COVID-19: NEW GERMAN COVID-19 WORKPLACE RESTRICTIONS: MANDATORY WORK FROM HOME AND ENTRY RESTRICTIONS FOR OFFICE ACCESS

Date: 23 November 2021

German Labor Employment and Workplace Safety Alert

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Due to rapidly increasing numbers of COVID-19 cases over the past few weeks, an amendment of the German Infection Protection Act (the Act) was passed last week. The amendments will enter into force on 24 November 2021.

The Act will drastically change the German approach towards COVID-19-related office entry restrictions (requiring proof of vaccination, recovery, or daily testing). It will also introduce a mandatory principle of “work from home wherever possible.” In particular, the following nationwide obligations will come into force for employees and employers in Germany:

WORK FROM HOME

Employers *must offer* their employees who perform office work or comparable activities the opportunity to work from home, unless there are “compelling operational reasons” for not doing so.

The Act itself does not specify what constitutes such “compelling operational reasons”. However, based on additional legislative materials, such “compelling operational reasons” may exist in particular where employees working from home would materially affect (a) business continuity (e.g., processing of incoming physical mail, work on physical information technology (IT) infrastructure, or similar), (b) special operational data protection requirements, or (c) the protection of trade secrets.

The employer's lack of proper IT equipment or similar organizational shortcomings will generally not be a sufficient reason for not offering the ability to work from home. If at all, then such circumstances might only constitute a temporary reason that the employer will need to overcome as soon as possible (e.g., by ensuring that required equipment is made available).

Ultimately, the employer will bear the burden of proof to demonstrate that a sufficient reason for not offering the ability to work from home exists in each specific case.

Employees generally must accept the employer's offer to work from home unless there are “reasons” on their part for not working from home. Again, the Act itself does not specify what constitutes such “reasons.” However, the bar for employees will generally not be very high (i.e., they will generally be able to rather easily reject the offer to work from home). Based on additional legislative materials, such reasons, for example, could include lack of space, interference by third parties (such as children, spouses, or roommates) or lack of proper equipment at

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home. At the employer's request, employees must notify their employer of the reasons preventing them from working from home.

WORKPLACE ACCESS RESTRICTIONS: ACCESS ONLY FOR VACCINATED, RECOVERED, OR TESTED EMPLOYEES

To the extent employees are not obliged to work from home, strict workplace entry restrictions will apply. This will be the case for employees who either (a) do not receive a work-from-home offer from their employer (due to compelling operational reasons on the part of the employer), or (b) reject the employer's work-from-home offer (due to reasons preventing them to work from home). The employer itself (including executives or other management) will be subject to these entry restrictions as well.

The restrictions will apply for each workplace where physical contact between employers and employees or with third parties cannot be avoided. There is no need for actual physical contact, but rather the mere possibility of meeting other individuals at the workplace will be sufficient to trigger the restrictions.

Entry to such workplaces will be allowed only if those individuals wishing to gain entry are fully vaccinated against, recovered from, or tested negative for COVID-19 (the so-called “3G model” based on the three German words for vaccinated (*geimpft*), recovered (*genesen*), or tested (*getestet*)). In addition, the individuals will need to be in the possession of a vaccination certificate, recovery certificate, or negative test result. The certificate or test result needs to be made available for inspection by the employer or on file with the employer no later than upon entry into the workplace.

The negative COVID-19 test results need to be based on a test conducted no later than 24 hours before (or, in case of PCR tests, no more than 48 hours before) entry into the workplace. Formal test certificates will be required, i.e., self-testing by employees at home will not be sufficient. However, self-applied tests supervised by the employer can be sufficient if the employer offers and certifies such testing immediately upon entry into the workplace.

Employees will generally need to bear the costs of any required COVID-19 testing (unless the employer voluntarily offers to reimburse the costs or to conduct and certify supervised testing upon workplace entry).

Stricter regulations apply to certain businesses and facilities such as hospitals or nursing homes: Only employees who have tested negative (with proof of testing) may enter them. This applies to all employees—regardless of whether they are fully vaccinated or recovered. However, employees who have been vaccinated or who have recovered will need to be tested less frequently.

Employers must monitor compliance with the above obligations on a daily basis by means of verification checks, and they must also document them on a regular basis. Employees are required to *provide proof* of their vaccination, recovery, or testing status upon request.

The Act now also explicitly provides that employers may process personal data, including data on employees' vaccination, recovery, and testing status, for the above purposes.

If employers or employees do not comply with the above obligations, they may ultimately be subject to sanctions under the Act, including administrative fines of up to €25,000. Further, employees may face disciplinary measures in case of noncompliance. This can include loss of income, formal warnings, and termination of employment. For

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now, the new obligations will remain in force until 19 March 2022 with the possibility of one three-month extension. In addition, existing COVID-19 workplace safety obligations (such as those relating to specific hygiene measures at the workplace, obligations to provide employees with certain testing options, and similar obligations) will continue to apply alongside the new provisions of the Act.

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