There's no place like home? – The "home office duty" is ending soon

INTRODUCTION

It is anticipated that the so-called "home office duty" (or more precisely: the duty of employers to allow working in a home office wherever possible) most recently formulated in Sec. 28b (4) of the Protection against Infectious Diseases Act will end at the close of March 19, 2022. Under that provision, employers currently remain obliged to offer their employees who primarily perform office work or work of a comparable nature that they may work from home, provided this is not prevented by overriding business demands. However, a general "recall" as a consequence of the discontinuation of that duty will likely not satisfy the interests of many employers, nor will it be in keeping with the interests of their employees who have come to appreciate the advantages of working at least partially from home.

For this reason, the intention, or at least the thought of allowing employees to also work from home in the future has been in the minds of many businesses. A fully uncommented continuation of the practice carried on during the pandemic on the basis of statutory provisions raises, however, the question of whether or not this would unintentionally create a permanent entitlement on the part of employees to work from home, and whether or not employers would be cutting themselves off from their ability to recall employees back into the office at a future time.

THE RIGHT OF THE EMPLOYER TO ISSUE INSTRUCTIONS

One must therefore first call to mind that it is in the nature of an employment relationship that the employee must perform their work in accordance with the employer's instructions (provided the specific terms of employment have not already been set down in the employment contract or in other provisions). The right of the employer to issue instructions includes the authority to set down the place of work performance (Sec. 106 sentence 1 Trade Regulation Code), whereby the employer is not completely free, however, in how he acts, and may certainly not act arbitrarily, but must comply with the principles of reasonable discretion and non-discrimination when making decisions. In general, the employer is free, however, to order their employees to return to the office even after a longer period of working from home.

CONTRACTUAL CLAIM TO WORKING FROM HOME ON THE BASIS OF COMPANY PRACTICE?

If an employee has been allowed over a longer period of time to execute their work duties in the same manner from home, it would appear debatable whether this exception poses a restructuring of the employment contract by the parties, through which the right to give instructions is limited and the employee is to only perform their work in the future from home (or to the extent this had already been allowed).

A claim of this kind could only arise out of **so-called company practice**. "Company practice" is understood to mean the regular repetition of a certain behavior by the employer from which the employee may infer that the benefit granted to them under this practice is also meant to be granted in the future (the "classic case" is the payment of a Christmas bonus three years in a row with no disclaimer). The governing factor for company practice is always that one may infer from the employer's behavior their will to also be contractually bound in the future with regard to the provision of a benefit.

In light of this, the offer to work from home **for the duration of the statutory "home office duty"** will generally fail to create a claim based on company practice. It is obvious here that the employer is merely complying with their legal duty but does not want to create an obligation for the future.

If the employer had already **allowed** working from home **prior to the enactment of the home office duty, but still clearly within the context of the Corona pandemic**, there will likely not be any claims based on company practice, in this case, either, unless special circumstances indicate a different interpretation. The permission in this case clearly serves the protection of employee health and the continuation of business operations during the pandemic, but not the creation of a duty that will remain in effect in the future.

Claims based on company practice will furthermore fail if working from home is taking place on the basis of a **works agreement** entered into with the responsible works council for this reason. In this case it is also clear that the employer is only acting in fulfillment of the agreement entered into with the works council. If the employer wants to recall employers in these cases, one may need to consider, instead, whether the works agreement must be terminated.

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Less clearly defined, however, is the case, which will certainly be coming up again and again soon, that working from home **is continued after the end of the statutory home office duty and even after the end of pandemic (which will hopefully be soon)** without being commented on or explained more closely by the employer. Legally, the prior (apparently) majority opinion, which, in our view is also the correct opinion, takes the stance that, in the absence of special circumstances, one **cannot** infer from such employer conduct, that the employee in question is supposed to be left to work (partially) from home for the rest of their working life. However, it can be assumed that this topic will be the subject of controversial discussion and keep the courts busy as the pandemic dies down and in light of the increased prominence of working from home. A simple and uncommented "carry on" will lay the groundwork for misunderstanding, false expectations, uncertainty, and the occasional, avoidable litigation before the labor courts.

Clear communication is therefore necessary. Businesses should take this opportunity to examine past communication regarding working from home and clearly inform their employees that working from home will continue to be possible, if desired, but that the company does not want to become permanently committed to it. This would appear to be a way to get control over the creation of entitlements under the principle of company practice, a development that is feared by some.

LIMITATION OF THE RIGHT TO GIVE INSTRUCTIONS BY SO-CALLED "SPECIFICATION"?

A further employment law aspect one could cite as a manifestation of the recent practice of working from home is the aspect of so-called "specification". The idea behind this postulates that a practice carried out for a long period (e.g. assignment to a certain location) can lead to a limitation of the employer's right to give instructions.

This kind of specification, however, is subject to strict requirements. According to the case law, it is not sufficient that an employee has been working over a longer time period at one location. Rather, it is necessary that additional special circumstances are present from which the will of the employer to no longer assign the employee to another location can be inferred (cf. for instance, Superior Labor Court of Munich, judgment of August 26, 2021 – 3 SaGa 13/21). Such a special circumstance is assumed, for instance if the employee has made his remaining with the employer dependent on the permission to work from home in the future and if the employer has (tacitly) complied with this demand. The right to give instructions can be limited by this. Ultimately, however, the decisive point, despite the somewhat different approach, is how the behavior of the employer is to be interpreted.

SUMMARY

To be clear: the employer generally cannot be prevented from having their employees return to working in the office at the end of the statutory home office duty. This is generally permitted by the employer's right to give instructions, taking into account the principles of equitable discretion and non-discrimination, which also includes determining where work is to be performed.

Limitations of the right to give instructions through company practice or specification are conceivable, but do not as such result, in the view of the majority opinion, from the fact that the employer has permitted working from home on a temporary basis, and particularly because of a pandemic. One should examine with a critical eye whether the company has set up any communication "scent marks" from which the workforce or individual employees can infer what is wanted after the pandemic is over. In any event, it appears meaningful, also with a view to the end of the home office duty and the end of the pandemic, that the employer communication is unequivocal and does not allow for any misinterpretation.

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