



The impact of COVID-19 on labour and social security law in Austria

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The current pandemic holds challenges that affect people on all continents and through all segments of society. The available regulatory systems at the beginning of the pandemic were often only partially able to respond to these fast-changing circumstances in an appropriate manner.

A variety of measures have been used in order to cope with significant challenges in, for both, public health and economy. One of the most important mechanisms is Corona short-time work, which is intended to keep employees in their jobs during economically precarious periods.¹ In addition, a variety of legislative changes have been made to make it easier to reconcile work and care duties. Most recently, for the first time since the 1970s, a ‘general collective bargaining agreement’ was concluded by the social partners in order to establish a broad consensus among employers and employees with regard to COVID-19 tests and wearing masks at work.²

The following article highlights measures taken by the Austrian legislator and social partners that have proven to be particularly effective in addressing these challenges, since a complete presentation of all legislative changes would not be possible due to the extent of this report. Subsequently, the measures examined are evaluated in terms of their effectiveness.

1. Corona short-time work

The purpose of short-time work is to protect employment during economically challenging times. For this reason, the State pays for parts of the salaries. On the one hand, this ensures that employees are kept in their jobs despite the reduced workload, thus avoiding unemployment. On the other hand, it reduces personnel costs of the employer and hence helps to prevent compulsory redundancies of employees who can then in the future assist to rebuild the company with their individual skills after overcoming the health crisis.³

The model adopted in Austria based on § 37b AMSG provides a funding period between 1 March 2020 and 31 March 2021.⁴ An extension of the measure beyond March 2021 is to be expected.⁵ § 37b (1) AMSG requires inter alia an agreement between the respective social partners that

¹ <https://www.ams.at/unternehmen/personalsicherung-und-fruehwarnsystem/kurzarbeit> accessed 02/05/2021.

² The last general collective agreement concerned vacation payments and dates back to 1978; <https://www.wko.at/service/kollektivvertrag/generalkollektivvertrag-urlaubsgesetz-entgelt.html> accessed 02/05/2021.

³ Susanne Auer-Mayer, ‘Ausgewählte Fragen zur Kurzarbeit’ [2020] ZAS 220.

⁴ <https://www.wko.at/service/corona-kurzarbeit.html> accessed 02/05/2021.

⁵ Stefan Kühnleub/Sebastian Müller, ‘Kurzarbeit und Restrukturierung’ [2021] 26, 27; Philipp Brokes, ‘Phase III - Die Corona-Kurzarbeit geht in die Verlängerung’ [2020] DRdA-infas 461.

regulates the detailed conditions of short-time work. This determinable agreement can be concluded using a CBA, a company agreement or an individual agreement, if no works council is present at the particular company.⁶ After the expiry of the maximum funding period of three months, employers may apply for an extension which can lead to a maximum of 13 months under the current system.

All private law companies can agree on short-time work if they have a business in Austria. Excluded are regional authorities, political parties and most legal entities under public law.⁷ On the part of the employees, all those working in an employment relationship covered by unemployment insurance may benefit from Corona short-time work. Hence, this also includes part-time employees and apprentices if they have not been explicitly excluded in the social partner agreement.⁸

The model basically allows reductions in working hours between 10% and 90%, depending on the respective agreement.⁹ A major advantage of the Austrian system is the flexible timing of the work actually performed after the reduction. Thus, under the Corona short-time work scheme, it is even possible to omit work entirely, if the average lost working time during the funded period does not exceed 90%.¹⁰ Previous short-time work models, eg the model designed to contain the effects of the 2008 financial crisis did not provide for this option.¹¹ Depending on the gross pay, the employees continue to receive 90% (for gross pay up to € 1,700), 85% (up to € 2,685) or 80% (from € 2,685) of their last net income. For any income shares above € 5,370¹², short-time work allowance is omitted.¹³ The employer remains liable for paying the worktime actually performed. Remuneration entitlements which exceed this actually performed working time are compensated by the short-time work allowance.

However, the granting of short-time work is subject to various conditions. The employer must not terminate employment relationships for operational reasons during the funding period. The number of employees must therefore be maintained at the level as before the start of Corona short-time work.¹⁴ In addition, statutory vacation entitlements from previous years and time credits of the employees should be reduced.¹⁵ Nevertheless, employers are only obliged to offer this consumption to the employees. A unilateral order is not possible since the consumption of these entitlements always requires an individual agreement. Consequently, a refusal by the employee does not affect the financial support.¹⁶

In summary, Corona short-time work can be considered a successful measure. This is underlined by the fact that many companies have made use of this instrument. In May 2020, over 1.3 million people were on short-time work instead of mostly losing their jobs. In February 2021, the figure

⁶ Christoph Wolf and others, 'Kurzarbeit und Kurzarbeitshilfe' in Reinhard Resch (ed), *Das Corona-Handbuch* (2020) 4th chapter para 8-14.

⁷ Ibid para 42.

⁸ Ibid para 54-58.

⁹ Since 1st of October 2020 - except in certain cases - only reductions from 30% to 80% of normal working time are possible <https://www.ams.at/unternehmen/personalsicherung-und-fruehwarnsystem/kurzarbeit#wassinddiezielederkurzarbeit> accessed 02/05/2021.

¹⁰ Auer-Mayer (n 3) 220, 222.

¹¹ Marie-Cecile Escande Varniol and others, *Quel droit social dans une europe en crise* (2012) 96.

¹² For 2021, this amount increased to € 5.550,00.

¹³ Auer-Mayer (n 3) 222.

¹⁴ Kühteubl/Müller (n 5) 27.

¹⁵ Since 1st of October, 2020 employees are obliged to consume also one week of the current vacation entitlement; Alfred Shubshizky, 'Phase 3 der COVID-19-Kurzarbeit' [2020] ASoK 437, 438.

¹⁶ Auer-Mayer (n 3) 228.

was still at 433,674.¹⁷ The advantages are primarily the flexible adjustment to the wide range of circumstances prevailing in the sectors concerned. Furthermore, short-time work can be considered a seasoned instrument in times of crises, as similar models were already used during the economic crisis in 2008.¹⁸ However, the pre-financing of the allowances by the employers is often regarded as problematic in practical application. Companies can only reclaim the respective grants from the public employment service after the salaries have been paid out to the employees. Given the absence of liquidity and a poorly filled order book, though, it is often not possible for companies to finance these payments in advance. This problem was solved by credit institutions who are now accepting the confirmation letter of short-time work issued by the public employment service as collateral security for working capital loans.¹⁹

2. Home Office Act

Similar to many other countries, home office went from being the exception to a much-used option in the Austrian work environment virtually overnight. From around 10% before the pandemic, almost 40% of jobs moved to home office during the first lockdown in March 2020.²⁰ However, specific regulations are still missing today. On 16 February 2021, the Federal Ministry of Labour issued a draft law regarding home office, which aims at providing answers to the most urgent questions.²¹ However, there are doubts as to whether this law will be passed quickly.²² The most important topics covered in the draft are dealt with in the following, although, that the law would be only in force until 2023, after which the regulations shall be re-evaluated.²³

In Austrian labour law, it is disputed to what extent home office can be ordered or demanded unilaterally. The prevailing theory in Austria assumes that a relocation by the employer into home office is not covered by the existing regulations.²⁴ The Austrian legislator apparently agrees: according to Art 1 of the draft law, home office must be agreed upon; a unilateral relocation or - as demanded by employee representatives - the obligation of the employer to offer home office on a binding basis was not implemented. The agreement must be concluded in writing and can be revoked by either party at any time with one month's notice.²⁵

Furthermore, the provisions regarding work accidents in home office (§ 175 ASVG especially, thereafter referred to as 'old version') were already reformed as of 11 March 2020 (thus '§ 175 ASVG new version') and were initially supposed to remain in effect until the end of March 2021. Art 5 of the draft law will merely extend this time limit.²⁶ These adjustments in § 175 (1a) ASVG (new version) state that accidents at home are to be understood as work accidents if they occur at the insured person's place of residence while the insured person performs his/her work; a causal relationship is required. Under the previous legal situation (§ 175 ASVG old version), there were already cases where, according to the Supreme Court of Justice, an accident during home office could be regarded as a work accident, especially if it happened in a room that is predominantly used

¹⁷ <https://www.bmafi.gv.at/Services/News/Aktuelle-Arbeitsmarktzahlen.html> accessed 02/05/2021.

¹⁸ Wolf and others (n 6) para 1.

¹⁹ Florian Mosing, 'COVID-19-Kurzarbeit' [2020] JAS 141, 159.

²⁰ <https://www.derstandard.at/story/2000120097091/aschbacher-homeoffice-regelung-kommt-erst-im-maerz-2021> accessed 02/04/2021.

²¹ ME HomeofficeRÄG 2021, 94/ME 27. GP.

²² Employer representatives insist on deferment until July 2021 <https://orf.at/stories/3202540/> accessed 02/22/2021.

²³ <https://apa.at/news/homeoffice-regeln-sind-fertig-freiwilligkeit-bleibt/> accessed 02/04/2021.

²⁴ Elisabeth Bartmann/Philipp Ondrejka, 'Home-Office in Zeiten von COVID-19' [2020] ZAS 163, 164; Thomas Dullinger, 'COVID-19-bedingte Dienstverhinderung in der Arbeitnehmersphäre' [2021] ZAS 12, 14.

²⁵ ME HomeofficeRÄG 2021, 94/ME 27. GP Art 1.

²⁶ ME HomeofficeRÄG 2021, 94/ME 27. GP Art 5.

for business purposes.²⁷ The differentiation was more difficult if the accident occurred in a room that is used for both work and private life. So far, it was always necessary to examine whether the activity that led to the accident, in addition to a further private activity, was nevertheless substantial for the damage of the employee in order to fall under the regime of accident insurance.²⁸ At first glance, the wording of the newly introduced paragraph does not contain any major innovations. Just like before, § 175 (1a) ASVG (new version) also demands a temporal and causal connection with the insured activity.²⁹

The legislative materials to the new version, however, states that the previous regime of accident insurance protection in home office was too strict and unreasonable.³⁰ Consequently, rooms that are used for both work and private life should be treated the same way as rooms that are predominantly used for business purposes.³¹ Therefore, the scope of application of § 175 (1a) ASVG seems to be extended by the version introduced in March 2020. Accordingly, any accidents occurring during working hours that are related to business activities have to be regarded as work accidents. The problem with this extension of the scope of application is that the potential for abuse has increased considerably as there is hardly any restriction. Any accident can be considered to be related to a business activity – including those related to household hazards, which in itself bears a certain potential for abuse.³² Moreover, the business connection can always be argued subsequently, even if it did not exist at the time of the accident.

3. General Collective Bargaining Agreement on COVID-19 tests

At the end of January 2021, the Austrian Minister of Health ordered that certain workplaces may only be entered if employees regularly pass COVID-19 tests. This applies inter alia in educational institutions, hospitals and nursing homes or in places where regular customer contact may occur. If the COVID-19 test is not performed, the respective employees must wear a FFP2 mask at their workplace.³³ In order to ensure a standardized approach in all industries and companies, the social partners agreed on a general CBA that applies to the majority of Austrian companies. It came into force on 25 January 2021 and is applicable until 31 August 2021. In addition, this CBA was declared generally applicable in order to extend it to uncovered areas.³⁴

It mainly stipulates that employees must be granted continued payment of remuneration while traveling to the testing stations and performing a test if a negative test result is required before entering the workplace. If there is no test-obligation, the testing should be done ‘as far as possible’ outside working hours. If this is not possible for the employee, the employer is obliged to indemnify the employee from work once a week.³⁵ Furthermore, employees ‘may not be dismissed, terminated or otherwise disadvantaged because of the use of a SARS-CoV-2 test [...] or because of a positive test result’³⁶. In addition, provisions regarding the wearing of masks were agreed upon. Employees who are required to wear a mask during working time must be allowed to remove the mask for at

²⁷ OGH 9.10.2007 10 Ob S 79/07a DRdA 2009/23, 314.

²⁸ Bartmann/ Ondrejka (n 24) 168.

²⁹ Walter J. Pfeil, *Österreichisches Sozialrecht* (12th edn, 2018) 66; Wolfgang Brodil, ‘Neue Arbeitsformen und Unfallversicherung’ [2019] ZAS 12; Rudolf Müller, ‘Der Arbeitsunfall im Homeoffice’ [2020] DRdA 311, 314, 315.

³⁰ IA 402/A 27. GP.

³¹ Bartmann/ Ondrejka (n 24) 168.

³² Martin Risak, ‘Arbeitsunfall im Homeoffice: Alles neu durch das 3. COVID-19-Gesetz?’ [2020] CuRe 29.

³³ 3. COVID-19-Notmaßnahmenverordnung, BGBl II 2021/27.

³⁴ BGBl II 91/2021.

³⁵ § 2 Z 2 General-KV Corona-Test.

³⁶ § 3 Z 1 General-KV Corona-Test.

least 10 minutes after three hours at the latest.³⁷ However, it should be noted that the employees do not have to be granted an additional break for this. It is sufficient to change to activities where physical contact with other persons can be ruled out or suitable protective measures minimize the risk of infection and therefore a mask does not have to be worn. For example, a saleswoman can temporarily change from a job with customer contact to a job in the warehouse where she is merely alone.³⁸ If it is not possible to switch to an activity without a mask, the activity must be interrupted. This interruption is generally considered working time.³⁹

Worth noticing about the general CBA is that this instrument has not been used since 1978 and is experiencing a kind of renaissance as a result of the pandemic. This instrument had been called for during the debate on the Home Office Act to create rapid legal certainty without a statutory solution.⁴⁰ Now the social partners have agreed on this instrument to adopt a generally accepted solution in a timely manner.

4. Innovations in indemnification and special care time

There have been numerous changes in employee-related leaves of absence, as a wide variety of situations had to be considered during this pandemic. Parents were confronted with extensive school closures ('distance learning'), which resulted in childcare obligations during working hours. Moreover, employees were and still are prevented from working due to health reasons, eg because they belong to a risk group.

If employees belong to a COVID-19 risk group defined by ordinance, they are entitled to indemnification with continued payment according to § 735 ASVG.⁴¹ However, the work must be performed in home office if the nature of the work supports this option and technical possibilities are available.⁴² If no technical equipment is available, the employer must provide the necessary resources. However, the right to indemnification does not apply if an infection with COVID-19 can be ruled out by implementing suitable protective measures at the workplace; commuting to and from work must be taken into account, too. The costs of continued payment during the leave of absence is covered by Social security.⁴³ The entitlement applies to virtually all regular employees. Initially, marginally employed⁴⁴ and employees in critical infrastructure, eg employees in the health care sector, were excluded. This was corrected by the legislator after criticism.⁴⁵ Nb, though, that the entitlement under § 735 ASVG is limited until 30 June 2021 and does not include employees who merely live with members of a risk group but do not belong to this group themselves. Despite these points of criticism, the new version of § 735 ASVG can be considered rather successful.⁴⁶

In addition, § 18b AVRAG was introduced in response to childcare obligations during official closures of teaching and childcare facilities. In its original version, it stated that employers could

³⁷ § 4 General-KV Corona-Test.

³⁸ Explanation General-KV Corona-Test <https://www.wko.at/service/kollektivvertrag/erlaeuterungen-generalkollektivvertrag-corona-test.html> accessed 02/10/2021.

³⁹ Lindmayr, 'Generalkollektivvertrag zu COVID-19-Tests und Maskenpflicht' [2021] ARD 6733/11/2021, 13, 14.

⁴⁰ <https://www.derstandard.at/story/2000120097091/aschbacher-homeoffice-regelung-kommt-erst-im-maerz-2021> accessed 02/05/2021.

⁴¹ Elias Felten, 'Home-Office und Arbeitsrecht' [2020] DRdA 511, 517.

⁴² § 735 (4) ASVG, idF BGBl I 28/2021; Dullinger (n 24) 13.

⁴³ Ibid 13.

⁴⁴ Employees with an income below € 475,86 gross.

⁴⁵ Dullinger (n 24) 14; criticized in Elias Felten/Walter J. Pfeil, 'Arbeitsrechtliche Auswirkungen der COVID-19-Gesetze - ausgewählte Probleme' [2020] DRdA 295, 310.

⁴⁶ § 18b AVRAG, idF BGBl I 72/2020; this entitlement was extended two times for three weeks each.

agree on a special care period of three weeks maximum for the care of children up to the age of 14.⁴⁷ However, the relevant employees must not be urgently required to maintain business operations. The scope of application was later extended to also include care for people with disabilities or special care needs. The employers were originally reimbursed with one-third of the remuneration paid, which was increased to 50% as of 1 October 2020. In addition, the scope of application was extended to the period of summer vacation.⁴⁸

However, in particular employee representatives were not satisfied with this regulation, as no binding legal entitlement could be derived from it and employees were therefore dependent on the pure goodwill of their employers.⁴⁹ This changed with the amendment to § 18b AVRAG at the end of November 2020. The legislator decided that henceforth there will be a legal entitlement to special care time period of four weeks maximum if - in simplified terms - facilities are partially or completely closed due to official measures and employees are therefore obliged to take care of children up to the age of 14 or people with disabilities. However, employees must do everything reasonable to ensure that the agreed work is nevertheless performed.⁵⁰ Thus, an existing possibility of childcare in the schools despite the closure excludes this claim. Nevertheless, an individual contractual agreement that goes beyond the statutory entitlement to special care time is still possible.⁵¹ In return, the employer is now entitled to claim full compensation from the federal government for the paid remuneration up to a maximum of € 5.550 per month and employee.⁵² As the entitlement expires on 9 July 2021, the special care period can be used up to that date. Since it would have been virtually impossible to cope with national or regional closures of childcare facilities with the pre-existing options, the introduction of § 18b AVRAG provides a mostly positively received remedy.⁵³

5. Conclusion

Almost a year has passed since the first cases of COVID-19 appeared in Austria and the Tyrolean ski resort of Ischgl became one of the starting points for the European pandemic. Luckily, since then, not only science and research have gained new knowledge about the virus, but also authorities and legislators have learned mostly from past mistakes. Since then, the Austrian legislator tried to adopt provisions considering epidemiological and economical as well as social aspects. Now, Austria has a regulatory framework that attempts to answer at least the most urgent questions in the working environment. To a large extent, these regulations can be described as successful. Yet, it is to be seen whether the instrument of short-time work, especially, is going to keep its promise – keeping people in employment – which strongly depends on the hopefully quick post-pandemic economic recovery.

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⁴⁷ § 18b (1) AVRAG, idF BGBl I 107/2020.

⁴⁸ <https://www.arbeiterkammer.at/rechtsanspruch-auf-sonderbetreuungszeit> accessed 02/10/2020.

⁴⁹ § 18b AVRAG, idF BGBl I 131/2020.

⁵⁰ Dullinger (n 24) 19.

⁵¹ Ibid 19.

⁵² Ruth Ettl, 'Corona, Arbeit und wo bleiben die Kinder? Kinderbetreuung und Dienstverhinderung in Zeiten einer Pandemie' [2021] DRdA-infas 58, 60.

⁵³ Dullinger (n 24) 19; criticized in Andreas Gerhartl, 'Sonderbetreuungszeit und Dienstfreistellung für Risikogruppen' [2020] ASoK 411, 417.