

Working during the coronavirus pandemic: As an employer, how do I deal with employees returning from holidays?

HOW DOES THE CHOICE OF A HOLIDAY DESTINATION AFFECT THE RIGHTS AND DUTIES IN THE EMPLOYMENT RELATIONSHIP?

Executive Summary

- A delayed return from holiday due to travel restrictions falls within the sphere of risk of the employee. They then must take additional leave or do not receive a salary for the period in question.
- If a compulsory quarantine is ordered by the authorities after a trip to a risk area and the employee cannot perform any work as a result, the obligation to pay remuneration does not apply. The employer should clarify with the competent authority whether a claim for compensation exists according to section 56 of the Protection against Infection Act (Infektionsschutzgesetz - IfSG).
- If an employee falls ill with COVID-19 after having knowingly stayed in a risk area, the fundamental right to continued payment of remuneration could be excluded.
- The employer has a right to be informed by employees to the extent necessary in order to protect the workforce. In addition, he may demand information from the employee regarding a possible illness if they suffer from relevant symptoms or after they have stayed in a risk area.

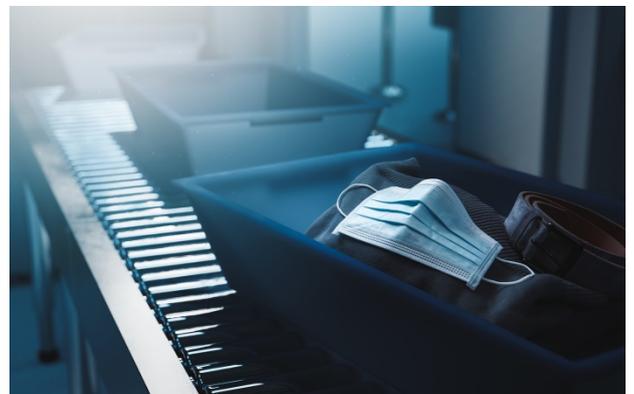
Many will have spent their holidays in Germany during this extraordinary summer. Nevertheless, some employees may have travelled abroad, some of them knowingly or unknowingly to “coronavirus risk areas”. How does a scheduled trip affect the employment relationship? What does a trip to a risk area mean for the return to work? What applies if the employee has to go into

quarantine or falls ill after their holiday? Which rights to information does the employer have?

The following is an overview of the issues arising after the end of leave in relation to the employment relationship.

Delayed return from holiday

If employees are prevented from returning home after a private stay abroad due to travel restrictions and cannot start work in time, this falls within their sphere of risk. The so-called “travel risk”, i.e. the risk that the employee cannot physically reach the company, is realized. Since it becomes impossible for the employee to perform the service, the employer does not have to pay any remuneration either. In agreement with the employee, the use of any (remaining) leave or time credits in order to obtain paid leave could be an alternative, possibly preferred by them, to stopping salary payments.



Quarantine upon arrival from holidays in a risk area

States or regions outside Germany for which there is an increased risk of infection with the coronavirus when returning to Germany are defined as coronavirus risk areas. The website of the Robert Koch Institute provides information on how the classification as a risk area is made and which countries are currently designated as such.

Whether an obligation to quarantine exists upon arrival from a risk area depends on the applicable regulations of the federal states. In many cases, it is currently planned that entry from a risk area must be reported to the public health office and that those returning from a risk area are required to stay in home quarantine for up to 14 days. The obligation for quarantine is not applicable if a current negative coronavirus test result is provided. Since the beginning of August - at least for the time being - appropriate tests are mandatory when returning from a risk area. The obligation to carry out home quarantine exists at least until a (negative) test result is available; the competent health office decides on the lifting of the quarantine.

Subject to the possibility of performing work from a home office, the employee will be unable to perform work if quarantine is ordered. Irrespective of an official quarantine, the employer cannot employ the employee referred to in view of existing welfare and protection obligations towards the rest of the workforce due to the higher risk of infection.

The employee does not lose, in principle, their right to remuneration if they are temporarily prevented from performing their work through no fault of their part. However, there is some evidence to suggest that this provision of section 616 German Civil Code (Bürgerliches Gesetzbuch - BGB) does not apply if the employee is prevented from performing work as a result of a foreseeable quarantine after returning from a risk area. In addition, the relevant provision in section 616 of the German Civil Code (BGB) is often excluded from employment contracts.

In this context, it has not been conclusively clarified whether there is a claim for compensation under the German Protection against Infection Act instead of the lost right to remuneration. In the event of an officially ordered quarantine, the German Protection against Infection Act provides for compensation in the amount of the lost earnings for a period of six weeks. The claim is directed against the competent authority, although the employer must first make an advance payment. However, doubts as to the eligibility of the claim could arise from the fact that the order for home quarantine after returning from a holiday is based on an ordinance and not on a case-by-case decision of the competent health office; moreover, it could play a role that the person concerned, with knowledge of the quarantine obligation, deliberately entered a risk area. The heads of government of the federal states agreed on 27 August 2020, with regard to this case of deliberate risk taking, to initiate a legislative amendment to exclude compensation claims. In view of this legal uncertainty, the employer who is, in principle, obliged to make advance payments should seek clarification with the competent authorities before making a payment.

Illness after holidays

As with all illnesses, being ill with COVID-19 also entitles to continued payment of remuneration for up to six weeks. However, an employee may lose the right to continued payment of remuneration if they have culpably caused the incapacity for work. This is assumed by the labour courts if the employee has recklessly or intentionally exposed themselves to risks in a way that seriously violates "the behaviour to be expected from a reasonable person in their own interest". It seems at least conceivable that travelling deliberately to a designated risk area for COVID-19 could be qualified accordingly. However, it is not yet clear which standards the courts will apply when examining specific cases in this particular situation.



Employer's right to ask questions

In principle, employers do not have a right to be informed with regard to the employee's holiday destinations, neither before the start of the holiday nor after returning home. In view of the increased risk of infection and the employer's resulting duties to protect, there is, in the case of COVID-19, a duty of the employee to inform the employer with regard to a suspected infection or an increased risk of infection, e.g. due to a stay in a risk area. The duty of notification follows from the duties of consideration and support existing in the employment relationship, as the employer can only fulfil their duties of protection if the employee notifies the employer. The employee is therefore obliged to provide information and truthfully answer questions with regard to this area.

Can an employer demand employees to be tested for coronavirus?

There is currently no general obligation to test, only travellers returning from risk areas have to be tested. The employer cannot require a test. However, the employer must take appropriate measures to protect and quickly clarify suspicious cases, due to their duty of protection towards the entire workforce. If there are concrete indications of an increased risk from an employee, such as relevant symptoms or a return from a risk area, the employee should therefore be released from work until a medical clarification is provided.

While indications such as symptoms of illness generally entitle the holder to remuneration during the clarification phase, the situation could be different when returning from a risk area. In this respect, clarification should be sought via the exchange of information with the employee and the public health office with regard to any quarantine order and a claim for compensation under the German Infection Protection Act.

Our recommendations

In general, the employer should provide employees with helpful information on the subject of leave during the time of coronavirus and the possible effects on the employment relationship at an early stage. In particular, employees should be made aware of the problems of travelling to risk areas and be made aware that they are obliged to inform their employer when returning from a risk area or an officially ordered quarantine. Therefore, returning holidaymakers should be specifically asked whether they stayed in accordingly classified risk areas at the time of the return or whether they show symptoms of COVID-19 disease. As with all employer's measures - especially in connection with the corona pandemic - clear communication can help to prevent uncertainty and create acceptance and trust with regard to the employer's measures among employees.

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