**Client Alert** | Employment, Compensation & Benefits

# Home Office and Mobile Work: Status quo, Corona-ArbSchV and Outlook (Germany)

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We have now been back in a "hard lockdown" since mid-December 2020. Even when the so-called "lockdown lite" was decided, the German Chancellor and the heads of government of the German states called on companies to (re)enable their employees to work at home or to work remotely from home in view of the high number of infections.

The Corona Occupational Health and Safety Ordinance (the "**Corona-ArbSchV**") has been in force throughout Germany since January 27, 2021 and although it is currently due to expire March 15, 2021, it is likely that its duration will be extended unless the incidence rates fall significantly.

Against this background, it makes sense to take another look at the provisions of labor law in general and the Corona-ArbSchV as well as the current legal efforts regarding home office in particular.

***Does the Corona-ArbSchV require employers to offer their employees the option of working from home? Who decides whether working from home is in fact possible?***

Under the new Corona-ArbSchV, the employers of staff performing office work or comparable activities that are suitable for this purpose, are obliged, initially on a temporary basis, to offer their employees the option of doing so from home ("home office"), unless there are conflicting **operational reasons of a compelling nature**. Comparable activities are generally understood to mean those that can be performed from home using information technologies. The decision as to whether home office would be possible or if there are any conflicting reasons is made by the employer**.**

***Which compelling operational reasons could speak against work being performed from home?***

According to the Federal Ministry of Labor and Social Affairs (the "**BMAS**"), there are many activities in production, services, trade, logistics, etc. which it could be impossible to perform from home. In other areas, too, there could be operational reasons that speak against working from home. This could be the case, for example, if operational processes would otherwise be considerably restricted or could not be maintained at all. Examples could include: supporting activities associated with office work, such as processing and distributing incoming mail, processing incoming and outgoing goods, counter and cashier services for customers and employees where these are still necessary, issuing materials, repair and maintenance tasks (e.g. IT service), janitorial services and emergency services to maintain operations, possibly also ensuring first aid on the operational premises.

As a rule, relying on technical or organizational reasons, such as the unavailability of required IT equipment, necessary changes in work organization or insufficient qualification of the employees concerned is possible only temporarily until the obstacle preventing home office has been eliminated. Special data protection requirements and the protection of company secrets could also speak against performing activities from home.

***What happens if the employee does not accept the employer's claim that there are compelling operational reasons?***

If the employer claims that there are operational reasons preventing the employee from working at home, there is currently no way for the employee to take court action to enforce the right to work remotely. According to the Federal Minister of Labor, Hubertus Heil, the employee should and can contact the works council at the company. What exactly this is supposed to achieve, remains, however, unclear. The employee could also contact the occupational health and safety authorities (Section 17 ArbSchG). The occupational health and safety authority can then demand that the employer hand over the relevant documents and provide the information necessary for it to carry out its monitoring task. The employer must then explain the reasons why remote work is not possible. If the employer fails to comply with the demand, the occupational safety and health authority can prohibit work at the company. In addition, fines of up to EUR 30,000.00 can be imposed. It is therefore advisable that employers document offers to work remotely or any compelling operational reasons that speak against working remotely, which should also be discussed in detail with the employee beforehand.

***What are the requirements that must be met for occupational health and safety at home?***

Generally, the employer also has occupational health and safety obligations if employees are working at home, although enforcement and monitoring of occupational health and safety requirements is limited both factually and legally. Generally, the employer has no right to enter the employee's home unless this has been agreed between the parties. But even if the employer did have the right to enter the employee's home, the employer would still not be able to exert any permanent influence on all "domestic" hazards. The employer's occupational health and safety obligations for home office and mobile work should therefore be seen largely as organizational and information obligations, at least insofar as the workplace is not a telework place within the meaning of Section 2 VII ArbStättV.

In connection with the Corona ArbSchV, there is some discussion about which form of home office is actually referred to, because the text itself remains relatively vague. The reference in § 2 IV Corona-ArbSchV reads as follows:

*As regards office work or comparable activities, the employer must offer employees the option of performing these activities in their homes if there are no conflicting operational reasons of a compelling nature.*

In particular, the legitimate question arises whether employers have thus actually been obliged to install telework places within the meaning of § 2 VII ArbStättV for a period of around 2.5 months for all employees whose activities permit this, i.e. to provide equipment including office furniture, to carry out risk assessments and monitoring and to pay all the costs for this. In any case, the ordinance itself does not require the installation of a specific work station and its assessment. The BMAS (wisely?) does not specify exactly what is required on its homepage either, but only states that

*"Generally, the employer is also responsible for health and safety for work performed in the home office. This does, however, not mean that the employer must provide employees with all the necessary work equipment. Employees can also use their own work equipment in the home office. It is advisable that employer and employees jointly agree whether and under what conditions work equipment can be provided by the employees. The employer must include the workplace in the home office in its risk assessment and specify the necessary equipment. The employer must also ensure safe use of the work equipment."*

According to the wording of § 2 VII ArbStättV, a telework place requires the following:

*"A telework place is only deemed to have been established by the employer if and when employer and employee have set out the conditions for teleworking in an employment contract or as part of an agreement and the required equipment of the telework place with furniture, work equipment including communication equipment has been provided and installed in the employee's private area by the employer or a person instructed to do so by the employer."*

If all these aspects are taken into account, it can in our opinion be argued, especially in view of the short duration of the Corona ArbSchV, that the intention is not to impose an obligation on the employer to set up genuine

telework places across the board. The ordinance provides that employees may use their own work equipment, which is in conflict with the wording of § 2 VII ArbStättV stipulating that the equipment will be provided and installed by the employer. The ArbStättV also provides for a mandatory agreement between employer and employee. Finally, a bill on home office which has recently been introduced (see more on this below) does not at this point provide for an obligation to set up telework places. It seems unlikely that a proposed law that will be applicable in the long term does not provide for this obligation, whereas a temporarily applicable ordinance does.

While the employer is obliged to carry out a risk assessment as regards work in the home office, this obligation is largely limited to (very detailed) organizational and information duties.

Attention: In particular in view of the necessity to carry out the risk assessment as described above, it should be noted that this triggers a co-determination right of the works council, which must also be observed! In addition, various other co-determination rights of the works council must regularly be observed when introducing home office arrangements. If no agreements have yet been made with the works council in this respect, it would be advisable to get the works council on board now.

The employer's occupational health and safety obligations are further limited if employees are not restricted to working from home (home office) but are generally given the opportunity to work remotely (mobile office). In this case the employer's options to influence the specific working environment are more limited than in the classic home office case. For example, in the case of general mobile work, the employer cannot be expected to carry out a separate risk assessment and provide instructions for every conceivable mobile work place. It is inherent in the concept of mobile work that the work place is solely determined by the employee. If the employer cannot foresee the specific location of the work place then a general risk assessment must be sufficient, in which at most typical hazards would have to be identified.

Both in the home office and in the mobile office, the relevant employees' duties to cooperate are particularly strict, such as the duty of employees to protect themselves (§ 15 ArbSchG) and the duty to report any direct significant hazards (§ 16 ArbSchG).

***Does the employer have to provide the equipment for the home office? Who bears the costs?***

Generally, the employer is obliged to provide its employees with the work equipment required for the proper performance of their work, which includes mobile work or home office activities. Exactly what work equipment this means must be determined in each individual case. It is advisable that employer and employees agree jointly whether and under what conditions work equipment can be provided by the employees.

Insofar as the employer provides the employees with work equipment to be used by them for their work (typically cell phones and laptops, less often furniture and other office supplies), the employer bears all costs for the acquisition, maintenance and care of the work equipment. From the employer's point of view, it is advisable to provide technical work equipment that is intended exclusively for operational purposes, if only for data protection reasons. This may in addition involve the purchase of office equipment, pro rata rental payments, electricity and heating costs, and Internet connection costs. However, caution is required here. As just indicated, the result of an agreement on these details is likely to be that a telework place has been agreed and must then be set up.

Employees may also use their own work equipment, giving each of them a claim for reimbursement against the employer for those costs that the employee could reasonably consider necessary under the circumstances. However, according to the general opinion, the employee only has a claim for reimbursement if the work equipment was purchased predominantly in the employer's interest. This requirement is not met, for example, by an Internet broadband connection that the employee already purchased before working at home and continues to use privately.

The employer must include each home office work place in its risk assessment and determine the necessary equipment and ensure safe use of the work equipment.

The costs can in principle be reimbursed together with the employee's pay or by way of additional lump-sum payments. This would, however, require an agreement between employee and employer. Settlement by mere payment of the salary is only permissible if the relevant costs are specified (transparency requirement) and are as

such low compared to the employee's pay (appropriateness). As far as well-paid employees are concerned, it is likely that such costs would compensated by their salary even without a contractual agreement.

***Can the employer order work in the home office? Is there a general legal right to work in a home office?***

In principle, there was and currently is no **permanent** legal right to work from home (also according to the Higher Labor Court Berlin-Brandenburg in a decision from before the pandemic dated November 14, 2018 – case number 17 Sa 562/18). It is assumed that working from home is generally subject to the consent of the employees. The private living space of employees is outside the sphere of influence of the employer (due to the fundamental right of inviolability of the home, Article 13 GG). This continues to apply, i.e. with regard to the Corona ArbSchV. Here, too, there is no possibility of forcing the employee to work from home against their will, nor does the employee have an enforceable right to do so. This can, however, be agreed between employee and employer. Moreover, the option may already result from the employment contract, a works agreement or a collective bargaining agreement.

Recently, however, more voices have been assuming that the crisis situation caused by the Covid-19 pandemic and the recommendation by experts to maintain social distancing would justify a right by the employer to align the contract, provided that the employer provides the necessary infrastructure and there are no conflicting legitimate interests arising from the employee's home and life sphere. This applies in particular if, during a plant or business shutdown, damage to the employer can be averted if the employees are working from home. Conversely, an employee could also have such a claim against the employer if the nature of the work performed would not require the employee's presence at the plant or company. In light of the employer's duty of care, such a claim is generally to be affirmed if the employee has risk factors (such as age, respiratory or heart diseases) and the employer has no other legitimate interests.

***What legislative activities are underway regarding the home office/remote work?***

The BMAS is currently developing the "Bill to Facilitate Mobile Work, **EMAG**". It contains comprehensive provisions on mobile work and focuses primarily on tax relief for the equipment of the (possibly domestic) work place, but does not give employees any legal right to telework or work from home. Rather, the employer will be required to provide explanations and justification. Mobile work means that the employee does not have a permanently furnished workplace on the employer's premises and may instead perform work at any location, i.e., on a mobile basis.

The bill provides for the following in this regard: Employees who wish to work on a mobile basis must notify their employer in text form of the start, duration, scope and distribution of the mobile work no later than three months in advance of the date on which the employee wishes to start working on a mobile basis. The employer is then obliged to discuss the wishes with the employee with the aim of reaching an agreement. If no agreement on mobile work can be reached between employer and employee, the employer must explain the decision to refuse mobile work and the reasons for its refusal to the employee in text form no later than two months after the employee has communicated the request. The reasons for refusal may not be irrelevant or arbitrary. If the employer has duly rejected a request for mobile work, a request for mobile work can at the earliest be re-submitted by the employee concerned four months after receipt of the employer's rejection, which will then trigger the internal process again. If the employer does not comply with its obligation to provide explanations, the requested mobile work shall be deemed to be fixed for the period which has been communicated by the employee, but not longer than six months. Since the employee is not required to specify the type and location of mobile work when submitting the request, a catch-all provision allows the employee to work from a location or locations of his or her choice. As a sanction, the contractual freedom is interfered with by operation of law in such a case.

The EMAG further provides for accompanying legislative changes in the area of occupational health and safety, accident insurance protection, the recording of working hours and co-determination.

***What needs to be considered with regard to working hours when working at home?***

The Working Hours Act ("**ArbZG**") also applies to work performed from home. Even when working from home, employees must comply with the maximum working times according to Section 3 ArbZG, the provisions on breaks according to Section 4 ArbZG and the rest periods according to Section 5 ArbZG. The employer is responsible for compliance and must enforce the relevant provisions, also in cases where the parties have agreed on 'trust-based' working times. However, monitoring by the employer is only possible to a very limited extent when employees are working from home while the potential for remote working to blur work-life boundaries is particularly high. The employer should therefore delegate its duty to document daily working hours to the employee. The employee will then have to record his or her daily working hours, especially if the eight-hour limit is exceeded, and submit the records kept for this purpose to the employer and, if necessary, to a supervisory authority.

***How are home office activities terminated?***

When the parties to the employment contract agree on home office/remote work or mobile work, it is incumbent upon them to also provide for a possible termination of the same. The contracting parties should regulate whether and, if so, how the home office/remote work or mobile work agreement can be terminated again. A temporary agreement or, in the case of an open-ended agreement, a right of revocation would be a good way to do this and could for example at this point be linked to the development of the current pandemic situation. In the absence of an agreement and where the parties are unable to reach an agreement, the employer's only option is a dismissal with the option of altered conditions of employment.

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