefits can also be paid to trainees without further requirements to be met if the trainees, after termination of their vocational training, take up regular (temporary or permanent) employment subject to social insurance payments with the same or another employer.

Short-time benefits are, for instance, **not available for:**

- » CEOs who are shareholders and exempt from social security contributions (shareholding of 50 % or more)
- » Mini-jobbers
- » Early retirees during the phase of release from work
- » Sickness benefit recipients
- » Pensioners on reaching retirement age
- » Students trainees
- » Employees who have been dismissed.

Only hospitals are completely exempt from short-time benefits during the period from 16 March 2020 to 30 September 2020 during which the rescue package for the healthcare system is initially available. During this period, hospitals receive flat payments to cover personnel and material costs. Private clinics that are not entitled to compensation payments under the rescue package regulations can, however, receive short-time benefits if the other conditions are met.

5. How do I get short-time benefits?

A two-stage procedure applies here:

Step #1: Reporting the loss of work

Short-time benefits are paid at the earliest from the month in which the Federal Employment Agency receives the report on loss of work. The report can only be made by the employer or the works council.

The following documents must now be submitted when reporting short-time work:

- a) Electronic or written report on the loss of work to the office of the Federal Employment Agency in whose district the company is located:
<https://www.arbeitsagentur.de/unternehmen/finanziell/kurzarbeitergeld-bei-entgeltausfall>;
- b) A description of the reasons why short-time benefits are being applied for (more than just 'corona' as a keyword), i. e. substantive explanation of the operational requirements (see above, section II. 4.a) and the substantial loss of work (see above, section II. 4.b).

The Federal Employment Agency must immediately issue a written decision as to whether the conditions for granting short-time benefits are met (so-called '**notice of recognition**').

Step #2: Application for short-time benefits – Benefit application

- a) The company must apply for short-time benefits for each employee concerned, providing proof of the respective personal requirements (see above, section II. 4.b).
- b) Short-time benefits must be applied for for the respective calendar month within a non-extendable period of three calendar months. The period begins at the end of the month in which the days for which benefits are claimed fall.
- c) The employer pays the employee the reduced pay corresponding to the reduced working time plus short-time benefits (if short-time work is zero, the employer only pays the short-time benefits). The Federal Employment Agency reimburses the employer for the short-time benefits (to be passed on to the employee). The exact calculation is carried out by payroll accounting software.

6. Special payments for employees

In order to alleviate the additional burden of the corona pandemic, employers can now pay assistance and support to their employees up to an amount of EUR 1,500 or as a non-cash benefit without tax or social security contributions being payable thereon.

This applies to special benefits received by employees between 1 March 2020 and 31 December 2020. A precondition is that the assistance and support are granted in addition to the pay that is owed anyway. It is important to note that these special payments do not constitute an increase in short-time benefits.

III. Payroll accounting during short-time working

What information does payroll accounting need for short-time benefits?

A detailed list of the employees who receive short-time benefits. The list must show the following information: Precise recording of hours per day per employee, broken down into hours worked 'normally' and hours for which short-time benefits are to be paid.

Example:

John Doe: Monday, 2 hours normal, 3 hours short-time benefits
 John Doe: Tuesday, leave
 John Doe: Wednesday, sick
 John Doe: Easter Sunday, 5 hours normal, etc.

PKF Fasselt will be pleased to provide a corresponding sample list. Please contact us if you are interested.

Please understand that if PKF handles payroll accounting for you, only the data you have entered in this list will be used for payroll accounting during the period of reduced working hours.

IV. What PKF Fasselt can do for you:

- » Advice on labour law issues, in particular, on **labour contracts and**
- » **Company agreements**
- » Drafting the **notification of employees of short-time work**
- » Preparation of **sample statements of account** for our payroll accounting clients
- » Advice on **reporting the loss of work to the Federal Employment Agency in order to obtain the notice of recognition**
- » Advice on **applications for short-time benefits** – application for benefits
- » Implementation of **monthly short-time benefits accounting** as part of payroll accounting and bookkeeping; assistance in the data collection process
- » Advice on the monthly applications for reimbursement of short-time benefits

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