

# PEOPLE: OBLIGATION TO WORK FROM HOME STARTS TODAY - THE COVID-19 OCCUPATIONAL HEALTH AND SAFETY REGULATION (GERMANY)

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Legal Briefings

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According to the new Covid-19 Occupational Health and Safety Regulation in Germany, all employers must allow their employees to work from home when performing office duties. The regulation came into force on 27 January 2021 and will initially apply until 15 March 2021. In order to operate on a solid basis, it makes sense for employers to conclude appropriate agreements with employees and, if a works council has been established, a works council agreement.

## BACKGROUND

After almost three months of shutdown, the infection situation in Germany is not yet under control. On 19 January 2021, the Federal Government and the Federal States therefore agreed on a further extension of the previous measures against the Covid-19 virus until 14 February 2021. In addition, the Federal Ministry of Labour and Social Affairs issued the Covid-19 Occupational Health and Safety Regulation ("Corona-OSH-Reg"), which came into force on 27 January 2021 and will initially apply until 15 March 2021. The aim of the Corona-OSH-Reg is to improve the protection of employees at the workplace from a Covid-19 infection, no longer solely through compliance with hygiene measures at workplaces. Rather, employers will now be obliged, as far as possible, to allow their employees to work from home.

# WORKING FROM HOME REGULATION

The Corona-OSH-Reg contains regulations on contact reduction at the workplace and on the provision and wearing of "mouth-nose protection". In addition to the stricter occupational health and safety regulations on contact reduction, the most important regulation for employers is probably set in sec. 2 para. 4 Corona-OSH-Reg. According to this, employers are obliged, irrespective of the size of the company, to

- offer all employees who perform office work or comparable activities to carry out these activities at their home (working from home),
- if there are no opposing compelling operational reasons.

Activities comparable to office work are regularly those that can be carried out digitally from home. The Corona-OSH-Reg does not specify what compelling operational reasons oppose work from home. However, certain areas of the working world are naturally excluded from the working from home obligation. According to statements by the Federal Minister of Labour, Hubertus Heil, this applies in particular to the areas of production, retail, services, logistics and health care. This therefore primarily refers to those activities which are in principle suitable for being carried out at home, but which cannot be relocated there for comprehensible operational reasons, in particular because otherwise the remaining operations can only be maintained to a limited extent or not at all (e.g. processing and distribution of incoming mail, processing incoming and outgoing goods, counter services for customer and employee contacts which are still necessary, issuing of materials, repair and maintenance tasks (e.g. IT service), caretaker services and emergency services to maintain operations). On the other hand, technical or organisational reasons, such as difficulties in providing the necessary operating resources (such as IT equipment) or in making the necessary changes in the organisation of work, do not constitute compelling operational reasons and can thus at most be asserted for a limited period of time until they are eliminated.

## IMPACT FOR EMPLOYERS

According to the Corona-OSH-Reg, employers must now immediately review whether office work or comparable activities can also be carried out from home. If this is the case, the employer must offer their employees the opportunity to work from home if there are no compelling operational reasons to the contrary.

Employers are generally responsible for setting up the working from home and thus also for providing the necessary equipment. If the employee uses his or her private equipment or acquires the necessary work equipment at his or her own expense, he or she can demand reimbursement of the costs incurred from the employer in accordance with sec. 670 German Civil Code.

The involvement of the works councils must not be forgotten when implementing the Corona-OSH-Reg, as the temporary transfer to working from home can also constitute a relocation within the meaning of sec. 99 Works Constitution Act. In addition, co-determination rights according to sec. 87 para. 1, nos. 1, 2, 3, 6 and 7 Works Constitution Act come into consideration.

The Federal Minister of Labour, Hubertus Heil, has already announced official inspections in advance to guarantee the implementation of the Corona-OSH-Reg. During an inspection by the local occupational health and safety authorities, employers are obliged, inter alia, to comment on the existence of opposing compelling operational reasons if they have not offered working from home. A detailed justification by the employer is necessary as why working from home is not an option for the specific workplace. Simple justifications or individual preferences of superiors, for example to be able to better control the employees on site, are not sufficient.

Occupational health and safety authorities may enforce the provisions of the Corona-OSH-Reg by company orders. Violations of such official orders can be punished with fines of up to EUR 30,000.00.

## **IMPACT FOR EMPLOYEES**

Employees are not obliged by the Corona-OSH-Reg to accept an employer's offer to work in a home office. Rather, it is necessary for the implementation that, on the one hand, the spatial and technical conditions in the employee's home are given and, on the other hand, that the employer and the employee reach an agreement on working from home.

The Corona-OSH-Reg also does not contain a right of action for employees to work from home. However, employees can apply to the works council or make use of their right to complain under sec. 17 Occupational Health and Safety Act if the employer does not offer working from home arrangements. If the employer does not remedy a complaint, employees can also apply to the competent occupational health and safety authority and report violations of the Corona-OSH-Reg.

## **CONCLUSION AND OUTLOOK**

With the Corona-OSH-Reg, the offer to carry out office work from home is now obligatory for employers if there are no opposing compelling operational reasons. In this context, employers should not underestimate the legal risks in connection with the occupational safety and health requirements for the workplace at home and the cost issues. Employers are therefore recommended to conclude written agreements with employees and, if a works council has been established, a works council agreement in order to act on a solid basis.

Since the working from home requirement was created in an effort to further lower the incidence of infection by further reducing contact even at the workplace in response to the emergence of contagious coronavirus mutations, it would not be surprising if this measure is also extended.

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## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**DR ANJA  
LINGSCHIED**  
COUNSEL, GERMANY

+49 69 2222 82504  
anja.lingscheid@hsf.com



**TRA MY NGUYEN  
THI**  
ASSOCIATE,  
GERMANY

+49 69 2222 82506  
TraMy.NguyenThi@hsf.com

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