

COVID-19: Germany Update — Office Reorganization When Employees Return From Working From Home

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The following article is the translation of an associated podcast, which is [available in German here](#).

Germany is slowly breathing again — albeit through protective masks for the mouth and nose. The federal and state governments have begun to relax the strict restrictions implemented in response to the COVID-19 crisis and have announced plans to loosen them further. Many companies that sent their employees to work from home as a precautionary measure are now preparing for their return to the office. As part of those preparations, employers should consider the key legal issues for organizing a return. In this client alert, we discuss what management should contemplate in order to carefully get ready for the “new normal” and avoid exposing themselves to liability.

From the management’s point of view, as always, the **diligence of a prudent and conscientious manager** must be applied. For German stock corporations (*Aktiengesellschaften*), this standard is set forth by Sec. 93, Para. 1, Sent. 1 of the German Stock Corporation Act (AktG); for German limited liability companies (*Gesellschaften mit beschränkter Haftung*), the guiding law is Sec. 43 Para. 1 of the German Limited Liability Companies Act (GmbHG) (even if the wording of the law only speaks of the “prudent businessman”).

Of course, this standard also applies to questions of business organization. For these questions, one must comply with the applicable law, especially for companies in industries for which special hygiene and other prevention regulations have been issued. If no such special regulations exist — as is likely the case for many office operations — management’s decisions typically are subject to the so-called business judgment rule. Under this standard, a member of the board of directors or management board always acts properly when he or she can reasonably assume, on the basis of appropriate information, that he or she is acting in the best interests of the company. But what exactly does this mean in the case of the COVID-19 pandemic?

Binding rules can be found in some cases in the federal states’ regulations on infection control measures. These regulations include, for example, the Fourth Bavarian Regulation on Infection Control Measures of May 5, 2020, which stipulates that employees must develop a protection and hygiene plan, which includes ensuring that employees can maintain a minimum distance of 1.5 meters from each other and that they comply with the obligation to wear a protective mouth and nose mask.

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How an employer ensures this is up to the employer. The business judgment rule applies here. Members of the management therefore must ensure that they have a **good information** basis and can then exercise their organizational discretion. The information basis could include, for example, the “SARS-CoV-2 Occupational Safety and Health Standard” published by the German Federal Ministry of Labor and Social Affairs on April 16, 2020. This “standard” does not have the legally binding effect of a regulation or law, but it can be used to evaluate the employer’s standards of care. Guidance also can be found in the “Recommendations for Display Screen and Office Workstations in the Sector Office Operations and Call Centers” issued by the *Verwaltungs-Berufsgenossenschaft* on April 30, 2020.

With regard to the best interests of the company, there are a number of arguments in favor of letting employees back into the office as soon as possible, while, at the same time, excluding health hazards to the extent possible — above all, the danger that a wave of infection could paralyze entire corridors or floors of the office or even entire departments of the company must be avoided. The employer bears responsibility for implementing necessary infection-prevention measures. Employers should be aware that a violation — even a negligent one — of a valid legal regulation in accordance with Sec. 25 of the German Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (*Arbeitsschutzgesetz*) or Secs. 73, 74 of the German Infection Protection Act (*Infektionsschutzgesetz*) may result in a fine and/or punishment. If the employer violates its duty of care and one of its employees is infected, it could result in criminal liability for the employer for negligent physical injury. The aforementioned acts could then, under the further conditions of Sec. 30 German Act on Regulatory Offenses (*Gesetz über Ordnungswidrigkeiten*, or OWiG), possibly in conjunction with OWiG Sec. 130, also give rise to liability on the part of the company and lead to a company fine.

What management can actually do depends on its specific circumstances. Independent of the company, however, the management should (re)design the **office space** to the degree possible so that contact between employees is minimized and distance rules can be observed. Furthermore, management should provide the employees with **rules of conduct** to reduce the risk of infection.

As for the design of the office premises, the following measures should be taken where appropriate:

- providing facilities for **washing or disinfecting hands** before or immediately after entering the office;
- assigning a fixed workstation for each employee;

- reserving work equipment for personal use;
- hanging or erecting transparent partitions in reception and other public areas;
- installing disinfectant dispensers in all offices;
- determining walking routes that, if possible, exclude or limit the possibility of individual employees encountering each other (e.g., by setting up “one-way streets” or alternative areas along the walking routes); and/or
- cleaning and ventilating all offices regularly and thoroughly.

In order to ensure the functionality of the company and protect the health of its employees, the following rules of conduct should be established where appropriate:

- organizing the return to the office in **groups, alternating daily or weekly**, and ensuring that the respective groups do not mix at any time;
- supporting continued work from home, especially for employees who belong to at-risk groups or have contact with at-risk groups, cannot otherwise ensure the care of their children or relatives in need of care, or have no other option than public transportation;
- setting **different starting times** for individual group members;
- **limiting the presence** of employees to one person in smaller offices and, in open areas, to number of persons limited so that the distance rules can be observed at all times;
- instructing employees to wear a **mouth and nose mask** in shared areas;
- organizing a sufficient number of masks (including replacement masks) for each employee;
- organizing regular, proper cleaning of the masks;
- reducing external employee appointments to an absolute minimum;
- requiring employees to inform the employer of the length and destination of business trips;
- instructing employees not to visit the offices for 14 days after travelling abroad for more than 48 hours;
- limiting access by visitors or external persons to a minimum and documenting any contact chains that may result from such visits;
- instructing that employees who exhibit symptoms of illness (especially fever, cough and shortness of breath) or have had contact with a person who has tested positive for COVID-19 should not be allowed to work in the office — until the employee has been cleared by a doctor, he or she should be considered to be unfit for work;

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- explaining that the sick person and — if the sick employee was in the office — the employer must identify his or her contacts in the event of a confirmed infection; and/or
- instructing any contact person to put themselves under a 14-day quarantine.

Before returning to the office, the prevention and occupational safety measures that have been introduced should be explained to employees in a personal **briefing** and communicated in writing. This should be carefully documented, and a contact person for the regulations should be appointed. Extended training should be

provided for employees whose job descriptions provide for more regular contact with other employees or external parties (*e.g.*, reception or mail room staff).

Managers can set up regular (*e.g.*, weekly or biweekly) appointments from the outset to check whether the hygiene strategy, once established, remains reasonable. In addition, managers should keep an eye on the situation inside and outside their company at all times in order to be able to make prompt adjustments to the approach, such as implementing new restrictions due to the confirmation of a case of illness, a change in legal requirements or a sharp increase in infection rates throughout Germany.