

TaylorWessing

# Next Normal? Working with Corona



3 December 2020 | Dr. Michael J. Pils



# Introduction

- Various Challenges require new structures in companies, e.g. home office policies, travelling policies, emergency plans, reorganization of production, supply chain continuation,...
- Digitalization
- Note: According to the largest German employer survey, 85,5% of all managers of over 1000 companies have confirmed the significance of health and safety management as a success factor for sustainable business.



# Business Continuity under Corona

## 1 February 2020

- Handling lockdown
- Identify critical infrastructure of the business
- Implement short time work
- Home office
- Update/set up an emergency plan
- Corona-Task-Force

## 2 April/Summer 2020

- Reopening
- Staff planning, shift time planning
- Continued risk analysis for health and safety risks
- Implementation of new law (e.g. *Arbeitsschutz-standard*)

## 3 Autumn/winter 2020

- Second wave; partial lockdowns (generally: lockdown light)
- Update emergency plan
- Home office revival
- Reorganizations to be discussed and to be prepared
- Reactions of authorities
- Increasing numbers of court proceedings

## 4 Next Normal?

- Business as usual? Depending on the business sector
- Digital companies as winners
- Health and Safety as success factor
- Flexibility: Short time work might be required
- Reorganization to be expected
- More regulations? Home Office law? Meat Industry law...
- New business life-style? Changing business culture?
- Working with Corona until 2025?
- Enforcement? Symbolic law? Soft law? „Best practices“?

## Example (1): Health and Safety

Core obligation of management/employers: Health and Safety Compliance

Before Corona, health and safety compliance was not a core focus of the management. The legal obligations of health and safety compliance were frequently underestimated (depending on the industry sector).

Begin of crisis March 2020

RKI: Certain standards for hospitals, nursing homes; hygiene rules,...

No guidelines / rules for working under Corona

April 2020

BMAS: SARS-CoV-2-Health and Safety Standard: „German-wide clear and mandatory standards“ (Hubertus Heil), further specifications announced; published in several languages; furthermore: GDA-guidelines for certain business sectors

→ Factual binding rules

→ Enforcement?

July 2020

BMAS: Guidelines for vulnerable employees; risk cluster depending on the handicap (high protective, potentially protective, potentially non-protective))

August 2020

SARS-CoV-2-Occupational Health and Safety Rules: Further health and safety regulations, factual binding → comprehensive analysis of all operational processes required, based on risk assessment

- Infection prevention, e.g. 1,5m-distance, separated working spaces, new cleaning policies, ventilation concepts, masks, room usage concepts (e.g. social rooms, toilets), personal usage of working materials...
- Infection management, especially contact tracing, entry controls...
- Home Office
- Instruction / communication / monitoring
- Enforcement?

→ Increasing number of regulations, increasing compliance risks...



## Example (2): Case-Studies

### Corona – Instruction (*Anweisung*)

**Purpose:** Compliance with the SARS-CoV-2 occupational health and safety standard/rule.

- Content (e.g.): Instruction, self-monitoring, reporting channels/obligations in the event of corona suspicion, suspect case management, leave, hygiene/ventilation/distance, masks, company cars/work equipment, information management (e.g. communication, social media), sanctions
- In addition: Training and monitoring necessary.
- Works council to be consulted

### Trainings (*Unterweisung*)

**Purpose:** Compliance with mandatory legal obligations based on the risk assessment; typically

- Awareness raising, education, training; long-term objective: delegation of entrepreneurial duties
- Training of all employees, but with varying intensity
- Training contents: Emergency plan, work instructions, rules of conduct, communication
- Ensuring documentation
- Ensuring monitoring (e.g. checklists)
- Works council to be consulted

### Home Office Arrangements

**Purpose:** Legal basis for home office use (so far no law).

- Suitability home office, especially IT, company culture (main challenge); individual prerequisites
- Working time arrangements and working time control
- Regulations on IT security/data protection and trade/company secrets
- Confidentiality
- Regulation regarding health protection in the home office/instruction
- Reimbursement of expenses? Insurance cover?
- Works council to be consulted

## Example (3) – Court Litigation

### Home office or single office room resulting from health and safety laws?

Local Labor Court Augsburg, judgement of 7 May 2020, 3 Ga 9/20, juris (pending), – no entitlement: *„it is the sole responsibility of the employer to decide about the compliance with the general health and safety obligations (§ 618 BGB) ... There is no entitlement of a single office room ...“*

### Technical control of employees in order to ensure the 1,5-m-distance?

Local Labor Court Wesel, resolution of 24 April 2020, 2 BVGa 4/20 – not justified; even during a pandemic, the employer must respect the rights of the works council.

### Rights of the works council with respect to SARS-CoV-2-Occupational Health and Safety Standard?

Local labor court Hamm, resolution of 4 Mai 2020, 2 BVGa 2/20, juris (pending) – no right of co-determination (?)

### Reopening or staff planning without consultation of works council

Risk of injunctions, see Local Labor Court Neumünster, resolution of 28 April 2020 4 BVGa 3 a/20, juris (pending); Local Labor Court Stuttgart, resolution of 28 April 2020, 3 BVGa 7/20, juris; Local Labor Court Berlin, resolution of 27 April 2020, 46 AR 50030/20, juris.

### Short time work introduction

Local Labor Court Stuttgart, judgement of 22 October 2020, 11 Ga 2950/20, juris – introduction of short time work by change notice.

### Video-conference for works council meetings

Regional Labor Court Berlin-Brandenburg, resolution of 24 August 2020, 12 TaBVGa 1015/20, juris – no obligation of the works council to conduct its meetings by video conference.

## Summary

- **It is true:** Higher demands on documentation and, in the short term, additional costs
- **However:** Prevention of consequential infection costs and business interruptions
- The implementation of the SARS-CoV-2 regulations is already a standard issue in transactions
- Health protection remains important beyond the pandemic!
- Health protection as an important part of CSR!
- Current legally required measures/structures can be reduced/reduced after the pandemic, basic concept can be "continued to be used".



Adjust risk assessments



Instruct actively



Implement a corona-monitoring system



Adjust home office arrangements



Design safe working environment



Introduce a smart work organization



Travel policies and meeting policies



Entry controls



Ensure medical prevention



Cooperate with works council

## Your Taylor Wessing Team

Michael Pils is a recognised expert in providing advice on all matters relating to employment law with respect to national and international company acquisitions as well as post-merger integration.

With passion, he always focuses on the corporate culture and the needs of his clients. A further focus of Michael's expertise is on projects relating to occupational safety and health, HR compliance, as well as corporate pension schemes.

Particularly noteworthy is his know-how about Japan. He has been supporting the Japan Practice Group of Taylor Wessing as co-head of the Japan desk with his excellent network for many years. Michael is known for building bridges between Asia and Europe; especially when it comes to projects that are related to Japan, numerous recommendations underline his expertise. He uses his influence, especially as a member of the executive board of the Deutsch-Japanischen Gesellschaft für Arbeitsrecht e.V. (*German-Japanese Society for Employment Law*), to foster the exchange of legal expertise and to promote young legal professionals.



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