

NEW REGULATIONS ON SHORT-TIME WORK (KURZARBEIT) –

Supporting Businesses and their Staff During the Corona Crisis

– GUIDELINES FOR WORKS COUNCILS, STAFF COMMITTEES, AND EMPLOYEES –

Status as of 15th May 2020

The Federal Government has changed the regulations for short-time work. Particularly those businesses and their staff that are directly or indirectly affected by the consequences of the Corona crisis shall in this way receive effective support. Short-time work swiftly reduces businesses' burdens in terms of personnel expenses in those cases where they were obliged to temporarily suspend production or events.

Short-time work means that the employer, in agreement with the works council, reduces an employee's working time. It is also possible to reduce work time by up to 100 percent, i.e. short-time work "0". For the relevant time, employees are compensated by the Federal Employment Agency, using funds from the unemployment insurance fund. Short-time work is thus a form of "partial unemployment", with the advantage that an employee retains his/her job and that the employer is able to manage things in a flexible manner. In case new orders come in, businesses will be able to resume their work in a quick and unbureaucratic manner.

In these Guidelines, we provide more details on this approach. It is important that, in addition to employers, works councils also let the Federal Employment Agency advise them on this matter. To this end, they can contact the local Employment Agency, or call the nationwide hotline **0800 45555 20**.



Short-time work helps to avoid layoffs. Despite many applications from the companies this bridge proves solid - mass unemployment was prevented in Germany. This shows the value of a strong welfare state.

The legislator has increased short-time work benefits and has thus met an important demand of the unions. Now it is time for politics – after weighing in all risks – to provide clear perspectives for employees and companies." –

Anja Piel,
Member of the Executive Board, DGB

Dear colleagues,

the Federal Government has changed several regulations during the Corona pandemic. For this reason, we are also continuously updating these guidelines, including answers to your questions that have reached us in the meantime.

You can access the current version via the following link:

www.dgb.de/schwerpunkt/corona (in German)

Information on questions related to employment law and Corona can be accessed here:

www.dgb.de/-/m72 (in German)

However, we ask for your understanding that individual answers to questions are currently not possible. To this purpose, please contact your competent trade union.

What Do the Corona Regulations Look Like?

As per applicable law, work stoppage needs to affect at least a third of a business's staff. The **new provisions** reduce this threshold, so that now only 10 percent of staff need to be affected by work stoppage.

What is new is that the amount of short-time work allowance depends on the amount of reduction in working hours and the duration of short-time work. It generally represents around 60 percent of the average net salary for the past 12 months for employees without children and 67 percent for employees with children. If the working time is reduced by more than 50 percent, the short-time work allowance in the first three reference months still represents 60 percent or 67 percent (for employees with children), of the net salary for the diminished working hours due to short-time work. Starting from the fourth month however, the amount rises to 70 or 77 percent, starting from the seventh month to about 80 or 87 percent. This regulation only applies for the limited period between April 1st, 2020 and December 31st, 2020.

Normally, employers need to try to prevent short-time work at all costs. Thus, they are also obliged to try and use the leeway provided to them via working time accounts. The **new provisions**, however, waive the obligation to accumulate a negative working time balance before issuing short-time work allowances.

The employer pays only social security contributions in relation to the short-time work allowances. The current system of short-time work allowances does not foresee contributions to unemployment insurance. The **new provisions** of the regulation state that the employer is reimbursed for the above social security contributions in full.

According to the **new provisions**, temporary agency workers ("Leiharbeiter*innen") are also eligible for short-time work allowance. These employees have been excluded from receiving such payments since 2012. The temporary employment agency is the employer of such employees, and thus obliged to submit the necessary applications. In these cases also, the short-time work allowances shall only be granted once work time surpluses (additional hours) have been compensated.

Which businesses may apply for short-time work?

All commercial businesses may apply for permission to conduct short-time work, including businesses devoted to cultural or social matters. Short-time work does not depend on the size of the business. The respective business needs to employ at least one dependent employee.

As a rule, publicly owned companies are excluded from short-time work. However, in case of unavoidable grounds requiring short-term work (e.g. if, by official order, such companies need to shut down), then the respective company can also apply for short-time work for its employees. The unavoidable grounds need to be directly related to the company. The competent Employment Agency will decide whether or not there are sufficient grounds to allow short-time work.

For how long can short-time work allowance be drawn?

In principle, short-time work benefits can be drawn for up to twelve months. However, there are companies that have already worked on short-time work in the past year and are now likely to exceed the twelve months. In order to avoid associated hardship cases, the period for receiving short-time work benefits for employees whose entitlement to short-time work benefits came into force before December 31, 2019, has been extended to up to 21 months, at most until December 31, 2020.

Is it possible to increase one's salary during short-time work?

Short-time work means that employees will suffer a considerable reduction of their income. Especially for low income earners this represents a very hard blow. That is why, when coping with the Corona pandemic, social imbalances need to be prevented! Many industries and companies live up to this responsibility by concluding collective agreements or company agreements with unions or works' councils, respectively, in order to top-up the short-time work allowance. Where this still hasn't happened, we request employers to accede to our offer of collective bargaining as soon as possible!

Who can receive short-time work allowance?

Short-time work allowance can be issued to all employees that are liable to social security contributions. Employees who are on leave or who receive sickness benefits prior to the start of short-time work, are exempted from receiving short-time work allowance.

Foreign employees are also entitled to short-time work allowance regardless of their residence status and nationality. However, there are special regulations or exceptions for certain groups that must be considered. See more: <https://www.dgb.de/-/xx1>.

“Mini-jobbers” are exempted, as they are excluded from the duty of social security contributions.

Trainees usually do not receive any short-time work allowance, as usually, the traineeship should continue even in cases of reduced production. If an interruption of the traineeship cannot be avoided – this should be the case where, e.g., a business is closed due to the Corona virus – trainees may also be included in short-time work. At the same time, the business will need to continue to pay the full traineeship allowance for another six months at least, as the traineeship allowance does not constitute remuneration for a certain work performance, but rather financial support for the trainee to enable him/her to accomplish the traineeship (Section 19 par 1, no. 2 of the Vocational Training Act (BBiG)).

Why is short-time work better than layoffs for employers and employees?

- **Jobs will be preserved and work can be resumed flexibly. No long application, hiring and job training processes are required. The trained specialists remain in the company.**
- **Employers should take into account that dismissals are subject to notice periods during which employees are entitled to receive their full remuneration no matter if they are still working or not.**
- **Other funds for employers, intended to ensure their liquidity, aim at preserving jobs and are tied to employment guarantees.**
- **If a later dismissal is inevitable, the period of short-time work will not be counted as unemployment regarding the extent and duration of the unemployment benefit.**

Which law regulates this?

→ The regulations are based on changes made to the Third Book of the Social Security Code (Drittes Buch Sozialgesetzbuch), where Section 109 par 5 constitutes the respective enabling provision.

→ Article 11a was introduced into the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz), which authorizes the Federal Government to issue relevant ordinances.

→ The respective ordinance contains details on short-time work.

What happens in case of a dismissal during short-time work?

These two types of dismissals are possible during short-time work:

1. Dismissal for operational reasons by the employer
2. Termination of contract by the employee

Regardless of who initiates the termination of contract, the following rules apply:

→ In order to be eligible for short-time work allowance, the employment contract cannot be terminated (Section 98 par 1, no. 2 SGB III).

→ The eligibility for short-time work allowance ends the day the employer hands out the termination note to the employee (or the other way around).

→ Notice periods are to be respected.

→ During the notice period employees are entitled to receive the full, undiminished remuneration from their employer regardless of the extent to which the employer can actually deploy them.

How to apply for short-time work?

Step 1:

Notification of the competent Employment Agency of short-time work in a business through the employer

Generally, the employer applies for short-time work allowance. In order to do that, the employer needs to notify the Employment Agency of short-time work in his/her business in writing. The works council's statement on this matter needs to be attached to the written notification. The respective templates for these documents are available on the website of the Federal Employment Agency.

The submission of the above notification is permissible, if the employer has announced his/her decision to engage in short-time work to the affected employees beforehand. For this purpose, the employer and the works council usually conclude a company-level agreement (see below). In cases where a business does not have a works council, a declaration of consent of all employees affected by short-time work is required (see below). In order to be able to bill the month in which short-time work took place, the written notification of short-time work needs to have been received by the competent Employment Agency by the last day of the month at the latest.

ATTENTION!

If the notification on short-time work is received too late – e.g. due to disruptions of the postal service – short-time work allowances can only be granted as of the following month. Therefore, it is highly recommended to submit notifications digitally!

Companies that are already in short-time work do not have to give a new notification in order to have easier access to short-time work allowances and reimbursement of Social Security contributions.

Short-time work can also be retrospectively applied for temporary agency workers, starting March 1, 2020.

TIPP

The Federal Employment Agency provides comprehensive information for employers and works councils here:

<https://t1p.de/q8gn> (in German)

All relevant documents concerning the notification and application for allowances as well as many answers to recently raised questions can be found here too.

Individual consultation on and explanation of payment terms are not provided as by now.

Employees can find further information as well as tables demonstrating how to calculate the short-time work allowance and an information leaflet by the Federal Employment Agency here:

<https://t1p.de/1csy> (in German)

Step 2:

Granting of short-time work through the Employment Agency in principle

The Employment Agency examines whether the eligibility criteria exist in the respective case. If the result of the examination is positive, then short-time work allowances will be granted, namely as of the month in which the notification was submitted. After that, the employer has three months' time in which to submit the payment claim for short term working allowances for the relevant accounting month.

Step 3:

Monthly applications for short-time work allowances by the employer

The employer calculates the short-time work allowance on the basis of the actual working hours and pays it out to the employees. He then applies for reimbursement of the amount he has paid from the responsible employment agency.

ATTENTION!

The application needs to have been received within three months after the expiry of the respective accounting month.

What role do works councils play?

According to section 87 par 1, no. 3 of the Works' Constitution Act (BetrVG) the works council has to be fully involved in the decision whether and to what extent a business introduces short-time work. The same applies to the decision if a company returns to its usual working hours e.g. in case of an earlier termination of short-time work. The new regulations didn't change this. The employer and the works council, as before, need to negotiate a company-level agreement, which settles the details. If expert advice is necessary, we recommend that works councils contact the competent union or seek the support of a lawyer.

What are essential components of the company-level agreement?

- ✓ **Which other regulations are in force (e.g. collective agreements)?**
- ✓ **Are there any terms of notice that need to be taken into account?**
- ✓ **Begin, end, extent and scheduling of short-time work**
- ✓ **Which divisions/groups of persons shall enter into short-time work, and which shall not?**
- ✓ **The amount of short-time work allowance, as well as employer supplements and subsidies derived from collective agreements, as applicable**
- ✓ **How to handle residual leave from the previous year?**
- ✓ **How to handle working hour accounts?**
- ✓ **Provisions regarding further education and training as well as occupational health during periods of short-time work**
- ✓ **How to inform and involve the works council on a regular basis during the period of short-time work and in further planning?**

Under Section 87 of the Works' Constitution Act (BetrVG), the co-determination of these matters by the works council is comprehensive and obligatory. It is not enough for the employer to merely inform the works council, or to have the works council "rubber stamp" a suggestion made by the employer. The works council needs to be actively involved in the decision on introducing short-time work in the business, and to have a part in developing the respective modalities. If no agreement is reached on these matters between the employer and the works council, a conciliation board shall decide. The conciliation board replaces the agreement between employer and the works council (Section 87 par 2 of the Works' Constitution Act).

What if there is no works council?

If there is no works council, individual employment law applies.

In businesses with no works council, short-time work always requires the consent of the employees. In some instances, such consent is already included in the employment contract. In such cases, the employer may order the imposition of short-time work. In cases where employment contracts do not contain such clauses, the employer needs to attach declarations of consent of all employees affected by short-time work to the notification of short-time work.

As short-time work is a means to retain employment positions, and is also not charged against a potential receipt of unemployment benefits at a later stage, we would counsel employees to provide such consent. If no consent is reached, the employer may be required to dismiss employees due to altered conditions of employment. The validity of such dismissals may – same as dismissals for operational reasons – be subjected to judicial review within a period of three weeks. We suggest nonetheless that employees – taking into consideration the company's performance – try to negotiate a top-up of the short-time work allowance with their employer.

What does short-time work mean for employees?

The short-time work allowance should at least partially compensate for the loss of earnings. It is granted only for the lost working hours and amounts to 67 percent of the difference to the employees' net remuneration in cases where employees have at least one child, and to 60 percent of the difference for employees with no children. For short time work starting March 1st 2020 the short time work allowance will rise from the 4th month to 77 or 70 percent and from the 7th month to 87 or 80 percent of the difference to the original net remuneration.

→ If the business has a regulation on flexible working hours, work time surpluses (additional hours) will need to be taken into account pro rata, unless special collective agreements apply. Since such agreements will differ depending on each individual situation, we would advise to contact the Employment Agency in case any questions remain unanswered.

→ Annual leave doesn't have to be used up before the start of short-time work. As a rule, it is sufficient if a vacation planning for the current calendar year is available. Then the employees cannot be expected to take this vacation before receiving short-time work allowance. Residual leave from the previous year needs to be taken or at least planned before the start of short-time work.

→ While receiving short-time work payments, employees are generally held to take part in any mediation efforts undertaken by the Employment Agency. The short-time work allowances paid by the Employment Agency are tax-exempt. Care will need to be taken during the annual adjustment of income tax to ensure that the paid amounts are taken into account when determining the personal tax rate – especially in cases of joint couple taxation. This leads to an increased tax rate, to be paid on the regular income (progression provision).

A top-up of the short-time work allowance by the employer is tax free up to an amount of 80 percent of the original net wage. **This is a new regulation**, up until now, this top-up was regarded as taxable wages.

TIPP

The website of the Federal Ministry of Labour and Social Affairs (BMAS) provides a good overview on questions and answers concerning labour law and occupational health and safety, translated into ten languages: <https://t1p.de/b8wm>

THIS IS IMPORTANT: Employees are obliged to immediately notify the employer of any changes in their personal circumstances (e.g. changes to their tax category).

Who is not entitled to request short-time work allowance?

The payment of short-time work allowance is linked to the unemployment insurance. Employees who do not have unemployment insurance can thus also not receive short time work allowance.

This includes employees, who have become eligible for standard retirement pensions and could obtain a standard retirement pension starting from the following month, as well as workers in marginal employment (mini-jobbers, see above), persons who are self-employed and who have no employees, and civil servants. Employees receiving sickness benefits are also not entitled to receive short-time work allowance.

Bis zum 31. Dezember 2020 soll der Erholungsurlaub aus dem laufenden Urlaubsjahr wie geplant akzeptiert werden. Wird die Kurzarbeit gegen Ende des Urlaubsjahres eingeführt oder gibt es noch Resturlaubsansprüche aus dem Vorjahr, wird der Arbeitgeber aufgefordert, den Zeitpunkt für den Antritt des Resturlaubs festzulegen. Dabei müssen die Urlaubswünsche der Arbeitnehmer*innen berücksichtigt werden.

ATTENTION!

Since the actual tax deduction is only determined at the end of the year with the tax declaration, the extent of the impact depends on the following factors: number of children, duration and amount of short-time work, amount of income and the use of the tax splitting by married couples ("Ehegattensplitting"). As there are many different situations, we strongly recommend that the tax effects be checked by a competent person or a tax advisor.

Are employees covered by social security schemes while receiving short-time work allowance?

Employees retain their membership in statutory health, care and pension insurance schemes respectively, as well as in unemployment and companies' accident insurance schemes.

What happens if people get sick during short-time work?

If employees fall sick while receiving short-time work allowance, and are no longer able to work, they are still entitled to receive short-time work allowance for 6 weeks (so-called sickness short-time work allowance).

If the incapacity to work occurs before short-time work allowance is paid, employees are entitled to the continued payment of undiminished wages up to the start of short-time work. From the start of short-time work:

In the case of short-time work zero: Entitlement to sick pay ("Krankengeld") equal to the amount of the short-time work allowance and paid by the employer, which is to be reimbursed by the health insurance company.

In the case of partial short-time work: Entitlement to continued payment of wages in the amount of the reduced wage and additional entitlement to sick pay in the amount of short-time work allowance, also paid by the employer.

If the sickness lasts longer than 6 weeks, the employees are entitled to sick pay ("Krankengeld") by the health insurance company.

EXAMPLE: An employee, single and without children, earning 2000 Euro/month is written off sick with effect from 15 March until the end of April. Starting 30 March his/her company introduces short-time work at a 50 % rate. His/her income can be calculated as following:

March 15 – March 29

→ **Continued payment of wages by the employer for two weeks, on the basis of the remuneration before short-time work (2000 Euro/month)**

Starting March 30: 50% short-time work

→ **Continued payment of wages by the employer on the basis of 50% of the regular income: 1000 Euro + 50 % sickness benefit equaling the amount of short-time work allowance at a rate of 60%: 600 Euro = 1600 Euro**

In case of short-time work at a 100% rate ("Short time work zero") starting March 30 only sickness benefit equaling the amount of the short-time work allowance will be paid.

If the employee's inability to work is caused by a third person (e.g. traffic accident), the employee must provide his/her employer with the third person's name and address. The affected employee's claims towards the third party are then transferred to the Federal Employment Agency in the amount of short-time work allowance due.

What if maternity leave occurs during short-time work?

Pregnant workers lose their entitlement to short-time work allowance starting with the day in which the maternity leave begins. They will receive benefits under the Maternity Protection Act. Before maternity leave begins, there can be a claim to short-time work allowance if and insofar as women are not restricted in their work because of their pregnancy.

TIPP

The responsible health insurance company will answer questions about the prohibition of employment, maternity allowance (depending on the health insurance company and the type of health insurance in question), sickness benefit or child sickness.

Help for parental benefit is available here:

<https://t1p.de/lrtn>

May employees work elsewhere during short-time work?

Those employees, who were already engaged in some form of secondary employment before short-time work was introduced (the first month of receiving short-time work allowance is decisive here), may pursue such secondary employment, without the resulting earnings being offset against short-time benefits.

If a new job is started or the existing secondary job is expanded, new additional earnings regulations will apply from April 1 to December 31, 2020.

→ As long as the total income does not exceed the previous earnings before short time work, the additional earnings (similar to the top-up amounts of short time work allowance) are not offset against the short-time work allowance. This applies irrespective of where the secondary earnings are made.

→ A "Minijob" is generally not taken into account, nor will it be checked in this case whether the original income is exceeded.

→ A so-called short-term employment ("kurzfristige Beschäftigung") can also be exercised. Such an activity is free of social security contributions, even if an income of more than 450 euros is achieved. It must necessarily be however limited from the start to a maximum of 115 days per year. This new extended regulation lasts until October 31, 2020.

Income from secondary employment is not offset against the short-time work allowance until the original net wage is reached. The top-up amounts paid by the employer are included in the calculation.

IT IS IMPORTANT to present documentation on the amount of supplementary earnings to the employer, because he must calculate the due amount of the short-time allowance taking into account the diminished working hours and the total earnings (including possible top-up amounts).

Can short-time work be used for a professional qualification?

The period during which short-time work is taking place may be used for professional qualification, according to the Qualification Opportunities Act ("Qualifizierungschancengesetz"). The works councils shall discuss this with the employer. In this way, businesses can establish jointly developed qualification plans that will regulate all details. Such qualification plans are also useful for the time after short-time work ends.

But not only employers, also employees can receive advice on this matter from the employment agency and undergo an examination of their claim for funding of qualification measures. However, participation in qualification and training must not stand in the way of returning to normal working hours, which is why it must also be ended when short-time work ends, as long as the employer does not grant leave to the concerned employee for the completion of his/her qualification. In any case, we recommend seeking advice from the responsible employment agency.

ATTENTION!

The employment agencies will prioritize putting an end to short-time work over the realization of training and qualification measures. This means that vocational training and qualification will not be accepted as a ground for continuing short-time work. This needs to be taken into account when planning such matters.

What if there is not enough money for living?

If the short-time work allowance received is not enough to cover the costs of living of an employee's household, he/she may apply for benefits to cover subsistence costs (Hartz IV). In this way, employees with income may receive an additional allowance. As a rule, 20% of the income will not be taken into account when calculating Hartz IV benefits, which means that the amount of payment is higher than if there is no income. This will be assessed in each individual case.

At the suggestion of the DGB, access to Hartz IV benefits was legally facilitated. In the future, savings will no longer be checked and the actual housing costs accepted - without checking whether these are appropriate. This applies to applications between March 1 and June 30, 2020.

Those who are self-employed and who have no employees may also receive benefits to cover subsistence costs if they are not able to receive short-time work allowance and are not receiving any more orders due to the crisis.

The DGB has issued a detailed guidebook on Hartz IV:

<https://t1p.de/rci0> (in German)

ATTENTION!

Instead of Hartz IV, you can alternatively also apply for housing allowance ("Wohngeld"), which is a pro rata subsidy for rent, e.g. an average of Euro 190 for a couple and the child supplement ("Kinderzuschlag") of max. Euro 185 per child. Nevertheless if the loss of income is very significant – as it is with short-time work zero – Hartz IV is usually the better option.

Info on the emergency child supplement ("Kinderzuschlag"): <https://t1p.de/luzj>

New Hartz IV rules: www.dgb.de/-/x04

COMPENSATION FOR PARENTS WHO TEMPORARILY CANNOT WORK DUE TO CHILD CARE OBLIGATIONS

Parents who have to stay at home to take care of their children, but whose companies do not work short-time, are entitled under the Infection Protection Act, to a compensation of 67 percent of their income fallout for a period of maximum six weeks. The maximum amount granted per month is EUR 2,016.

The entitlement only applies if:

- There is no other reasonable childcare option and this is explained to the employer or the authority. For example, the entitlement does not apply if the employer allows Home Office! The Ministry assumes here, that childcare and work can be done simultaneously and finds this reasonable – especially in situations like the current one, over a period of 5 weeks.
- Employees are not on short-time work,
- There are no work time surpluses (additional hours) that can be taken.

(see: Law to protect the population in an epidemic situation of national scope)

Note: www.dgb.de/schwerpunkt/corona

What kind of precautionary measures does an employer need to take in order to protect his/her employees from Corona?

What options do works councils have in this regard?

Based on the respective employment contracts, an employer has certain protection and care duties vis-a-vis his/her employees. For this reason, he/she has to make sure that the risks of falling ill and the dangers to employees' health remain as low as possible. Depending on the kind of business – namely in the case of businesses that have a lot of contact with clients – this duty can translate into a concrete obligation, e.g. to make available disinfectant. Moreover, employers are obliged to instruct their employees with respect to the hygiene and protective precautions that they are obliged to adhere to. This means that employers need to explain to employees how to minimize the risks of infection. For example, employees can be advised to wash their hands on a regular basis.

In cases where a business has a works council or staff committee, these types of employers' hygiene instructions, which usually touch on questions regarding the organization of the business and the behaviour of employees, need to be co-determined with the respective works councils or staff committees, based on Section 87 Nos. 1 and 7 of the Works' Constitution Act and Section 75 par 3, Nos. 11 and 15 of the Federal Law on Staff Committees in the Public Sector. It is thus recommended that the respective workforce representation come together quickly with the respective health and safety committee to discuss the existing hazards for the business, based on Section 11 of the Occupational Safety Act (ASiG). This joint session shall be used to swiftly put into place the order and division of labour needed in order to assess such hazards, the instructions to employees, operating instructions, general information and possible measures (personal protective equipment). The Ordinance on Biological Substances also provides the necessary scope for action for the workforce representations.

Where can you find tips on businesses' plans for pandemics?

The Coordination Group for Biological Agents (KOBAS) of the German Statutory Accident Insurance (DGUV) has updated its tips on business planning for pandemics. This leaflet provides information on what needs to be established and what arrangements need to be made in businesses, if a disease spreads across the world. The leaflet is published jointly by the German Statutory Accident Insurance, the Association of Company Doctors (VDBW) and the Association for Safety, Health and Protection of the Environment at Work (VDSI).

Find this leaflet at: <https://t1p.de/1cfjm> (in German)

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