The Coronavirus Liability Trap – An Overview of Employer Liability Risks if Employees Become Infected at Work

INTRODUCTION

As the world continues to be in the throes of COVID–19, a return to normalcy remains far from sight. Still, a slow return to everyday work is discernible. More and more employees are returning to the workplace after having worked from home. But what liability risks actually threaten employers if employees become infected with the virus at work? And what precaution can employers take to minimize their liability exposure?

A short overview:

LIABILITY OF THE EMPLOYER

Under the employment relationship, not only the primary performance obligations ("work for pay"), but also side obligations, particularly the employer's duties of care under Sec. 618 German Civil Code, must be observed. These duties oblige the employer to protect employees against risks to life and health. The standard to be complied with by the employer is specified more closely in the public law occupational safety regulations such as the Occupational Safety Act. With respect to the coronavirus, this means that the employer must implement the required measures of health safety in his business in order to protect employees from contracting infections at their place of work.

If an employer does not comply with this duty of care, there is the risk of liability for the employer under Sections 280 (1), 823 et seq. German Civil Code for personal injury in the event of the illness or even death of an employee, provided his conduct was culpable, that is, intentional or negligent (Sec. 276 German Civil Code). The reimbursable costs include the costs of treatment, the loss of income, the costs of possible long-term effects and their related loss of earnings. If an employee dies, it may be necessary to pay maintenance to his survivors and to assume burial costs.

As developed early on in several groundbreaking decisions, the Federal Labor Court has ruled that an employee who raises such claims must merely substantiate and prove that he has incurred damage and that an irregular situation existed that is generally capable of causing the incurred damage (see, for instance, Federal Labor Court, judgment of February 27,1970 - 1 AZR 258/69 or the judgment of May 8, 1996 - 5 AZR 315/95). With regard to the current situation, this means that an employee must only present that he is sick with COVID-19 and that the standard of protection at his place of work was insufficient in order to successfully assert his claims. It is then the duty of the employer to refute that the asserted damage was based on an irregular situation or to show that he is not at fault. This will likely present a special challenge in the litigation.

CORONA AS OCCUPATIONAL DISEASE AND THUS APPLICATION OF STATUTORY ACCIDENT INSURANCE?

The fatal issue in this scenario: The German statutory accident insurer, Deutsche Gesetzliche Unfallversicherung (DGUV), rejects that it has a duty to become involved in cases of injury to health due to COVID-19 infections at the workplace. The DGUV justifies this stance by arguing that illness based on the coronavirus, which has been classified as a pandemic by the World Health Organization (WHO) does not constitute a risk specific to the workplace, but is realized as an illness presenting as a public hazard. The rule (cf. Sec. 104 (1) sentence 1 Social Code VII) that employers are not liable for work accidents and occupational disease – save in the event of willful misconduct – which is otherwise very useful for employers, will not help in the event of COVID-19 infections in many cases, if one assumes that argument is correct.

According to the DGUV, a different situation can apply, however, for healthcare workers. Here, COVID-19 infections can be recognized to be occupational illnesses under the following requirements:

- contact with individuals infected with SARS-CoV-2-under the scope of occupational activities in health care and
- relevant manifestations of illness such as fever and coughing and
- positive evidence of the virus through a PCR test.

It remains to be seen whether the stance of the DGUV regarding the general non-acceptance of COVID-19 as an occupational disease will prevail in the courts. Doubts could be particularly justified if several employees become infected at the workplace. As long as no other clarification by court rulings exists, there is the risk, however, that employers will also be made liable for merely negligently caused infections in their employees.

LIABILITY OF COMPANY MANAGEMENT

Not only companies, but also their management could be made liable, for management must also institute new measures to protect employees from infection at work if no such sufficient measures had previously existed. This duty is particularly derived from the duty of company management to use care in conducting the business of the company. In the event of breaches, there will at least be liability exposure in relation to the company, e.g. under Sec. 93 (2) Joint Stock Companies Act.

MISCELLANEOUS

In addition, violations of occupational safety regulations may constitute misdemeanors (cf. Sec. 25 Occupational Safety Act), which may entail fines of up to EUR 25,000.

Even more drastic consequences may arise for the individuals in charge on the employer side if a violation of occupational safety regulations triggers criminal liability, e.g. for negligent bodily harm under Sec. 229 German Criminal Code or involuntary manslaughter under Sec. 222 German Criminal Code. In these cases, there is even the risk of incarceration.

Furthermore, employees may refuse under some circumstances to perform work obligations under Sec. 273 (1) German Civil Code without losing their claim to pay if occupational safety requirements are not met by the employer.

RECOMMENDED ACTION

In addition to compliance with federal and state occupational safety regulations as well as regulations of the accident insurances, it is highly recommended to follow the „non-binding recommendations“, specifically the SARS-CoV-2 Occupational Safety Standards of the Federal Ministry of Labor and Social Affairs of April 16, 2020 (downloadable **here**) to minimize a company’s liability exposure as much as possible.

Although there might not be a direct duty to follow the measures provided for there (including social distance of 1.5 meters, possible provision of nose/mouth coverings, office work where possible from home) since the occupational work standard has not been passed as either a statute or ordinance, the occupational safety standard has been attributed significant relevance because it is clear that it will be taken into account when a review of “required” protective measures under Sec. 3 (1) sentence 1 Occupational Safety Act is made. To such extent, its implementation will also be relevant for the question of whether the employer has complied with his duties of care and diligence. The DGUV, for instance, views the occupational safety standard, together with its specific implementations in the specific industries to be „specific requirements“ of occupational safety. If there is compliance with the occupational safety standards and any industry-specific requirements when occupational safety measures are introduced and implemented with regard to COVID-19, there will likely be the assumption to the benefit of the employer that he has taken the “required action”. The employer will then be more easily able to refute a possible connection between an irregular situation and the illness of employees.

Should you have further questions regarding occupational safety measures during the COVID-19 pandemic and employer liability risks, please feel free to contact us at any time.

CONTACT

Dr. Henning Reitz
h.reitz@justem.de

Dr. Sebastian Schulte
s.schulte@justem.de

www.justem.de

© JUSTEM Rechtsanwälte Neue Mainzer Str. 26 60311 Frankfurt am Main www.justem.de