



# **Covid-19 Coronavirus: Protective Shields to Mitigate Impact for Companies and Employees**

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## An Overview of Measures Enacted or Envisaged by the German Government

The current outbreak of COVID-19 coronavirus, recognized by the World Health Organization as a global pandemic, has already had a material impact on the operations of companies worldwide, and this is expected to continue. Whether in the short or long term, this will likely put significant pressure on the financial situation of these companies, particularly their liquidity and ability to maintain a positive going concern.

The German government is taking swift action to mitigate the economic impact of COVID-19 on German companies and their employees by enacting various new regulations that together are intended to form a protective shield for German companies and their employees impacted by COVID-19.

Peter Altmaier, Germany's economy minister, said the measures enacted so far have been "unprecedented in Germany's post-war history," calling them the "most comprehensive and effective assistance and guarantees there have ever been created in a crisis."

The following provides an overview on the protective measures enacted (or expected to be enacted) by the German government to address and mitigate the impact of COVID-19 on German companies and their employees. The information in this overview reflects the legislative developments in Germany as of March 17, 2020.

## 1. Protective shields for companies

### 1.1. Short-time work (*Kurzarbeit*)

Short-time work (*Kurzarbeit*) is a legal instrument to bridge a temporary work shortfall. It basically means that the working time of the employees (or a part of the workforce) is being reduced, which results in a reduced remuneration for employees being affected by the short-time work. Subject to certain requirements (as discussed in the following), there are statutory benefits called short-time compensation (*Kurzarbeitergeld*) that are being paid to the impacted employees to cover part of their reduced remuneration.

With a view to the expected drop in demand due to the COVID-19 crisis resulting for many companies in a significant decrease of the workforce utilization, companies may be facing the necessity for redundancies (*betriebsbedingte Kündigungen*) to avoid insolvency. To alleviate the negative impacts on employers and employees, and with a particular view to avoid such redundancies, the German government eased the requirements for obtaining short-time compensation by passing an Act amending the existing rules of the German Social Code III (*Sozialgesetzbuch III*) on 13 March 2020.

It is expected that the new rules will come into force in the next few days, and will be effective retroactively as of 1 March 2020. The new rules are intended to be applicable for a limited period of time until 31 December 2021.

In essence, the strict eligibility rules concerning short-time compensation have been loosened, including by introduction of a lower quorum of employees affected by the short-time work and the extension to temporary/agency

workers. Social security contributions incurred on short-time compensation will be completely reimbursed by the Federal Employment Agency (*Bundesagentur für Arbeit*).

### 1.1.1. Changes in the German Social Code III with regard to COVID-19<sup>1</sup>

In accordance with sec. 96 German Social Code III, obtaining short-time compensation requires that regular working hours are reduced as a result of either economic reasons (e.g., due to follow-up orders being held off) or force majeure (unabwendbares Ereignis), with the COVID-19 crisis falling in the category "force majeure." Certain restrictions and thresholds applying under the previous legal regime are now facilitated by the new rules passed by the German government providing as follows:<sup>2</sup>

- **10 percent threshold:** For purposes of applying for short-time work and short-time compensation, it is sufficient that at least 10% of the employees within a plant (or a department/plant section) are effected by the short-time work, resulting in a decrease of the affected employees' regular salary by more than 10%. Under the existing regime, at least 1/3 of the employees of a plant/plant section were required to be affected by the short-time work. This results in companies being able to apply much earlier and with less employees being affected by the short-time work for short-time compensation.
- **Waiver of negative work time balances:** Companies applying rules on work time variation (*Arbeitszeitschwankungen*) at their work force were required to use work time variation, including the establishment of a negative balance, for purposes of avoiding short-time work. Pursuant to the new regime that will come into force, shortly, the establishment of negative work time balances can be waived in full or in part without affecting the eligibility to receive short-time compensation.
- **Temporary workers are eligible for short-time compensation:** Temporary workers shall be eligible to apply for short-time compensation, which has not been available to them under the current regime.
- **Reimbursement of social security contributions:** In addition to the short-time compensation it pays to the affected employees (as a certain percentage of the salary for the cancelled worktime, as described in more detail below), the Federal Employment Agency assumes the liability of the employer to contribute to the social security for the cancelled working hours. As opposed to the current situation, the Federal Employment Agency will refund the social security contributions with respect to the cancelled working hours (employer and employee contributions) in its entirety.
- **Extension:** Generally, the maximum period subsidized is 12 months. By statutory order, the Federal Ministry of Labor and Social Affairs (*Bundesministerium für Arbeit und Soziales*) may extend this period up to a maximum of 24 months in aggregate.

The short-time compensation amounts to 60% of the regular salary for the individual employee's cancelled working hours, unless at least one child lives in the household of the employee, in which case the short-time compensation entitlement is increased to 67%.

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<sup>1</sup> BMWi, Schutzschild für Beschäftigte, ([https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?\\_\\_blob=publicationFile&v=14](https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?__blob=publicationFile&v=14)).

<sup>2</sup> Regierungsentwurf, Arbeit für Morgen, ([https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Gesetze/Regierungsentwerfe/reg-arbeit-von-morgen-gesetz.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Gesetze/Regierungsentwerfe/reg-arbeit-von-morgen-gesetz.pdf?__blob=publicationFile&v=3)).

### 1.1.2. Next steps to consider and application procedure<sup>3</sup>

If you face, or expect to face in the next couple of weeks or months, the need for cuts in your business activities affecting at least 10% of your workforce as a result of the evolving the COVID-19 crisis, it is time for you now to prepare for a successful application to receive short-time compensation for your affected employees.

As first step, you should consider whether either the individual employment agreements of your employees contain a short-time clause permitting you as employer to instruct short-time work unilaterally, or whether the permission for such instruction is granted to you under applicable collective agreements (*Tarifverträge*). If neither of these two options apply to your business, it is time to take any of the following actions:

- If a works council (*Betriebsrat*) is established, you can enter into a shop agreement with the works council governing the permission to instruct short-time work.
- If no works council exists, an individual agreement with each affected employee, considering the appropriate form as prescribed by the form requirements in the employment agreement (typically written), is needed.

If you are entitled to instruct your employees to work short-time based on any of the possibilities described above, you are further required to notify the competent Employment Agency of the decrease of your business activities and the short-time work resulting from such decrease in general (*Kurzarbeitsanzeige*). Short-time compensation can be received starting from the month, in which the notification is being made. The respective notification form can be found on the website of the Federal Employment Agency as form “**Kug 101**.” The reasons for the short-time work, which will form the basis for the acceptance or refusal decision of the Employment Agency, have to be specified in detail in the notification. Based on experiences made during the financial crisis in 2008, we expect the Employment Agencies to be rather generous in accepting short-time work requests during the COVID-19 crisis, provided, always, the abovementioned criteria (particularly, at least 10% of the employees being affected by the reduced work time resulting in them losing more than 10% of their regular salary) are met.

Following receipt of the acceptance decision, the application for short-time compensation has to be made by using the forms “**Kug 107**” and “**Kug 108**,” which must be submitted to the respective competent Employment Agency mentioned in the acceptance decision. Please note that both forms need to be completed and submitted to the competent Employment Agency within three (3) months following the expiry of the month for which the short-time compensation is requested for the first time. As an example, if you intend to receive short-time compensation for your affected employees starting from the month March 2020, completed forms Kug 107 and Kug 108 must be submitted to the competent Employment Agency on 30 June 2020 at the very latest (provided, always, you are notifying the Employment Agency in time still in March 2020 of the short-time work, using form Kug 101).

Please note that under certain circumstances, outstanding vacation entitlements of employees (in particular entitlements of previous years) need to be used up first before instructing short-time work and applying (successfully) for short-time compensation.

## 1.2. Tax-related liquidity assistance for businesses<sup>4</sup>

In order to improve companies' liquidity situation, the options for deferring tax payments and reducing tax prepayments will be enhanced, and enforcement rules will be adapted. Enforcement measures (e.g., attachment

<sup>3</sup> Agentur für Arbeit, Kurzarbeitergeld ([https://www.arbeitsagentur.de/datei/merkblatt-8a-kurzarbeitergeld\\_ba015385.pdf](https://www.arbeitsagentur.de/datei/merkblatt-8a-kurzarbeitergeld_ba015385.pdf)).

<sup>4</sup> BMWi, Schutzschild für Beschäftigte, ([https://www.bmw.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?\\_\\_blob=publicationFile&v=14](https://www.bmw.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?__blob=publicationFile&v=14)).

of bank accounts of debtors of tax (pre-)payments) and late-payment penalties are to be waived until 31 December 2020 if a debtor is directly affected by COVID-19.

### 1.3. Government funding

#### 1.3.1. Government loans<sup>5</sup>

In order to attenuate the severe financial distress companies are facing as a result of the COVID-19 crisis, in particular plunges in turnover, the German government has committed to providing sufficient liquidity to overcome the impacts of the COVID-19 crisis. The government confirmed to be willing to provide an unlimited amount of liquidity (so called Protective Shield for Companies).

Until today and according to the announced further plans of the government, such financial support is mainly granted through the bank of the German Development Loan Corporation (*Bank der Kreditanstalt für Wiederaufbau, "KfW"*) generally either by way of guarantees issued to the lending banks or by way of syndicated loans including the KfW as one of the lenders.

As a first step, the government has expanded existing liquidity assistance programs of the KfW to make it easier for companies to access cheap loans, e.g., by extending the group of the eligible recipients of the respective funding or the permitted purpose of the loans or by way of increasing the coverage of provided guarantees.

The German government is working on additional and new KfW funding programs to procure that all affected companies will get access to the provided working capital credits as eligible recipients. These additional special funding programs are subject to approval by the European Commissions which is currently outstanding. Dechert will closely monitor future developments regarding financing programs by the German government.

Currently in particular the following KfW funding programs are in place and have been subject to extension with respect to the particular requirements created by the current situation:

##### 1.3.1.1. *KfW Business Loan (KfW-Unternehmerkredit)*<sup>6</sup> and *ERP-General Founders' Loan (ERP-Gründerkredit-Universell)*<sup>7</sup>

KfW has taken specific measures to increase the willingness of the lending banks to issue loans to companies affected by COVID-19. Under these loan programs, generally, KfW issues guarantees to the landing banks for approximately 50% of the loans. As a funding measure during the COVID-19 crisis the KfW increased the percentage of the loans covered the KfW guarantees from 50% to up to 80%.

While these programs are generally limited to loans in the amount of up to €25million, the scope of the loans which can be backed-up by KfW guarantees were increased to €250million, including working capital loans.

#### **Eligible beneficiaries for**

- **KfW Business Loan (KfW-Unternehmerkredit):** Domestic and foreign companies as well as freelancers who have been active on the German market for at least five (5) years, freelancers; and foreign

<sup>5</sup> BMWi, Schutzschild für Beschäftigte, ([https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?\\_\\_blob=publicationFile&v=14](https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?__blob=publicationFile&v=14)) and <https://www.kfw.de/KfW-Konzern/Newsroom/Aktuelles/KfW-Corona-Hilfe-Unternehmen.html>.

<sup>6</sup> KfW, Merkblatt zum Unternehmerkredit, [https://www.kfw.de/Download-Center/F%C3%B6rderprogramme-\(Inlandsf%C3%B6rderung\)/PDF-Dokumente/6000000188-Merkblatt-037-047.pdf](https://www.kfw.de/Download-Center/F%C3%B6rderprogramme-(Inlandsf%C3%B6rderung)/PDF-Dokumente/6000000188-Merkblatt-037-047.pdf).

<sup>7</sup> KfW, Merkblatt zum Unternehmerkredit, [https://www.kfw.de/Download-Center/F%C3%B6rderprogramme-\(Inlandsf%C3%B6rderung\)/PDF-Dokumente/6000000188-Merkblatt-037-047.pdf](https://www.kfw.de/Download-Center/F%C3%B6rderprogramme-(Inlandsf%C3%B6rderung)/PDF-Dokumente/6000000188-Merkblatt-037-047.pdf).

subsidiaries of German companies and foreign joint ventures with significant German participation. Companies with an annual turnover of up to €2 billion can be eligible for this funding program.

- **ERP-General Founders' Loan (*ERP-Gründerkredit-Universell*):** Start-ups and company successors, freelancer, young medium-sized companies that have been active on the market for less than five (5) years, foreign subsidiaries of such companies and foreign joint ventures with significant German participation.
- **Loan conditions:** Credit line up to €200 million. The interest rate is to be agreed in the individual case, while the interest rates in the program generally start from 1% p.a. This includes, for example, working capital loans (*Betriebsmittelkredit*). Provision of customary security might be requested.
- **Application procedure:** The loan is being applied for with a financing partner of KfW which are generally local banks, like Deutsche Bank, Commerzbank, Sparkasse etc.

#### 1.3.3.2. *KfW-Loan for Growth (larger companies/turnover threshold €5 billion)*

While this funding program generally aims to promote innovation and digitalization projects, this program was also extended to apply for general working capital loans.

With respect to the COVID-19 crisis, the group of eligible recipients for the KfW Loan for Growth was extended to companies with a turnover of up to €5 billion (from formerly only companies with a turnover of up to €2 billion).

Loans under this program are granted as syndicated loans with KfW bank as one of the lending banks. In addition also under this program, KfW issues repayment guarantees to the benefit of the lending banks for up to 70% of the total loan amount.

Interest rates, securities and terms of the loans are subject to the agreements in each individual case.

#### 1.3.2. *KfW Guarantee Program (Bürgschafts-Programme)*<sup>8</sup>

Further in light of the COVID-19 crisis, the existing KfW guarantee programs were subject to modifications under which KfW provides security for guarantees (*Bürgschaften*) issued by lending banks.

The limit for guarantees which can be secured by KfW was doubled from €1.25 million to €2.5 million.

#### 1.3.3. *Other measures*<sup>9</sup>

Other measures include planned new KfW loan programs and existing export of credit guarantees. On addition, European Central Bank and the European Commission plan further measures to strengthen liquidity.

### 1.4. **Suspension of the obligation to file for insolvency**

German law provides for an obligation for the management of corporate entities to file for the opening of insolvency proceedings without undue delay and not later than within three weeks after the respective company is either overindebted (*überschuldet*) or unable to honor its financial obligations (*zahlungsunfähig*). Breach of such obligation can lead to civil law liability and prosecution under criminal law.

<sup>8</sup> BMWi, Schutzschild für Beschäftigte, ([https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?\\_\\_blob=publicationFile&v=14](https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?__blob=publicationFile&v=14)).

<sup>9</sup> BMWi, Schutzschild für Beschäftigte, ([https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?\\_\\_blob=publicationFile&v=14](https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaefigte-und-unternehmen.pdf?__blob=publicationFile&v=14)).

Due to the COVID-19 crisis, many German companies are experiencing severe financial strains and might even get close to an insolvency scenario.

On March 16, 2020, the German federal government (Ministry of Justice) announced its intention to suspend the management's duty to file for insolvency in order to preserve companies in Germany from an insolvency filing if this would be exclusively related to the knock-on effects of COVID-19 on the respective companies' business. According to the currently discussed draft act this suspension shall last until 30 September 2020, and the Federal Ministry of Justice shall be empowered to extend the suspension period further until 31 March 2021.<sup>10</sup> According to the press release published by the Federal Ministry of Justice, the suspension of the duty to file for insolvency shall require:

- the occurrence of an insolvency event due to the economic effects caused by COVID-19; and
- a reasonable prospect of successful restructuring of the affected company based on the (i) either an application for state aid or (ii) respective negotiations with the company's stakeholders.

In addition to the duty of insolvent corporate entities to file for the opening of insolvency proceedings, German civil law requires an increased level of diligence to be applied by the management in times of distress. There are several duties specifically applying in scenarios of financial distress, e.g., the duty to convene shareholder meeting if the cumulated loss is equal to 50% of the share capital or the duty to constantly monitor liquidity more closely than in the ordinary course of business.

According to the German Act on Limited Liability Companies, in the interest of the company's creditors in the insolvency proceedings, managing directors can be held personally liable for any payments made by the company after the date when the company has actually become insolvent. Management may only make payments which are compatible with the due care of a prudent business man and which are made in consideration of the creditors' interests (Section 64 of the German Act on Limited Liability Companies, Section 92 para 2 of the German Stock Corporations Act).

If the duty to file for insolvency would be suspended as currently discussed by the German government this would not *per se* affect the management's liability under Section 64 of the GmbHG and Section 92 para. 2 of the German Stock Corporations Act. It remains to be seen whether and to what extent such obligations will also be adjusted in the course of the discussed extension of the term to file for insolvency.

Dechert will closely monitor and provide updates on the scope of the legislative act to be taken by the German government to provide companies relief with respect to the duty to file for insolvency. However, particularly in the current situation dominated by the effects of the COVID-19 crisis, the management should seek independent legal advice, to remain aware of potential civil or criminal law liability.

## 2. Protective shields for employees

### 2.1. Home office

Generally, an employee's place of work is determined by the contractual provision. Typically, this will be on site of the employer. If no home office-clause is included in the employment contract, the employee has to consent to the employer's request to send the employee to home office. Forcing employees to work from home is only permitted in very rare cases such as an urgent emergency.

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<sup>10</sup>Pressemitteilung, 16 März 2020 Insolvenzantragspflicht für durch die Corona-Epidemie geschädigten Unternehmen, [https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/03/1620\\_Insolvenzantragspflicht.html](https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/03/1620_Insolvenzantragspflicht.html).

It is advisable to enter into an addendum to the employment contract with each employee, and not only accept oral agreements to working from home. The addendum should contain particularly the following provisions:

- Consent of the employee to work from home when requested by the employer for a limited period of time (clause can be limited to emergency cases or not).
- Data protection agreement (considering that the employee works with company data from home, and it needs to be avoided that third parties are having access to company data at the home of the employee).
- As the workplace safety rules apply when working from home likewise than when working on site and the employer is obliged to verify that the employee's home office complies with the workplace safety rules, it is further advisable that the addendum contains a clause governing the employer's right to inspect the home office workplace upon prior notice to the employee.

## 2.2. Salary payments

In case of office closures and low workload for employers, the company is generally obliged to continue payment of their regular salary during that time (the risk is with the employer, not with the employee). The reason is that employees have a legal right to work when they are under an employment agreement, which the employer cannot suspend unilaterally (save in cases of release from work duties when having terminated the employment during notice period, for example). In other words, a statutory right of an employee towards the employer for being provided with (qualified) work exists. In essence, in all cases where the employee is able to work (i.e., not when being sick), the company is obliged to continued salary payment even if the company is closing the office and do not have work for the employees from home office.

In the event of sickness of an employee due to COVID-19, the German sick pay provisions apply. If someone has to be isolated due to having been in contact with someone with the virus or returning from a restricted country or area, that person is generally obliged to continue working from home, if home office has either been agreed in the employment contract or is being agreed by an addendum, as mentioned above. In that case, the company is required to continue the regular salary payment.

## 3. Protective shields by the Federal States (*Bundesländer*)

In addition to the funding provided by the German Federal government, the governments of the various German Federal States are also implementing specific financial support programs for companies suffering from the effects of the COVID-19 pandemic. For example, on 16 March 2020 the Federal State of Bavaria published that it will provide funding in the amount of up to €10 billion in addition to the funding provided by the German Federal government. These funds will be used (i) to provide security for loans issued by the Bavarian development bank, (ii) to direct payment to eligible recipients and (iii) as direct payment to certain specifically defined eligible recipients, particular law and mid cap companies.

The Federal States offer various aid measures, e.g., immediate assistance packages for companies in the catering sector in the amount up to €30,000 (Bavaria). Relevant information can be found on the website of the respective Chamber of Industry and Commerce.



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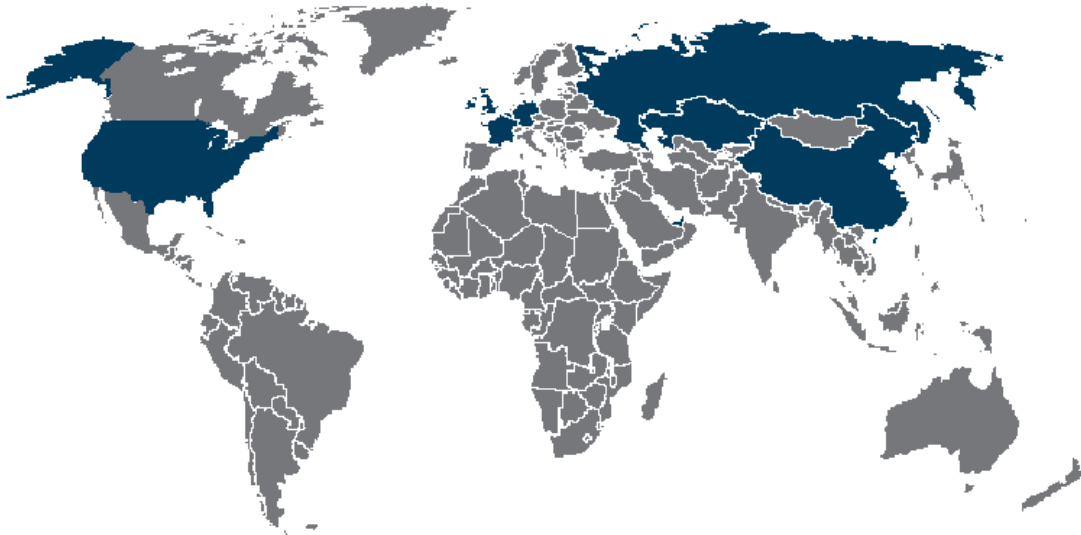
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