

A banner image showing a modern office interior with large windows overlooking a city. The text 'EH Legal Update' is overlaid in large white letters. A large white star graphic is on the right side.

# EH Legal Update

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## COVID-19 HR/Labor Law Update on the Lockdown as of 17.11.2020

(Special Care Leave, Home Office, Vacation Consumption, Short-time Work)

Dear esteemed readers,

As you are probably aware, as of Tuesday, November 17, 2020, 0:00 a.m., a lockdown similar to the one in March is in effect. The COVID-19 emergency regulation and the legal justification and explanations of these measures is attached in German. Access to establishments is banned, and further changes have been planned. Here is an initial overview of the most important consequences for companies:

## 1. A legal entitlement to special care leave?

Effective from November 1, 2020 (retroactively), to July 9, 2021, employees will now have a legal entitlement to up to 4 weeks of special care leave, to care for children up to age 14, if "facilities are partially or completely closed because of official measures." However, the ministries and the federal government expressed differing interpretations of this measure over the weekend. The Minister of Health, Rudolf Anschober, seemed to be of the opinion that the entitlement to special care leave would be available starting November 17, 2020, when children may stay home, but schools and kindergartens are still open for childcare. Conversely, Chancellor Sebastian Kurz and the Minister of Labor, Christine Aschbacher, expressed the view that **the legal entitlement can only be invoked when there is no childcare available. Because schools and kindergartens may currently remain open for childcare, the entitlement could only be invoked if the school or kindergarten is completely closed**, for example because of COVID-19 infections.

As in the past, special care leave can also be taken by relatives of disabled persons or persons in need of care. What is new is that the entitlement is now available to fulfill the duty to care for a child up to the age of 14 who is in quarantine. It is **not** possible for both parents to invoke the entitlement at the same time. Special care leave can also be granted during periods of actual employment within the framework of **COVID-19 short-time work**. However, special care leave cannot be granted for lost hours of work.

Also new is that employers have an **entitlement to reimbursement** from the federal government for **100% of the remuneration paid** to employees taking special care leave. However, the amount of reimbursement is **limited by the monthly ASVG maximum contribution basis (2020: EUR 5,370 gross per month)**. This means that the employer bears the entire burden for any remuneration exceeding that amount. In terms of social security and tax law, the remuneration paid is to be treated as before. The claim for reimbursement **must be submitted to the accounting agency within six weeks of the end of the special care period**. The accounting agency of the federal government generally issues decisions by notice. If the application is not fully granted, the employer can demand a justification within four weeks of receiving the notice.

The legal entitlement to special care leave is **not** to be offset against statutory vacation entitlements or flextime credits. In addition, special care leave is intended to be counted as "normal" working time, which is why **it must be taken into account for entitlements based on work**.

Special care leave taken by entitlement is slightly different from special care leave granted by agreement. According to the Ministry of Labor, special care leave granted and taken during the period up to October 31, 2020 does **not** count as part of the entitlement. Special care leave granted on or after November 1, 2020 under phase 3 is to be credited against the entitlement maximum of four weeks. **In total, during the period from November 1, 2020 to July 9, 2021, an employee is not entitled to more than 4 weeks of special care leave, regardless of how much is taken at one time**. According to Minister of Labor Aschbacher, **special care leave can be granted by agreement**, even if there is no entitlement, but it is not clear whether this will be reimbursed at 100%.

This special care leave package has **not yet been approved** by the National Council, and is scheduled for decision on Friday, November 20, 2020. We will of course update you if there are any changes or clarifications.

## 2. Is Home-Office mandatory?

As in March 2020, the federal government recommends that employees work from home wherever possible. The COVID-19 regulation (§6(1)) states: "**to the extent possible**, work should not be performed at the workplace. Employers and employees should make **agreements** about working remotely." Because of the 24-hr curfew currently in place, an employee may only leave the home for professional reasons if it is "necessary," but the legal justification does not define or clarify that.

**The regulation does not make home office mandatory.** The employer may still require employees to come to work. In fact, the place of work agreed in the employment contract, or the lack of a transfer clause, could limit the employer's ability to order employees to work from home. **Even if the employer can arguably order home office under the duty of care, we recommend executing a home office agreement** that sets the parameters, including reimbursement of costs, data protection, revocability, remote access, etc. It might also be helpful to make an agreement with the works council.

If it will be necessary for certain employees to go to the workplace, these individuals should be identified and given documentation to carry with them to justify their reason for breaking curfew, in case they are stopped by the authorities.

An employer that does not switch to home office runs the risk of incurring **civil liability or social security claims**. If an employee gets infected at work, the employer may be found at fault if they did not take appropriate protective measures. If the employees do not feel sufficiently protected, they could potentially involve the labor inspector. Certainly no employer desires to test this new area of law, and we have no further official guidelines yet.

**Insurance covering accidents** in home office, which was originally valid until 31.12.2020, will be extended until March 2021. As before, employers must continue to pay commuter allowance to employees who normally receive it, regardless of whether they travel to work every day or not.

## 3. Can an employer order employees to consume their vacation entitlement?

In general, the employer and employee must agree on when vacation will be taken, and the employer cannot unilaterally order the employee to consume vacation or leave. In principle, vacation should be used up during the current vacation year, and that still applies despite COVID-19.

**However, one of the COVID regulations does make a limited exception to the normal rules, and allows an employer to essentially order the consumption of vacation time in certain circumstances.** If **(i)** a business is closed, or access to it is restricted, by the COVID-19 measures, and **(ii)** the employee can therefore not perform their regular duties (there is no work or limited work), the employer can order the employee to use up vacation time and flextime credits. The total amount of time that can be unilaterally requested in this way is eight weeks. This applies to overtime credits, old vacation, and **up to two weeks of vacation from the current vacation year** (See §1155(3) and (4) ABGB). This regulation was passed on March 20, 2020, and applies to the time period March 15, 2020 - December 31, 2020.

#### 4. Update on short-time work

According to the website of the Ministry of Labor, **it is possible to sink below the 30% or 10% minimum working hours in November 2020, if the business is ordered closed by the COVID-19 regulations.** If such a business sinks below the average 30% minimum working time, **the approval procedure will continue to be bureaucratically streamlined** (blanket approval by the Austrian Chamber of Commerce; the Austrian Trade Union Federation (ÖGB) reviews and reports back to the AMS within 72 hours) and does not require the express approval of the social partners.

Even if the business is not closed, it is possible for the working time to sink to as low as 0%, as long as the average working time during the entire short-time working period reaches 30% or 10%. Any business affected by the government closure may reduce working time to 10% if individually approved by the social partners.

Companies that are directly affected by the lockdown (official closure), or companies that apply for Corona short-time work only for the month of November 2020, **do not need to have a tax advisor confirm the economic justification.** There is also no obligation to train apprentices in short-time work during the lockdown.

Through November 20, 2020, it is possible to **apply** for the short-time work subsidy **retroactively** for the time period beginning November 1. Applications for short-time work beginning during the lockdown period can be submitted until the end of the lockdown. This is subject to change, as the Ministry of Labor has indicated that an amendment to the short-time work directive is currently being drafted. **Please refer to our newsletter from the beginning of October for the most recent changes to short-time work - Phase 3.**

We hope you have found this summary of the most recent COVID-19 policies helpful. We will continue to inform you of any changes or clarifications.

Feel free to contact us with any questions.

Stay healthy & best regards,

Jana Eichmeyer

#### Further Links

1. [COVID 19 - Notmaßnahmenverordnung](#)
2. [Rechtliche Begründung](#)

The information, opinions and legal views in this article are not intended to be comprehensive and in any case cannot replace an individual examination based on the special circumstances.

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