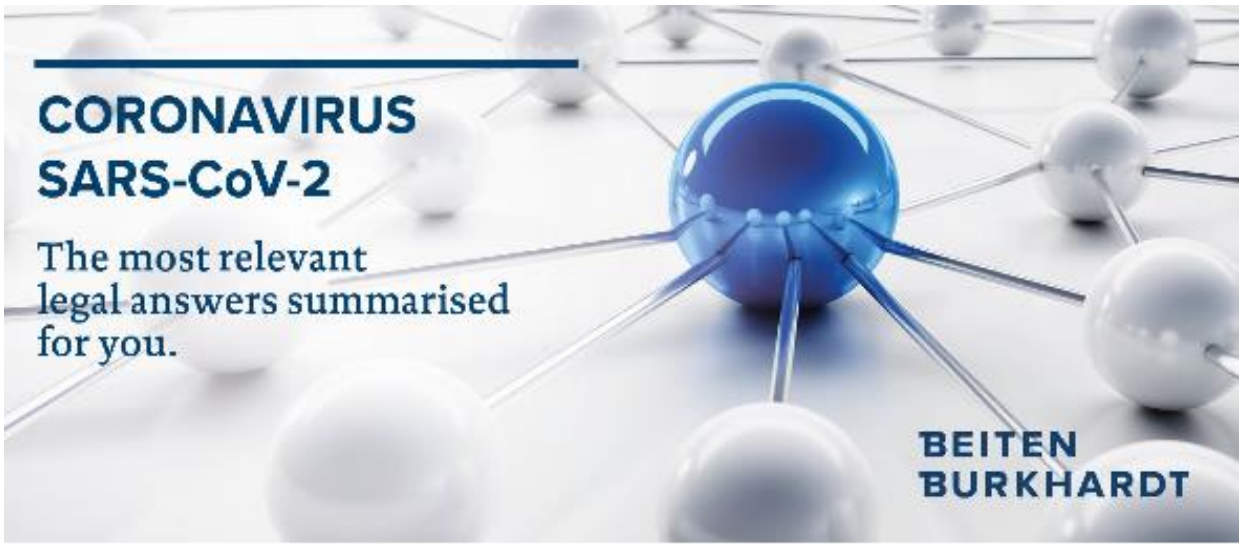

Short-Time Working, Act 2 - Be Careful When (Hastily) Applying for Short-Time Allowance!

The payment of short-time allowance is preceded by a two-stage procedure. At first, the "notification of loss of working hours" must demonstrate that the general and operational requirements for short-time allowance (sections 96, 97 SGB III (*Third Book of German Social Code*)) are fulfilled. Among other things, it must be stated in the notification to what extent the working hours are to be reduced. There is a prognostic element to this, since at the time of notification it is not yet possible to state in detail how the operational situation will develop and it is also not yet required to state which employees will be affected by the loss of working hours and to what specific extent. Based on the notification, the employment agency decides on the basic requirements for receiving short-time allowance.

When applying for short-time allowance, on the other hand, a lot of detailed information must be provided. After all, this "2nd act of short-time working" is about explaining the concrete loss of working hours and this in relation to the respective employee who is affected by short-time work. Here, some special features must be taken into account and errors with possibly serious consequences must be avoided urgently.

A. Application for the short-time allowance

The short-time allowance must be applied for every calendar month again and is granted retroactively (section 324 (2) sentence 2 SGB III). The application has to be submitted within the three-month cut-off period pursuant to section 325 (3) SGB III. The period begins at the end of the month for which payments for short-time working are applied for. For the application for short-time allowance, it is advisable to use the corresponding form of the Federal Employment Agency (https://www.arbeitsagentur.de/datei/antrag-kug107_ba015344.pdf) as well as the corresponding short time allowance settlement list (*KUG-Abrechnungsliste*) (https://www.arbeitsagentur.de/datei/kug108_ba013010.pdf).

B. Provision of Proof

The employer must provide the employment agency with evidence of the requirements for the provision of short-time allowance on request (section 320 (1) sentence 1 SGB III). This concerns in particular the evidence of the extent of lost working hours which can be attributed to the economic reasons required for short-time allowance or an unavoidable event. The evidence does not have to be provided together with the application for short-time allowance; the relevant forms need only be completed with regard to the actual volume of lost working hours and the resulting key figures for the calculation of the short-time allowance. However, it must be possible to provide such evidence as soon as the employment agency so demands. It is therefore strongly recommended that the relevant documents be kept available for (later) submission as evidence.

I. Evidencing the loss of working hours

Evidencing of working hours actually lost will be comparatively easy to produce if the working hours are fully recorded in the company: By submitting the corresponding working time records, evidence can be provided of the extent to which the respective employee has in fact worked. A comparison with the standard working hours stipulated in the employment contract/collective agreement then results in the delta that is relevant for the short-time allowance.

In companies that do not record the entire working time (key word *trust-based working time*), short-time allowance can only be claimed if the working time is recorded in detail at short notice. This can be done by means of appropriate working time documentation by the individual employee or by means of appropriate software-based systems. However, the employer must ensure in this respect as well that the documented time entries are plausible. Schematic working time entries that cannot be reconciled with reality in retrospect are not helpful and should therefore be avoided.

Practical advice: It is advisable, especially when working in a home office or in case of mobile working, to at least demand keyword time entries that are recorded every working day and at least show the actual working time volume, or better still the actual time span (start and end time) of the work. The right of co-determination of the works council (depending

upon arrangement in particular section 87 (1) No. 1, 6, 7 German Works Constitution Act (*BetrVG*) is to be considered in this context.

II. Evidencing the downtimes relevant to short-time working

It will not yet suffice to simply provide evidence of the actual loss of working hours. The employer must also prove that the downtimes are of relevance to short-time working, i.e. that the downtimes are due to circumstances that entitle the employee to short-time allowance. For this to be the case, it must be an atypical temporary loss of working hours in comparison to the usual business development and the options available in the company to increase flexibility must have been exhausted to a reasonable extent. Only if these prerequisites are also met is there an "unavoidable loss of working hours" within the meaning of section 96 (1) sentence 1 no. 3 SGB III.

1. Loss of work due to Covid-19

Insofar as the downtimes are due to the fact that the business as such had to be closed down as a result of an officially ordered measure (whether as a result of an individual order under the Infection Protection Act or due to general decrees/ordinances, such as in particular in the retail and hotel/catering industry), there is a direct connection to the pandemic, so that a downtime can regularly be assumed to be by its very nature non-standard, temporary and thus relevant to short-time allowance.

Practical advice: However, even in such a case, a comparison with the usual amount of work in previous years is necessary: If the loss of working hours occurs at a time when the company was normally expected to have less work (for instance, in comparison to previous years), it would not be in conformity with the law to report a loss of working hours in contrast to the full utilization of the company' s capacity.
If, on the other hand, the business operation is not closed due to an official order, but the reduced workload is the result of the general decline in orders due to the pandemic, further evidence will have to be provided.

Practical advice: Therefore, documents should be kept available which can then be presented if necessary, from which an exceptional reduction in orders compared to previous years can be derived. After all, it is a question of proving that the decline in orders is not to be regarded as "seasonally typical" but is due to the current exceptional situation. This can be done, for instance, by documenting the current order intake in comparison to the average figures of previous years. The relevant documentation should be prepared and kept in a comprehensible form so that it can be presented immediately if necessary.

2. Required use of holidays and flexibility options

The law also requires companies to make their own efforts at company level before public support is provided in the form of short-time allowances. Starting point here is the "unavoidability of loss of working hours" within the meaning of section 96 (4) SGB III and, in particular, the obligation to reduce holiday entitlements and to use operational flexibility instruments.

2.1 Use of holiday entitlements

According to the wording of section 96 (4) sentence 2 no. 2 SGB III, there should be no avoidable loss of working hours if the loss of working hours can be avoided by granting (paid) holidays. According to the wording of the law, the sole restriction is that no priority holiday requests of other employees are opposed. So, does this mean that all holiday entitlements must first be reduced before short-time allowance can be considered for the respective employee?

The German Federal Employment Agency is providing relief in this respect during the Covid-19 pandemic: For a limited period until 31 December 2020, it is not required that the holiday entitlement of the current year be used to avoid short-time working if the respective employee has already specified individual holiday wishes (https://www.arbeitsagentur.de/news/corona-virus-informationen-fuer-unternehmen-zum-kurzarbeitergeld, "What about holiday/remaining holiday?",retrieved on 18 May 2020). Individual holiday requests will then be given special weight, for example to enable working parents to cover the costs of childcare, which has already become more difficult due to the closure of daycare facilities and schools. However, the relief provided is not explicitly limited to the individual holiday wishes of working parents. It can therefore be assumed that in general the individual holiday wishes of employees will be given priority protection and that consequently the holiday entitlement for the current calendar year can be freely scheduled for all employees.

Practical advice: If not already done, it will be necessary to draw up or update the annual holiday schedule and to invite employees to submit their individual holiday requests. If a works council exists, its right of co-determination must be observed when drawing up a holiday schedule pursuant to section 87 (1) no. 5 BetrVG.

On the other hand, any remaining holiday entitlements from the previous year must be reduced, i.e. granted first before the respective employee can draw short-time allowance. For these remaining holiday entitlements, the statutory regulation remains in force, according to which priority holiday wishes of other employees may conflict with the granting of the remaining holiday entitlements. If this is the case, remaining holiday entitlements can also continue to exist, even though short-time allowance has been requested.

Practical advice: In this context, too, care must be taken to ensure that there is proper documentation which can be presented later to explain, if necessary, which legitimate holiday

entitlements of other employees existed that prevented the remaining holiday entitlements from being reduced. Corresponding remaining holiday entitlements must then, however, be granted promptly.

2.2 Application of operational flexibility instruments

According to section 96 (4) sentence 2 no. 3 SGB III, there is also no avoidable loss of working hours if such loss can be compensated by using the instruments provided in the company for dealing with fluctuations in working time. Only those instruments that are actually applied in the company come into consideration here, so that there is no obligation to make use of an option for flexibilisation that may be provided for in collective agreements but has not been implemented in the company. If, for instance, annual working time or general flexitime accounts do exist in the company, then in principle the reduction of existing credit hours (*Plusstunden*) should be demanded.
However, the reduction of such accounts should not be demanded to an unlimited extent. Due to the systematic nature of the social law provisions, there are many arguments supporting the idea that the use of credit hours to avoid short-time working should only be demanded to the extent that the flexibility associated with the working time quota also allows this in the interest of the company. In other words: If working time credits are freely available to employees under the company's regulations, for example to grant working time sovereignty, these quotas do not have to be reduced before short-time allowance is claimed.
The working time credits listed in section 96 (4) sentences 3 and 4 SGB III remain unaffected, including long-term accounts in accordance with section 7c (1) SGB IV (e.g. for sabbaticals, partial or early retirement, and parental and care periods) and saved working time quotas that amount to more than 10 percent of the contractually owed annual work performance.

Practical advice: f working time accounts do exist in the company, it must be assessed on a case-by-case basis whether prior to claiming short-time allowance credit hours must first be reduced. When doing so, the purpose and structure of the respective instrument must be considered. The following will serve as a guideline: Whatever has been saved in the company's interest to cushion normal fluctuations in working time is to be reduced before short-time allowance is claimed. The review and respective assessment is necessary because the applicant assures the labour administration that the existing possibilities have been exploited. A general reduction of all possible credit hours - in order to be "on the safe side" from the employer's point of view - cannot be recommended as this may lead to individual disputes with the employees concerned, depending on the situation.

While the legal regulations and their application in practice usually require that debit hours (*Minusstunden*) be built up to the extent provided for in the company before short-time

allowances can be paid, the Federal Employment Agency will also refrain from doing so in the current pandemic situation (also until the end of 2020) (https://www.arbeitsagentur.de/news/corona-virus-informationen-fuer-unternehmen-zum-kurzarbeitergeld, "Must negative working time balances be built up and or working time credits reduced?"retrieved on 18 May 2020).

C. Risky inaccurate statements

Upon application for short-time allowance, the applicant, i.e. the employer, assures that the information provided is true to the best of its knowledge and that only those employees who are entitled to short-time allowance are listed on the documents submitted. Furthermore, it must be assured that the loss of working hours is solely attributable to economic reasons or an unavoidable event and that the loss of working hours could not be avoided by operational means. At this point, an urgent warning is to be issued against making hasty statements that have not been checked in detail and can be substantiated later.
If the employer is requested to provide evidence and is unable to do so, the short-time allowance will either not be paid or - if it has already been paid - will be reclaimed by the employer.

Under individual contracts, the employer bears the corresponding economic risk of not paying or reclaiming short-time allowance. The employer cannot demand compensation from the employee, since the employee - irrespective of the actual payment by the employment agency - retains his or her short-time allowance claim against the employer.

Under public law, the failure to prove that the requirements for receiving short-time allowance have been met can constitute an administrative offence which is punishable by a fine of up to EUR 2,000 pursuant to section 404 (2) no. 25 SGB III. The incorrect statement of circumstances relevant to the payment of short-time allowance can also lead to criminal liability for fraud (section 263 German Criminal Code (*StGB*)) or subsidy fraud (section 264 StGB). Even if the employment agencies have currently reached or already exceeded the limit of their capacity due to the sheer volume of notifications of short-time working, a subsequent, systematic review of applications for short-time allowance must be expected - similar to the situation after the financial crisis.

Pracitcal advice: When applying for short-time allowance, what matters is the actual loss of working hours. If, when preparing the application, it should turn out that the assumptions communicated to the employment agency when the short-time working was notified (i.e. in the "1st Act") were too pessimistic, this is in principle not harmful: There is no compulsion to claim short-time allowance to the extent that it was notified when the loss of work was reported. It is important, though, that the information in the application for short-time allow-

ance is exact and correct. It may be necessary to correct the notification of the loss of working hours. If, in turn, an application for short-time allowance has already been submitted and its incorrectness is not discovered until after it has been sent, the employee must act immediately and correct the erroneous information in order to avoid or at least mitigate the consequences of an administrative offence or even criminal liability.

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