

Short Work Update – “System-relevant” Side Jobs While on Short Work

INTRODUCTION

The spread of the coronavirus and its impacts continue to have a firm grip on the country and our economy. According to the most recent figures of the Federal Employment Ministry, 470,000 German businesses have applied for short work to date. More businesses will follow, which should be reason enough to continue the intensive discussion of the employment law parameters of short work. A new regulation addressing the question of side jobs during the short-work phase, which came into effect on April 1, 2020, is a good opportunity for this.

From the employment law perspective, the initiation of short work requires that work hours have been reduced, at least for parts of a business's workforce. This is generally quite straightforward in businesses with a works council, where it is possible to execute a company/shop agreement. Collective bargaining rules may also offer a suitable basis for initiating short work. However, if neither of these cases apply and if the agreements used in a business do not provide for sufficient authorization to order short work (which is usually the case), the significantly more rocky road of individual agreements will often be the only way to reach the goal of short work. In many cases, this will require a lot of convincing, but employees have often shown themselves to be understanding, during the present corona crisis, when the advantages of short work and the collecting of short-work compensation under the Short Work Act (KUG) are explained to them by their employer. If short work is introduced, jobs can be initially saved during difficult economic times, even though the current business situation as such could make lay-offs necessary. Although the temporary reduction of work hours will undoubtedly result in a pay reduction, at least the KUG covers 60 % or 67 % of the so-called net wage difference.

TAKING ON SIDE JOBS WHILE ON SHORT WORK

In addition to the employer possibly considering to pay a subsidy to the KUG payment and to thus further mitigate the reduction of net wages, an open discussion of whether employees could work side jobs while on short work can be helpful. In a provision that came into effect on April 1, 2020, lawmakers have created an incentive to do this by providing that income from certain side jobs will not be deducted from the KUG payment.

Until now, it was necessary to make the following differentiation concerning which income from side jobs is to be deducted from the KUG payment:

If the side job (including freelance work) starts during the short-work phase, the income earned from this increases the so-called actual wages and thus reduces the net wage difference that governs how the KUG payment is calculated (see Sec. 106 (3) Social Code III). In this case, as opposed to a side job that had started prior to the start of short work, there will be a deduction of the side income, which makes starting a side job during the short-work phase seem unattractive.

SEC. 421c SOCIAL CODE III (NEW) – TEMPORARY SPECIAL PROVISIONS RELATED TO SHORT WORK

This is where lawmakers have acted in the newly enacted Sec. 421c Social Code III (new) that came into effect on April 1, 2020: Due to the current crisis and the increased need for workers in certain segments of society, it provides, in a departure from Sec. 106 (3) Social Code III, that the wages from work in “system-relevant industries and professions” taken up while receiving KUG payments are not to be added to the actual wages. This provision has been limited to the initial period of April 1, 2020 to October 31, 2020. Such wages will not be deducted, but only under one condition: Because no one is supposed to profit additionally because of the current situation, Sec. 421c Social Code III (new) only excludes the deduction to the extent that the wages from the new work, together with the KUG payment and the remaining actual wages, are not greater than the original amount of the wages that are to be paid for the work for which the short-work pay is being collected.

SYSTEM-RELEVANT INDUSTRIES AND PROFESSIONS

A short look into the reasoning for the new regulation shows what lawmakers understand to be “system-relevant industries and professions”. It is stated there:

*„[...] Certain industries and professions are crucial for public life and the safety of the populace as well as for supplying their needs. These include **public order and safety authorities, energy and water providers, transport and public transportation, but also the maintenance of communications. Of special importance are the health system with hospitals and pharmacies, but also agriculture and food and supplying the populace with food.** One standard for the allocation of work to system-relevant in-*

dustries and professions is offered by the Regulation for Defining Critical Structures under the Act governing the Federal Office for Security and Information Technology (BSI Act). [...]"

As documented by these grounds for the legislation, lawmakers are explicitly concerned with creating an incentive for people to take up work in system-relevant sectors on a temporary basis. Without a doubt, this is a clever move, as workers are urgently needed in both agriculture and the food industries, both of which belong to system-relevant sectors.

In its most current directive of March 30, 2020 ("Directive 20200315 of March 30, 2020 – Directive on Improvements for the KUG for the period to December 31, 2020), available under:

<https://www.arbeitsagentur.de/datei/ba146387.pdf>

the Employment Office cites the following examples of system-relevant industries and professions:

- Medical care, out-patient and in-patient, including ambulances
- Supply of hospitals and care facilities with food and consumables
- Supply of lifesaving medical products and machines
- Supply of prescription medicines
- Laboratory diagnostics
- Pharmacies
- Freight traffic, e.g. to distribute food to wholesalers and retailers
- Grocery stores – e.g. selling or stocking shelves
- Food production, including agriculture
- Delivery services to distribute food

This list is not conclusive. As has already been expressed in the above grounds for the legislation, one standard for the allocation of such work is also the Regulation for the Definition of Critical Infrastructure under the Act governing the Federal Office for Security and Information Technology

(<https://www.gesetze-im-internet.de/bsi-kritisv/>).

ADVICE FOR PRACTITIONERS

Harvesting asparagus as a system-relevant side job for extra income in a time of crisis that is not deducted from short-work pay: Just a few months ago we would have been (at least) shaking our heads and dismissing this as a strange idea; but no longer. The latest initiative by lawmakers is a reason to discuss this with individual employees as well as in negotiations with employee representatives, but to at least include it in considerations on whether the economic impact of short work could not be softened by taking up a system-relevant side job. Lawmakers are showing us an opportunity that makes it possible for individuals to become involved in an economically meaningful way in sectors where help is needed for the good of society. Even if not all of the "system-relevant" sectors are equally suitable for a spontaneous lateral entry, the thought of using the phases of short work for this kind of commitment, be this in agriculture or by stocking shelves at the local grocery, could be well worth considering.

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