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COVID-19: A pressure test for Occupational Health and Safety (OHS)

German Team Report

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German Team European University Viadrina Frankfurt (Oder)

Carolin Alexander
Dominic Andres
Annabel Buschhorn
Neele Heineck

Prof. Dr. Eva Kocher
Dominik Schmitz

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I. Introduction

On 27 January 2020, the first Covid case was reported in Germany. At first, the virus spread quite slowly. Hospitals were prepared for higher case numbers, beds were already kept free for future Covid cases. The first Corona containment order was issued on 17 March 2020. It set contact restrictions, closed shops, schools and universities, and shut down most of modern life. At that time, the incidence (incidence = number of infections per 100.000 inhabitants within one week) was very low (levels >50). When summer came and the incidence dropped even further, measures were largely relaxed.

The summer of 2020 was almost normal, except for the absence of major cultural and commercial events. The incidence rose again in autumn 2020. This time to just below 200 infections per 100,000 inhabitants within one week. As a consequence, contact restrictions and other measures were imposed again. Masks were made compulsory and public life went into shutdown again. For almost five months, all non-essential retail shops and all leisure facilities, cafes, restaurants and the like, were closed. This was relaxed again in the spring of 2021. Retail shops were allowed to reopen and outdoor catering was permitted again. The measures were further relaxed and eased as the incidence continued to fall towards the summer, until normal life almost returned in the summer of 2021. Only the mask requirement remained. In addition, the 3G rule was introduced in August 2021. Accordingly, only vaccinated, tested or recovered persons had access to almost all facilities and shops.

With the incidence rising again in autumn 2021, the 3G rule was extended to public transport and the workplace. The incidence rises sharply to new highs of up to 500. However, the actual peak of the pandemic does not reach Germany until the beginning of 2022. The incidence exploded and reached its peak at the end of March 2022 with 1945 infections per 100,000 inhabitants within 7 days. Nevertheless, all Covid measures were lifted at the beginning of April 2022. Since then, the incidence has been falling and is currently at 900. At the university, we can study on site again for the first time in 4 semesters.

During the Covid pandemic, occupational health and safety faced very unique challenges. This report deals with occupational safety and health, especially during the

Covid pandemic. We asked ourselves the question: How did the pandemic put Occupational Health and Safety in a pressure test?

To answer this question first of all it is important to understand how the German occupational health and safety law is structured. Although there is the Occupational Safety and Health Act (*Arbeitsschutzgesetz, ArbSchG*) which contains fundamental regulations, there are a lot more spread over many laws; many regulations are found in other (labour) laws. Thus, we refer to various laws in this report:

- First and foremost, the Occupational Safety and Health Act (*Arbeitsschutzgesetz, ArbSchG*), which is the German implementation of the EU OSH Framework Directive 89/391/EEC.
- The Infection Protection Act (*Infektionsschutzgesetz, IfSG*) as a federal law against dangerous or transmissible human diseases and regulates the necessary cooperation of the parties involved. It also regulates an institution-related compulsory vaccination.
- The SARS-CoV-2 Occupational Health and Safety Ordinance (*SARS-CoV2-Arbeitsschutzverordnung, SARS-CoV2-ArbSchV*) is a German legal ordinance issued in Germany by the Federal Ministry of Labour and Social Affairs. It regulates organisational details for the control of Covid-19 and was issued on 21 January 2021 and last amended on 20 March 2022.
- Although the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) does not contain any specific occupational health and safety regulations in the narrower sense, some corresponding rights are derived from it.
- The Ninth Book of the Social Code (*Neuntes Sozialgesetzbuch, SGB IX*) contains the regulations on the rehabilitation and participation of people with disabilities in Germany and is also very important in the workplace. The Seventh Social Code (*Siebtes Sozialgesetzbuch, SGB VII*) also plays a major OHS role as a set of rules for statutory accident insurance.
- The Trade, Commerce and Industry Regulation Act (*Gewerbeordnung, GewO*) determines and limits the content of freedom of trade and industry. It also defines the employer's right of direction.
- The Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) regulates the cooperation between the employer and the employee-elected workplace

representation. It also regulates the co-determination of employee representatives on OHS issues.

To answer the question we are starting with the obligations of employers, with a particular focus on risk assessment and its alterations during the pandemic, and specific new employer obligations due to Covid. But it is not only for employers that things have changed during the pandemic. Employees also had to adapt to new rules. First, the contractual and legal regulations of the employee are presented. Then the new special Covid rules from the employee's point of view are examined.

Besides employers and employees, works councils also play an important role, especially in times of Covid. We will explain what works councils are, what their tasks are, especially in occupational health and safety, and what role they have played in occupational health and safety during Covid.

But what happens if the employer does not comply with the prescribed occupational health and safety measures? This question is answered in the fifth part of the report. This part focuses on sanctions available to workers and how they can be indemnified.

II. Obligations of employers

The legislative framework for the employers' obligations to ensure OHS with a reference also to working time.

1. Overview

This chapter deals with the employer's obligations. In particular, it deals with the contractual duty of care. This states that the employer must consider the well-being and interests of the employee. It also describes the risk assessment of the workplace and how it has been changed and extended by the SARS-CoV-2 Occupational Health and Safety Ordinance (*SARS-CoV2-Arbeitsschutzverordnung, SARS-CoV2-ArbSchV*). Finally, it discusses the changes in occupational health and safety measures during the Corona pandemic. In particular, the 3G rule at the workplace, the facility-based mandatory vaccination requirement and the home office obligation. On 2 April 2022, almost all Covid measures were lifted.

2. General obligations of employers

The obligations of employers in OHS are regulated by the Occupational Safety and Health Act (*Arbeitsschutzgesetz, ArbSchG*). The Occupational Safety and Health Act is a public law. This Act applies to workers, employees, civil servants and quasi-employees (Sec. 2 ArbSchG). Domestic workers in private households and home-based workers are not included (Sec. 1 (2) ArbSchG). The employer's obligations are manifold. There are duties of payment, duties of protection, duties of care and duties of disclosure.[1] Furthermore, employers are mandated to regularly assess the health hazards at the workplace and then decide on suitable protective measures (Sec. 3 (1) ArbSchG). Special safeguards must be put in place for particularly dangerous work areas (Sec. 9 (1) ArbSchG).

The most important duty in private law is the duty of care. This states that the employer must care for the employee in a way that would be expected by just and decent thinking people. This also includes that the employer protects the employee from dangers to life and health at the workplace. In this context, public legal requirements such as the Occupational Safety and Health Act must be observed.[2]

The duty of care is not explicitly regulated, but is derived from Sec. 618 Civil Code (*Bürgerliche Gesetzbuch, BGB*) and cannot be limited by employment contract or law (Sec. 619 BGB). The duty of care applies to rooms, equipment and services. The employer must protect the worker from risks to life and limb to the extent permitted by the nature of the work (Sec. 618 (1) BGB). It is also necessary that the employee's health-related performance is honoured.[3] The duty of care also applies if an employee is on sick leave for more than six weeks at a time. In this case, the employee is entitled to integration management. This involves overcoming the inability to work and maintaining the job (Sec. 176 (2) Ninth Book of the Social Code, *Sozialgesetzbuch IX, SGB IX*).

The worker is bound by the employment contract to do the right job, at the right time, in the right place. As the employment contract often does not specify how exactly the employee fulfils this obligation, the employer must specify it. This is what the

[1] *Redaktionsteam Safety Xperts* (2022).
[2] *Schwede* (2022).
[3] *Ibid.*

employer's right of direction is for. It covers the content, place and time of work performance. The employer must exercise his right of direction in such a way that occupational health and safety is guaranteed at all times and in all situations. The time of work performance does not refer to the duration, but to the timing of the working time. The right of direction results from Sec. 315 BGB and Sec. 106 Trade, Commerce and Industry Regulation Act (*Gewerbeordnung, GewO*). According to this, the employer is entitled to assign tasks to the employee. The right of direction is a right of organisation which the employer can exercise at any time.[4]

3. Risk assessment

3.1. Description and types

An important means of OSH is risk assessment. There is no legal definition for this term. Rather, it has been defined by the Federal Institute for Occupational Safety and Health (*Bundesanstalt für Arbeitssicherheit und Arbeitsmedizin, BAuA*). It states: "Risk assessment describes the process of systematically identifying and evaluating all relevant hazards to which employees are exposed in the course of their work."[5]

The implementation of the risk assessment, on the other hand, is regulated in Sec. 5 ArbSchG. In the risk assessment, the health risks at all workplaces in the company are identified and analysed. This then results in the necessary measures for health protection and occupational safety.[6] Sec. 5 (3), no. 1-6 ArbSchG lists special risks. These include the design of the workplace (no. 1), the effects of physical, chemical or biological substances (no. 2), the use of machines, equipment, etc. (no. 3), the use of certain working methods or production processes (no. 4), insufficient training or instruction of employees (no. 5) or particular mental stress at work (no. 6). The law contains only a few guidelines on how the employer should proceed. It leaves room for flexibility for the specific situation of individual companies through very open wording.[7] The general rule for the measures is that they should not become excessive. Rather, they should be limited to what is necessary. This restriction results from Sec.

[4] *Kluge/Fischer – Lange* (2022)
[5] *Bundesanstalt für Arbeitsschutz und Arbeitsmedizin* (2014).
[6] *Kollmer/Kindt/Schlucht* (2021) Sec. 5 para. 77.
[7] *Ibid*. para. 78.

5 (2) ArbSchG. The assessment is made according to the type of activity. In the case of similar working conditions, only one activity is assessed.[8]

There are three types of risk assessment. The activity-related, the work area-related and the person-related risk assessment.

3.1.1. Activity-related risk assessment

In the case of activity-related risk assessment, individual workplaces or activities are analysed without reference to the employee. This type of risk assessment is used, for example, for employees who maintain different workplaces. They are often in different places and are therefore exposed to a variety of risks. These dangers must be recorded and analysed in order to make the maintenance worker's activities as safe as possible.[9]

3.1.2. Work-area related risk assessment

In the work area-related risk assessment, several workplaces within one work area of the company are grouped together. A grouping is allowed if the workplaces concerned present the same risks and stress for all workers. For example, the same noise level exists everywhere or the same dangerous substances are used.[10]

3.1.3. Personal risk assessment

The third and last form of risk assessment is the personal risk assessment. This is an individual assessment of a workplace with reference to a specific employee. It is only necessary in certain cases, e.g. for workplaces of workers with disabilities or pregnant women. The combination of risk or stress in combination with the activity is measured. In addition, individual performance requirements such as age, gender or qualifications are taken into account. This form of risk assessment is particularly useful in implementing specific measures for persons at particular risk or persons with a high level of sick leave.[11]

3.2. Additions due to Covid

During the Covid pandemic, the risk assessment in the company changed and was expanded until the change of the Infection Protection Act (*Infektionsschutzgesetz,*

[8] *Ibid*. para. 86.
[9] *Ibid*. para. 83.
[10] *Kollmer/Kindt/Schlucht* (2021) Sec. 5 para. 84.
[11] *Ibid*. para. 85.

IfSG) from 2 April 2022. Companies are mandated to draw up a company hygiene concept on the basis of a risk assessment (Sec. 2 (1) SARS-CoV-2 Occupational Health and Safety Ordinance, *SARS-CoV2-Arbeitsschutzverordnung, SARS-CoV2-ArbSchV*). This concept contains a compilation of steps that must be taken to protect employees from infections in the workplace. The concept must first and above all contain some basic protective measures (Sec. 2 (3) Corona-ArbSchV). These include organisational and technical measures to maintain the minimum distance of 1.5 m and to minimise contacts during work. In addition, workers must wear mouth and nose protection wherever the minimum distance cannot be maintained. These masks must be provided by the employer (Sec. 2 (3), no. 3 Corona-ArbSchV). There was no specification about the type of mouth and nose protection. Both FFP 2 (KN95) masks and medical masks could be handed out. The employer should also check whether employees in office work can work from home (home office) (Sec. 2 (3), no. 2 Corona-ArbSchV). For employees who cannot work from home, the employer must offer two free Corona tests per week (Sec. 2 (3), no. 1 Corona-ArbSchV). The basic protective measures are not directly described, but are presented by way of example. They depend on the local infection situation and the risk of infection associated with the activity. The local infection situation is measured by the 7-day incidence (how many people out of 100,000 were infected with Covid - 19 within seven days). Which 7-day incidence led to which action varied widely during the pandemic. The employer then decides which actions are necessary (Sec. 2 (3) Corona-ArbSchV). In case of a change in the pandemic situation, the company hygiene concept must be adapted and updated.[12] Moreover, the hygiene concept must be accessible to workers (Sec. 2 (3) Corona-ArbSchV).

The employer is also mandated to contribute to increasing vaccination awareness. This can be done through various measures. The employer must inform about vaccination offers, support the company doctors in vaccinating against Covid-19 (organisationally and in terms of personnel) and release the employees for an off-the-job vaccination appointment (Sec. 3 (1) Corona-ArbSchV). The employer should also provide information about the dangers of Covid in general (Sec. 5 (2) Corona – ArbSchV) and close any information gaps that employees may have.[13]

[12] *Bundesministerium für Arbeit und Soziales* (2022).
[13] *Ibid*.

4. Special Covid regulations

4.1. 3G rule at the workplace

The 3G rule in the workplace states that employees may only come to work if they have been vaccinated, recovered or tested (Sec. 28b (1) Infection Protection Act, *Infektionsschutzgesetz, IfSG*). Section 28b (1) IfSG was repealed on 20 March 2022. The term 3G is based on the German words for vaccinated (**g**eimpft), recovered (**g**enesen) and tested (**g**etestet). All those employees who have been vaccinated or tested can inform the employer. However, there is no obligation to share the vaccination status. Only in facilities such as kindergartens, schools or nursing homes, employees have to share their vaccination status with the employer due to the truthfulness obligation. Those who do not wish to share their status despite being vaccinated or recovered will be treated as if they are neither. Those who are neither vaccinated nor recovered must provide a negative result from a daily Covid rapid test or a Covid PCR test that is not older than 48 hours. All vaccination certificates, recovery certificates or test certificates must fulfil the requirements of Sec. 22a IfSG.[14]

The employer is mandated to provide and pay for at least two rapid tests per week. This can be done in two ways. The employer can hire a third party to do the tests and then write a certificate for the results. The other option would be for the employees to conduct the rapid tests themselves under supervision. For this, the employer must then assign supervisors and provide facilities in the company. The employer must check the test certificates before allowing access to the workplace. The employer is also mandated to keep the receipts for the tests.

In care facilities, even vaccinated and recovered employees must be tested. There, the company must create a testing concept that offers all employees and visitors a Covid rapid test.[15]

The 3G rule in the workplace no longer applies due to changes to the Infection Protection Act. Nevertheless, employers have the option to continue to impose a mask requirement and to make a weekly test offer based on the risk assessment. Within the

[14] *Kunst* (2022).
[15] *Ibid*.

framework of this assessment, employers may also come to the conclusion that infections in the workplace can only be limited by reintroducing the 3G rule. However, this is not mandated by the amended Infection Protection Act.[16]

4.2. Covid - 19 and the meat industry

The pandemic led to the adoption of the Occupational Safety and Health Control Act (*Arbeitsschutzkontrollgesetz*) in Germany. Covid 19 Outbreaks in large meat industry plants occurred quite frequently. The cause was often very poor working conditions and even worse housing conditions. As a result, the Corona virus was able to spread particularly quickly and unhindered there. In the meat industry, contract workers and agency workers were largely used. Most of these workers are people from Eastern Europe who speak little or no German and who are housed in collective accommodation with shared rooms during their stay. The new law of 1 January 2021 improves the enforcement of labour protection legislation and bans some forms of employment in the meat industry, including contract workers, self-employment and agency workers.[17]

4.3. Facility-based mandatory vaccination

With the changes to the Infection Protection Act (IfSG) as of 15 March 2022, employees in some facilities and companies must be vaccinated or recovered, or provide a doctor's certificate excusing them from vaccination in order to continue working (Sec. 20a (1) IfSG). These include hospitals or other health care facilities, such as medical practices, day clinics, etc., nursing homes and institutions for people with disabilities (Sec. 20a (1), no. 1, letter a-o IfSG). The reason for this is the special responsibility that employees in these professions carry due to their work with vulnerable groups. Vulnerable groups are those who are at high risk of severe or fatal infection with Covid 19.[18] Until 15 March 2022, all employees in the professions affected must provide proof of vaccination or recovery. All those who started a new employment contract with a company covered by the scope of application of the regulation on or after 16 March 2022 could only be employed if they fulfilled these

[16] *Wernecke* (2022).
[17] *Däubler* (2022).
[18] *Bundesministerium für Gesundheit* (2022).

requirements and submitted their vaccination certificate or proof of recovery to the employer before starting work (Sec. 20a (3) IfSG).

The employer has a duty to report. If an employee does not provide such a certificate, or if the employer has doubts about the authenticity of the certificate, he must inform the responsible health authority.[19] If he does not do so, it is an administrative offence which may result in a fine (Sec. 73 (1), no. 7e IfSG).

However, there are some problems with the implementation of the facility-based mandatory vaccination. Basically, a distinction is made between new employees and those already employed. New employees may not be hired and employed without a proper certificate (Sec. 20a (3) IfSG). According to the wording of the Sec. 20a IfSG, those already employed without a certificate are not automatically banned from working. The health authority has the task of banning the employee affected from employment and from entering the company.[20]

When releasing employees due to a missing certificate, a distinction must also be made between existing employees and new employees. Releasing means that the employer expressly declares that he will not make use of the employee's work performance, i.e. that the employee does not have to work if the employment relationship continues. This can lead to the employee's entitlement to payment also being cancelled. The new employee can be released without payment. The principle then applies: no work, no salary. The same applies to those already employed if they have already been banned from working by the competent health authority. They can also be released without salary. This poses a problem if the health authority has not issued a ban on employment. In this case, the legal situation is unclear and cannot be answered with legal accuracy. It is already unclear whether the employee may be released from work at all or whether the employer is mandated to continue employment until the health authority steps in.[21]

It is also difficult to terminate employees who do not have a certificate. If the employee does not provide a reason for his missing certificate and therefore violates his obligation to provide proof, this is a violation of contractual secondary obligations. In

[19] *Wernecke* (2022).
[20] *Ibid*.
[21] *Wernecke* (2022).

this case, the employer can issue a warning and set a deadline for the submission of the proof. If the employee fails to meet this deadline and does not submit proof, the employer is entitled to dismiss the employee on grounds of behaviour.[22]

How exactly the facility-based mandatory vaccination is implemented varies from federal state to federal state. In Brandenburg (the federal state where the European University Viadrina is located), unvaccinated staff will not have to fear consequences until the end of May. This takes into account whether or not the supply situation is at risk in a particular region.[23]

4.4. Home office Obligation

Due to the Covid pandemic, employers were mandated to offer employees the opportunity to work from home (Sec. 28b (4) IfSG (repealed with effect from 20 March 2022)). Working from home is a proven way to reduce company contacts. In addition, the lack of transport to and from work also reduces contacts. Of course, this only applies if the activity in question can be performed without problems from a location other than the usual workplace without disrupting operational processes.[24] Employees who work in technical professions, logistics, manufacturing or production cannot work from home. In this case, there are operational reasons that speak against switching to home office.[25] Due to the Covid pandemic, employers were mandated to offer employees the opportunity to work from home. The employee has the right to refuse to work from home if he does not have the necessary technical or spatial conditions. The employer is also not mandated to provide all work equipment. However, most employers allow employees to take company computers home. Employees can also use their own work equipment. The employer and the employee must agree on this. In addition, the employer must include the home office workplace in the risk assessment.[26]

Because the home office has proven to be such an effective means of reducing contacts, employers are further encouraged to provide employees with this option.

[22] *Ibid.*
[23] *Ernst* (2022).
[24] *Bundesministerium für Gesundheit* (2022).
[25] *Ibid*.
[26] *Bundesministerium für Arbeit und Soziales* (2022).

However, there is no longer a legal obligation under the amended Infection Protection Act.[27]

III. The role of workers' representation within the undertaking and collective bargaining in the view of ensuring the OHS rights and duties during the pandemic

1. Works council

1.1. German works councils

The German Law knows works councils (in German: Betriebsräte) to represent employees in the undertaking. The members of the works council are elected by the at least 16 years old employees of the undertaking. Any at least 18 years old employee who has worked for the company for six months or longer is eligible for election. Works councils have participation, consultation and information rights and obligations - such as occupational safety and health. Larger works councils often form occupational safety committees for this purpose. To be able to exercise (or fulfil) these rights (and the duties that come along with them), the responsible works council members need sometimes very specific expertise. For this purpose, works council members have a legal claim for further training. The costs for works council members are to be paid by the employer.[28]

1.2. Problems of works councils during the COVID-19-Pandemic

To be able to pass formally effective resolutions, the works council members – be it in a committee or on the panel – must meet in person.[29] This leads us to a problem of works councils in Corona times: The conflict of goals between ability to work and reducing contacts to other employees. It took only two weeks until the legislator changed the law. "[…] 9 April 2020 the Government adopted a draft bill on an amendment of the Works Constitutions Act which shall allow works councils to take decisions by video or telephone conferencing."[30] It also mandated the employer to

[27] *Ibid*.
[28] https://www.waf-seminar.de/schulungsanspruch/kostenuebernahme-budgetierung (retrieved on 23.03.22).
[29] *Krause/Kühn*, Italian Labour Law e-Journal, Vol. 13 (2020), at 4.
[30] *Ibid*.

provide appropriate information and communication technology.[31] This Sec. 129 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) was limited until 30 June 2021. However, Sec. 30 BetrVG was amended in such a way that the works council can create the possibility of a virtual meeting within certain limits through its rules of procedure.

2. OHS and works councils

2.1. Legal framework

The OHS Framework Directive 89/391/EEC requires in Article 11 that workers' representatives must have adequate involvement in health and safety issues so that the necessary protective measures are taken.[32] The German legislator transposed this especially in the Works Constitution Act (BetrVG). Sec. 80 (1) BetrVG lists general OHS tasks for works council:

- to monitor the employer's compliance with occupational health and safety law and accident prevention regulations (no. 1)
- to apply to the employer for specific occupational health and safety measures that it considers useful (no. 2),
- as well as to promote such measures (no. 9).

Sec. 89 (1) BetrVG specifies these general tasks:

- to work to ensure that occupational health and safety law and accident prevention are implemented in the company (sentence 1) (of course from both sides: employers and employees)
- to support the authorities and employers' liability insurance association through “Suggestion, advice and information” acc. to Sec. 89 (1) BetrVG.[33]

2.2. OHS Rights of the works council

To be able to fulfil its duties regarding occupational health and safety, the works council has extensive information, consultation and co-determination rights in accordance with Sec. 89 BetrVG. For example, a works council member must always

[31] Landesarbeitsgericht Hessen (regional labour court, LAG), judgement of 21 May 2021, case 16 TaBVGa 79/21, ECLI:DE:LAGHE:2021:0521.16TABVGA79.21.00.
[32] *Wiebauer*, Landmann/Rohmer GewO (2021), ArbSchG sec. 3 para. 77.
[33] *Ibid*. para. 78.

be consulted during visits for a risk assessment. Likewise, the works council must be given copies of the accident reports to the employers' liability insurance association.

2.2.1. Information rights of the works council

In order to carry out its duties, the law ensures that the works council has access to the necessary information. These are for example:

- Right of information and right to inspect the required documents, acc. to Sec. 80 (2) BetrVG,
- Right of expert advice from other employees of the undertaking, acc. to Sec. 80 (2) BetrVG,
- Right of advice from experts from outside the undertaking by agreement with the employer, acc. to Sec. 80 (3) BetrVG,
- Duty of occupational health physicians to cooperate with, to report and to advice the works council, acc. to Sec. 9 (1, 2) Occupational Safety Act (*Arbeitssicherheitsgesetz, ASiG*),
- Employer's duty to hand over accident notices to the works council, Sec. 89 (6) BetrVG; Sec. 193 (5) Social Code, Book VII.

The most important OHS right of the works council is the OHS monitoring law. This is not explicitly regulated in the written law, but results from the duty of supervision pursuant to Sec. 89 (1), sentence 1 BetrVG. If the works council detects violations, it can call in the supervisory authorities if the employer has been asked to remedy them without success.[34]

2.2.2. Participation rights of the works council

Likewise, the works council has participation rights to fulfil its OHS duties. In contrast to co-determination rights and obligations, participation rights are not genuine co-determination but merely a form of procedural involvement. This procedural involvement can be, for example, prior consultation with or advice from the works council. Occupational safety and health-specific participation rights would be for example Sec. 10 (2), sentence 3 ArbSchG (Right to be consulted on the appointment of company emergency officers) or also Sec. 9 (3), sentence 3 AsiG (Duty to consult

[34] *Ibid*. para. 81.

the works council before engaging or dismissing a freelance occupational health physician or a freelance occupational safety specialist.).[35]

2.2.3. Co-determination rights of the works council

The participation rights give the works council the opportunity to submit its proposals and objections to the employer. However, they do not ensure that the works council has any influence on the final decision, which is made by the employer alone. Co-determination, on the other hand, is a co-decision by the works council.[36]

The most important co-determination statute for OHS is Sec. 87 (1), no. 7 BetrVG. It stipulates that the works council has a right of co-determination whenever the employer takes OHS measures based on a public law statute and has discretion in doing so. Such discretion exists if the OHS standard only describes the protection objective to be achieved but does not prescribe any fixed measures. Such standards are not unusual. The legislator wants to give companies the possibility to react individually to the prevailing labour reality.[37] The employer and the works council therefore decide together and on an equal footing. They usually do this within the framework of risk assessments through so-called works agreements. Works agreements are negotiated standards between works council and employer to which all employees in the company can refer.[38] For example, the works council and the employer negotiated a company agreement on OHS and working time during the Corona pandemic at a large German company.[39]

According to the general opinion, the co-determination of the works council is an effectiveness requirement of the employer's measures. So, the employer cannot make effective general OHS requirements without the consent of the works council. Nevertheless, the employer remains solely responsible for ensuring the OHS. If, in the works council's view, the protective measures proposed by the employer are inadequate, it will therefore refuse to give its consent. If the works council and the employer cannot reach an agreement, the conciliation board (*Einigungsstelle*) decides.

[35] *Ibid*. para. 82.
[36] *Ibid*. para. 85.
[37] *Ibid*. para. 86-88.
[38] *Ibid*. para. 109-112.
[39] https://static.eurofound.europa.eu/covid19db/cases/DE-2020-38_1448.html (retrieved on 22.04.2022).

The conciliation board is an internal arbitration board. The conciliation board consists of representatives of the employer and the works council and a neutral chairperson, who is usually a specialist lawyer for labour law or a labour judge.[40]

2.3. Examples for OHS work during COVID-19 pandemic

2.3.1. Working time

Works councils have a right of co-determination over duty rosters.[41] What otherwise had less to do with OHS became an important OHS issue due to the COVID-19 pandemic. In industrial multi-shift operations, shift schedules were changed in such a way that workers from different shifts did not meet each other. Shift handovers were done virtually instead. This was to prevent infection between shifts. As shift schedules are subject to co-determination, works councils were able to actively ensure better health protection.[42]

In day-care centres, on the other hand, procedures were changed in such a way that groups of children do not meet each other, for example at lunch, which could lead to a change in duty rosters. Through the right of co-determination on duty rosters, works councils were able to influence health protection here as well.[43]

2.3.2 Risk assessment as a hygiene concept

Hygiene concepts are required by the authorities in many facilities during the COVID-19 pandemic, also in the workplace.[44] In this, the legislator had specifically stated the need for new risk assessments in the SARS-CoV-2 Occupational Health and Safety Ordinance (see above). Risk assessments under Sec. 5 Occupational Safety and Health Act are subject to co-determination under section 87 (1), no. 7 BetrVG.[45]

An example from practice: In Berlin, the works council of a company with 250 employees had applied for an interim injunction against the employer because the

[40] https://www.hensche.de/Rechtsanwalt_Arbeitsrecht_Handbuch_Einigungsstelle.html (retrieved on 10.04.2022).
[41] https://www.kluge-seminare.de/br-portal/wissen/soziale-angelegenheiten/betriebsrat-mitbestimmung-bei- dienstplaenen/ (retrieved on 13.04.2022).
[42] https://prozesstechnik.industrie.de/chemie/sicherheit-chemie/schichtuebergabe-in-corona-zeiten/ (retrieved on 22.04.2022.
[43] https://www.stmas.bayepara.de/imperia/md/content/stmas/stmas_inet/infektionsschutz_ rahmen-hygieneplan _kindertagesbetreuung.pdf (retrieved on 22.04.2022).
[44] https://www.bmas.de/DE/Corona/Fragen-und-Antworten/Fragen-und-Antworten- ASVO/faq-corona-asvo.html (retrieved on 13.04.2022).
[45] *Herfs-Röttgen*, NZA 2021, 388.

latter had prohibited its employees from wearing face masks - still very controversial at this time - and gloves to protect themselves from infection with the Covid-19 virus in duty-free shops at Berlin airports. The works council complained about the violation of its co-determination rights according to section 87 (1), sentence 1 BetrVG. The Berlin Labour Court did not have to make a decision on co-determination and occupational health and safety in the case of the pandemic. Before the hearing, the employer informed the court that employees are allowed to wear masks and gloves.[46]

2.3.3. Home office

As mentioned in the report already, another strategy against the spread of the coronavirus was to have as many employees working from home as technically and organisationally possible. The works council must already be involved in the planning phase of such schemes. These are information and consultation rights under Sec. 80, 90 and 92 of the Works Council Constitution Act (BetrVG). These rights relate to the technical and organisational design of the workplace, work processes and working environment, for example, the introduction of IT systems or special software.

Furthermore, the works council has real co-determination rights regarding home office. These are hiring, transfers and dismissals (for example from the company to the home office or back) under Sec. 99 et seq. BetrVG or social affairs under Sec. 87 (1) BetrVG.[47]

Since 18 June 2021, the works council has, according to Sec. 87 (1), no. 14 BetrVG, a dedicated co-determination right for home office. This serves as a catch-all provision that extends the previous rights.[48]

2.3.4. 3G-Rule

A testing obligation was also co-determined by works councils. This was due to the 3G rule in the workplace, which applied until 19 March 2022. The IG BCE trade union provided a model works agreement for works councils. With this, the frequency of

[46] https://www.haufe.de/recht/arbeits-sozialrecht/coronavirus-und-mitbestimmung-bei-persoenlichen-schutzmassnahmen_218_511412.html (retrieved on 18.04.2022); Arbeitsgericht Berlin (labour court, ArbG), case 55BVGa 2341/20.
[47] https://www.haufe.de/personal/haufe-personal-office-platin/homeoffice-8-mitbestimmung_idesk_PI42323_ HI13851839.html (retrieved on 13.04.2022).
[48] *Düwell*, Betriebsverfassungsgesetz, 6th edition, 2022, Sec. 87, para. 156.

tests, the (technical) requirements for tests and the use of test results could be regulated.[49]

3. Unions and collective agreements

3.1. The role of unions in occupational health and safety

German trade unions are increasingly taking OHS into account in collective bargaining, especially in view of an ageing society. For this purpose, regulations on working time, an institutionalised health protection management system, staffing levels or even further training are negotiated into the collective agreements. The ver.di trade union, for example, has negotiated such collective regulations in many different service sectors: the collective agreement on protection against stress at Deutsche Telekom AG, the collective agreement on staffing at Charité, the collective agreement on ageing-friendly working at Deutsche Post AG, the collective agreement on health management at IBM and various collective agreements in local transport.[50]

In addition to conducting collective bargaining to directly improve working conditions, German trade unions also campaign for better occupational health and safety at a political level. For example, the DGB trade unions demanded more co-determination rights for the works council regarding home office.[51] This demand had been made for some time but was given greater weight by the COVID-19 pandemic. With the introduction of the catch-all provision in Sec. 87 (1), no. 14 BetrVG, these demands were partially implemented (see above).

3.2. Collectively agreed regulations as (minimum) standard

Where collectively agreed regulations exist, these take precedence over a works agreement negotiated between the works council and the employer. Sec. 87 (1) BetrVG explicitly states that works councils have co-determination rights "insofar as there is no statutory or collectively agreed regulation".[52] In this way, the Works

[49] https://igbce.de/resource/blob/185742/aa6bb83574b33ccfd26ffc050c2f27b9/ musterbetriebsvereinbarung- corona-schnelltests-data.docx (retrieved on 22.04.2022).
[50] https://gesundheit-soziales.verdi.de/themen/gefaehrdungsbeurteilung/++co ++ce2ae9b0-526d-11e7-8473- 52540066e5a9 (retrieved on 07.04.2022).
[51] https://www.gew.de/aktuelles/detailseite/gewerkschaften-fordern-mehr-arbeitsschutz- im-homeoffice (retrieved on 11.04.2022).
[52] *Landmann/Rohmer GewO/Wiebauer*, (2021), ArbSchG Sec. 3 para. 97.

Constitution Act considers the autonomy of collective bargaining under Article 9 (3) of the Basic Law.[53]

4. OSH authorities, grievances procedures and practitioners.

4.1. German dualism

The German OHS legal system is based on the principle of dualism. On the one hand, there are the accident insurance bodies and on the other hand there are the authorities of *Bund* and *Länder* with its federal jurisdiction. Several committees coordinate between and cooperate with the two pillars of the dual system. The most important committee is the National OHS Conference (*Nationale Arbeitsschutz Konferenz, NAK*). It is responsible for the strategic steering and agenda setting of the Joint German OSH Strategy.[54] This strategy (*Gemeinsame Deutsche Arbeitsschutz- strategie, GDA*) is standardised in Sec. 20a Occupational Safety and Health Act (ArbSchG) and "is intended to continuously modernise the OHS system in Germany in line with changes in the world of work and to create incentives for companies to further strengthen the safety and health of their employees".[55] To this end, the GDA bodies (Federal Government, Länder and accident insurance institutions) agree on common OHS objectives, improved advisory concepts and comprehensible rules and regulations[56]. This ensures that OHS actors work together.

4.2. OHS authorities

In the federal republic of Germany, the federal government (*Bund*) and the federal states (*Länder*) share the official OHS tasks. While the federal states are responsible for the regulatory enforcement of OHS laws, the federal government maintains the Federal Institute for OSH (*Bundesanstalt für Arbeitsschutz und Arbeitsmedizin, BAuA*). The BAuA largely acts as a supporting research and reporting authority.[57] The BAuA was also responsible for drafting the SARS-COV-2 Occupational Health and

[53] *Heidemann*, Betriebs- und Dienstvereinbarungen Hintergrundwissen, Tarifvorrang und Betriebsvereinbarungen, Hans Böckler Stiftung, p. 3.
[54] Evaluation of the EU Occupational Safety and Health Directives, Country Summary Report for Germany, VC/2013/0049, 2015.
[55] https://www.gda-portal.de/DE/GDA/GDA_node.html (retrieved on 22.04.2022).
[56] *Kollmer/Klindt/Schucht/Schucht* (2021), ArbSchG Sec. 20a.
[57] https://www.baua.de/DE/Aufgaben/Aufgaben_node.html (retrieved on 10.04.2022).

Safety Rules, to which the SARS-COV-2 Occupational Health and Safety Regulation refers.[58]

The sixteen states fulfil their duties either through an own OHS authority or through their Bureaus of Trade Inspections. These have the following tasks:

- Monitoring occupational safety and health requirements in companies,
- advising employers on the fulfilment of their duties,
- sanctioning violations

and are also responsible for the enforcement of other federal OSH statutory laws (Working Hours Act, Youth Employment Protection Act, Improvement of Enforcement in OSH Act, etc.).[59]

The state authorities must inspect at least 5 % of the existing companies in the state for compliance with OHS regulations from 2026.[60]

As mentioned earlier in this report, works councils also cooperate with the OHS authorities when, for example, the works council identifies violations and has unsuccessfully asked the employer to remedy the situation. This would be conceivable, for example, if the employer does not provide the prescribed two COVID-19 tests per week or permanently does not allow home office.

4.3. Accident insurance bodies

The accident insurance institutions, the so-called accident insurance bodies (*Berufsgenossenschaften*), must use all appropriate means to ensure the prevention of occupational accidents, occupational diseases and work-related health hazards in companies, to monitor this and to advise employers and employees. This comprehensive prevention mandate is implemented by the self-governing bodies (which are supported by trade unions and employers' associations) of the accident insurance institutions.[61] So the accident insurance funds issue accident prevention

[58] https://www.baua.de/DE/Angebote/Rechtstexte-und-Technische-Regeln/Regelwerk/AR-CoV-2/AR-CoV-2.html (retrieved on 22.04.2022).
[59] https://www.gda-portal.de/DE/GDA/Traeger/Traeger_node.html (retrieved on 10.04.2022).
[60] *Kollmer/Klindt/Schucht/Schucht* (2021), ArbSchG Sec. 21.
[61] https://www.gda-portal.de/DE/GDA/Traeger/Traeger_node.html (retrieved on 10.04.2022).

regulations in accordance with the German Accident Prevention Act (Sec. 15 Social Code, Book VII).[62]

The accident insurance funds also act as statutory accident insurers. For this, employers pay a monthly contribution for each employee. COVID-19 is considered as an occupational disease under certain conditions, which means that workers can benefit from the significantly better benefits of statutory accident insurance compared to the statutory health insurance.[63] This also applies to post COVID and long COVID symptoms.[64] The precondition for the recognition of an infection as an occupational accident is, that the employee "worked in the health service, in welfare care or in a laboratory or was particularly exposed to the risk of infection to a similar extent through another activity".[65]

IV. Obligations of employees

1. Overview

This chapter is about obligations every single employee has. There are general obligations resulting from the work contract regulated in Sec. 611a Civil Code (*Bürgerliches Gesetzbuch, BGB*). This can be used as a basis for more specific obligations, such as Covid-19-related ones, which are found in German public law as well as in German civil law. The most important provisions are contained in the Occupational Safety and Health Act (*Arbeitsschutzgesetz, ArbSchG)*, the SARS-CoV-2 Occupational Health and Safety Ordinance, *SARS-CoV2-Arbeitsschutzverordnung, SARS-CoV2-ArbSchV*) and the Infection Protection Act *(Infektionsschutzgesetz, IfSG).*

In the following, there will be explained how those different laws interact with each other and how every employee is affected by it through certain obligations.

[62] https://www.dguv.de/de/praevention/vorschriften_regeln/vorschriften/index.jsp (retrieved on 10.04.2022).
[63] https://www.bmas.de/DE/Soziales/Gesetzliche-Unfallversicherung/Aktuelles-aus-dem-Berufskrankheitenrecht/anerkennung-von-covid-19-als-berufskrankheit.html (retrieved on 18.04.2022).
[64] https://www.bgw-online.de/bgw-online-de/service/unfall-berufskrankheit/berufskrankheiten/covid-19-63456 (retrieved on 18.04.2022).
[65] Anlage 1 zur Berufskrankheiten-Verordnung, Nr. 3101.

2. General obligations of employees

It is easier to understand how specific pandemic-related obligations for employees were brought into the German legal system if one knows which general obligations for employees exist.

2.1. The general contractual obligation to perform

Every employee has the duty to perform. That is the main duty of every employee which will be specified by other sources of law such as collective labour agreements, general standard terms and conditions, pre-formulated by the employer, or, on the contractual side, by company practice (= *certain behaviours of the employer which are repeated frequently*) and the instruction right of the employer.[66] The employee has the personal duty to offer the service in person (Sec. 613 BGB).[67] The employee does have a right to withhold performance (Sec. 275 (3) BGB) but more on this later.

If the employee does not fulfil his duty to perform, the employer can sue them for performance.[68] Other sanctions are also possible. They can follow based on separate arrangements or certain contractual agreements, e.g. the reduction of the payment agreed or the obligation to pay damages but also a contractual penalty (= *penalty someone has to pay if they fail to perform the contractually promised service as agreed)* or termination.[69]

2.2. General secondary obligations of employees

Besides the general main obligations, there are also general secondary obligations to fulfil, stemming from public OSH law, which also flesh out their duties from private law (Sec. 242 BGB and Sec. 241 (2) BGB).[70]

According to Sec. 15 (1), sentence 1 ArbSchG[71] employees have the duty to take care of their safety and health while they are on duty. That is why they are obligated to follow any industrial safety measures of the employer. For this reason, the employee must contribute to the protection of health through individual provision such as following any hygiene or behavioural measures. According to Sec. 15 (2) ArbSchG

66 ErfK/*Preis*, BGB, Sec. 611a, para. 639.
67 *Ibid*. para. 640.
68 *Ibid*. para. 643-647.
69 *Ibid*.
70 Kollmer/Klindt/Schucht/*Schucht*, ArbSchG, Sec. 15, para. 1-6.
71 *This Section transposes Art. 13 Directive 89/391/EWG.*

the employee must therefore make intended use of work tools, safety devices and individual protective equipment provided.[72] In the context of the pandemic this means that it is part of every employee's official duty to use e.g. FFP-2-masks provided by the employer. By law or collective agreement there can also emerge an obligation to undergo a health check-up.[73] This is supposed to ensure that the work-performance owed by the employee can be provided. A general obligation for health check-ups does not exist.[74] Eventually, the individual interests of employees must be considered in terms of their privacy and physical integrity.[75]

How an employee spends their time when they are off duty can only be prescribed in a very limited way through such obligations.[76] To give an example: there is not a general duty to inform the employer truthfully about the employee's free time activities. The case is different if the employee's private life has a negative impact on the workplace and is causing harmful interference.[77] The personal freedom of every employee can only be limited through secondary obligations as absolutely necessary for the purpose of the employment relationship.[78] The personality of the employee must be considered at this point.[79] A general obligation concerning health-promoting behaviour does not exist which could be relevant in terms of the pandemic.[80] More on this later. If the employee does not fulfil those duties, they can receive a warning notice by their employer but also termination without notice is a possible consequence such as a contractual penalty or the payment of damages.[81]

3. Specific obligations of employees in the context of the pandemic

As a result of the pandemic, new obligations are imposed on every employee.

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[72] Kollmer/Klindt/Schucht/*N. Kollmer*, ArbSchG Sec. 1, para. 137, 138, see also Moll/*Reinfeld*, Münchner Anwaltshandbuch, Sec. 33, para. 12-14.
[73] ErfK/*Preis*, BGB, Sec. 611a, para. 744-747.
[74] *Reichhold*, Münchner Handbuch zum Arbeitsrecht, Sec. 55, para. 36-38.
[75] *Ibid*.
[76] ErfK/*Preis* BGB, Sec. 611a, para. 730-734.
[77] *Ibid*.
[78] *Ibid*.
[79] *Ibid*.
[80] *Ibid*.
[81] ErfK/*Preis*, BGB, Sec. 611a, para. 748.

3.1. The lapsing of the obligation to perform due to Covid-19 measures

There are certain constellations in which employees do not have the duty to perform anymore. This could be the case when they are not able to perform because of an official order such as isolation after one had direct contact to an infected person (Sec. 30 (1), 32 IfSG).[82] The employee then receives compensation according to Sec. 56 (1) IfSG. The connecting factor here is a loss of earnings.[83] Should the employee still be able to work from home because their job and their health allows them to because they are free of Covid symptoms, a loss of earnings is not given, and they are not entitled to any compensation. This is handled the same way as the usual compensation regulation when an employee is ill.[84] This means that the special Covid-19 regulation is based on the general labour law regulations. The employee also does not have to perform if Sec. 275 (3) BGB applys.[85] Sec. 275 (3) BGB contains the right to withhold or refuse performance in case of personal impossibility. This means employees can choose to withhold performance, even though they would have to perform in person because obstacles hindering them from performing outweigh the interest of the employer in the performance. Anything else would be unreasonable for the employee, and anything that is a serious threat to the employee's health and safety is considered as unreasonable.[86] A dangerous virus such as Covid-19 can be seen as such a threat and therefore allows the employee to choose not to perform. Under those circumstances, a violation of duties does not necessarily apply. This does not apply for medical staff and non-medical providers in the healthcare sector since their labour-law obligation includes endangering their own health on a daily basis.[87]

3.2. Duty of care and consideration

According to Sec. 15 (1), 16 (1) ArbSchG in conjunction with Sec. 241 (2) BGB every employee has the duty of care and consideration. In terms of the pandemic employees have the obligation to notify or report their diagnosed Covid infection.[88] Also, they

[82] ErfK/*Preis* BGB, Sec. 611a, para. 690c-690g.
[83] *Ibid*.
[84] *Ibid*, *According to Sec. 3 EntgFG (Continuation of Remuneration Act) in the case of illness every employee is entitled to continued remuneration paid by the employer.*
[85] ErfK/*Preis* BGB, Sec. 611a, para. 690h, 690i.
[86] ErfK/*Preis* BGB, Sec. 611a, para. 690j-690m.
[87] *Ibid*.
[88] Kollmer/Klindt/Schucht/*N. Kollmer*, ArbSchG, Sec. 1, para. 137-138.

have the obligation to give information about any contact person or about their residence in a high-risk area (= *by the German government as highly contagious classified areas*). Those obligations are also justified by those of the employers according to Sec. 3 (1) ArbSchG.[89]

With the duty of care and consideration one can also justify the duty to undergo health checks. This only applies when there is a reasonable suspicion concerning an infection with the virus.[90]

3.3. Special Covid-19 Regulation

3.3.1. 3-G-rule at workplaces

Since 22 November 2021 Sec. 28b IfSG described the duty of employees to follow the 3-G-rules when being at work (repealed as of 20 March 2022). Sec. 28b (1) IfSG applies to the workplaces where physical contact is likely or at least cannot be excluded completely. In consequence, the workplace can only be entered if vaccinated, tested or recovered and if this can be proven through official evidence (Sec. 28b (1), sentence 1 IfSG). Here, the possibility of physical contact with other people is sufficient for this law to be applicable, actual direct body contact is not a requirement. Sec. 2 COVID-19-Schutzmaßnahmen-Ausnahmenverordnung *(= protective measures in exceptional cases during the Covid-19 pandemic)* defines when a person counts as vaccinated, tested or recovered.

According to Sec. 28 (1), sentence 3, no. 1 IfSG employees who accept the offer of their employer to get tested immediately before the beginning of their work do not have to provide other evidence. The same applies for employees who accept the offer of vaccination (Sec. 28b (1), no. 1 IfSG). The employee commits an administrative offence according to Sec. 73 (1a) no. 11d IfSG, if they enter the workplace without the needed evidence. It is disputed whether getting tested is included in the working time or if it counts as free time. The majority considers it as free time since the test needs to be available when entering the workplace. The claim to remuneration lapses as soon as the employee refuses to follow the 3-G-rules because in this case entering the workplace is not allowed and therefore the contractual work performance cannot be performed (Sec. 275 (1), 326 (1), sentence 1 BGB). This is not the case if the work

[89] *Ibid*.
[90] ErfK/*Preis*, BGB, Sec. 611a para. 744-747.

can also be done in home office. Without following the 3-G-rules the employee violates the law, contractual obligations and they are absent from their work without an excuse which can result in a formal warning or, if this happens repeatedly, in termination due to a breach of duty.[91]

3.3.2. Wearing masks

The duty to wear a mask while being at work results from Sec. 2 SARS-CoV-2-ArbSchV. The section says that if an operation has a hygiene concept, employees must follow it. Such a hygiene concept can be the duty to wear protective masks. Medical conditions can be a reason for the exemption from this duty. The consequences of an infringement depend on the reasons for it. If an employee is refusing to wear a mask without the justification of suffering any serious medical conditions their entitlement to payment lapses. If an employee cannot wear a mask due to medical reasons, they are incapable to work due to illness and therefore a termination for illness-related reasons can follow. At this point, the duration of the pandemic needs to be considered. Another possibility is a termination for reasons of conduct since the employee is endangering their co-workers and ignores the right to instruction of their employer.[92]

3.3.3. Working shifts during the pandemic

A new labour law legislation follows from COVID-19-Arbeitszeitverordnung (*working time ordinance*). Sec. 14 (4) ArbZG was created to expand the in performance contracts allowing working shifts from 10 hours to 12 hours.[93] It is supposed to cover the need for overtime during the pandemic. In this context the question emerges, if a duty concerning the extension of the employee's performance comes with this.[94] The question does not need to be answered now because as of 1 August 2020 the old regulation came into force again and they have been applying ever since then.

In urgent situations the employee may also be obligated to work overtime if otherwise damages cannot be avoided (Sec. 241 (2) BGB).

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[91] Küttner/Röller/*Köllmann*, Personalbuch, para. 30-32.
[92] *Harländer/Otte*, Arbeitsrechtliche Konflikte im Rahmen der Pandemie, NZA 2022, 160.
[93] Kluckert/*Temming*, Das neue Infektionsschutzrecht, para. 8, 9.
[94] *Ibid*.

3.3.4. Home Office Duty

A question of greater significance is whether there is a duty to work frome home or not. Since 27 February, 2021 a new regulation exists in terms of Covid-19: SARS-CoV-2 Occupational Health and Safety Ordinance (*SARS-CoV2-Arbeitsschutzverordnung, SARS-CoV2-ArbSchV*).[95] This regulation says that work related contact needs to be kept to the minimum necessary. The adoption of this emergency regulation is based on Sec. 18 (3) ArbSchG, which constitutes a special legal basis for the adoption of regulations for epidemic situations of national concern within the meaning of Sec. 5 IfSG.[96] The Home Office regulation is supposed to provide health protection for employees as a part of employment safety law (see Sec. 1 (1) *SARS-CoV2-ArbSchV*).[97] Through that, the protection of the entire population is supposed to be provided too because the numbers of infection are reduced. On the other hand, there was at first no such thing as the duty to accept the offer from the employer to work from home.[98] Because of this, it was necessary that employer and employee have both expressed by implication that they are agreeing on home office. A contractual employment provision or an operating agreement were also options.[99] The situation has changed in April 2021: according to Sec. 28b (7) IfSG the employee has the duty to accept the offer and therefore must work from home.[100]

3.3.5. Obligation to disclosure

There is no such thing as a general obligation to disclose for employees.[101] This means that an employee does not have to inform their employer about personal circumstances or state of health if the employer does not ask about it in detail. Such an obligation would be a violation of the general right of personality in Article 2 (1) GG (=*basic law*) in conjunction with Article 1 GG.[102] In special cases an obligation like this can be derived from Sec. 242, 241 (2) BGB.[103] When it comes to Covid -19, exceptions

[95] *Valid until 24th April, 2021.*
[96] Kluckert/*Temming*, Das neue Infektionsschutzrecht, Sec. 16 para. 10c, 10d.
[97] *Ibid*.
[98] *Ibid*.
[99] *Ibid.*
[100] *Since then the law has changed a few times. The home office-duty was brought back in December 2021 and was repealed as of 20 March 2022.*
[101] Sagan/*Brockfeld*, NJW 2020, 1112; see also Kluckert/*Temming*, Das neue Infektionsschutzrecht Sec. 16, para. 65.
[102] *Ibid*.
[103] Kluckert/*Temming*, Das neue Infektionsschutzrecht, Sec. 16, para. 49-72.

apply. The endangered legal interests are of particular importance. Therefore, the employer has a particular interest in the disclosure of any relevant information. Because of this, the right of the employer to ask for relevant information outweighs the general right of personality of the employee.[104] That is why the employee does have the obligation to disclose in that case. The classification as a person[105] within the meaning of Sec. 2 nb. 4, 5, 6 or 7 IfSG also indicates such a obligation of disclosure when it comes to residence in high-risk areas or recent contact to infected people.[106]

Based on Sec. 28b (3) IfSG in connection with the 3-G-rules employees must provide evidence and therefore disclose personal information about their health so that the obligation to disclose does exist at this point.

3.4. Compulsory vaccination

3.4.1. In the area of public law

There is no public law that obligates employees to get vaccinated against Covid. What does exist is an ordinance about vaccination against Covid in general (*Coronavirus-Impfverordnung*, *CoronaImpfV*) but it does not contain a compulsory vaccination requirement. Only a formal statutory law could mandate such a severe interference in the fundamental right of protection of physical health and physical integrity based in Article 2 (2) GG. However, it has proven to be impossible to pass such a statute.[107] In consequence, employers cannot make any claim based on public law that their employees must get vaccinated.[108]

3.4.2. Compulsory vaccination by instruction

Different from the obligation to disclose and compliance with hygiene or behavioural measures, compulsory vaccination by instructions of the employer would be a far more severe interference in the fundamental rights of employees. What matters here is the

[104] Federal Labor Court, judgment of October 5, 1995 – 2 AZR 923/94, NZA 1996, 696; cf. Kluckert/*Temming*, Das neue Infektionsschutzrecht, Sec. 16 para. 50, 51.
[105] *The legal text contains definitions of certain persons, e.g. "a person who has a communicable disease".*
[106] Kollmer/Klindt/Schucht/*N. Kollmer*, ArbSchG, Sec. 1, para. 137-138; see also Kluckert/*Temming*, Das neue Infektionsschutzrecht, Sec. 16 para. 65.
[107] On 7 April 2022 the majority voted down several draft laws for compulsory vaccination in the German Bundestag (= German Parliament).
[108] Fuhlrott/*Fischer* NJW 2021, 657.

specific employment relationship in order to determine when such an instruction could become a possibility.[109]

3.4.2.1. General employment relationship

In general employment relationships compulsory vaccination by instructions is not possible. The interest of the employee in the protection of their right to physical integrity and informal self-determination (Article 2 (1) in conjunction with Article 1 (1) GG) outweighs the interest in the right of freedom to conduct a business and the right to establish and exercise commercial enterprise (Articles 2 (1), 12 (1) and 14 (1), sentence 1 GG) on the employer side. Getting the vaccine is part of the individual lifestyle and therefore not covered by the right of instruction of the employer.[110] Nevertheless, a court decision concerning this topic does not exist yet.

3.4.2.2. Special employment relationship

Something different applies when the employer has protective duties towards third parties. This could be the case in hospitals e.g. Here, the employer has great interest in vaccinated staff because of their direct contact with patients. Therefore, it is more likely that employees will have to follow such an instruction to get vaccinated than in other economic sectors.[111]

3.4.2.3. Institution-related compulsory vaccination

There exists an institution-related compulsory vaccination. It is based on Sec. 28 (2) IfSG which contains the same regulation for the case of measles. It is a special regulation for certain institutions and companies where direct contact to risk groups is common. According to Sec. 20a IfSG employees working in those institutions have the temporary duty to provide evidence of their immunity. From 15 March 2022 on only vaccinated or recovered people are allowed to work in those institutions, except employees who cannot get vaccinated because of medical reasons.[112]

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[109] *Ibid*.
[110] *Ibid*.
[111] *Ibid*.
[112] Küttner/Röller/*Köllmann*, Personalbuch, para. 30-32.

3.4.3. Termination as a consequence if not vaccinated

Under certain circumstances the employment relationship can be terminated if an employee refuses to get vaccinated.[113]

3.4.3.1. Termination based on conduct

A termination based on conduct is a possibility but only if the employer has the right to give such a particular instruction which obligates the employee to get vaccinated. Before, a warning must have been given.[114]

3.4.3.2. Termination for person-related reasons

A termination for person-related reasons is also possible if the employee is not or no longer eligible or able to perform as owed based on the working contract. In contrast to the measles vaccination which is an obligation in Germany (cf. Sec. 20 (9), sentence 6 IfSG), the lack of the vaccination against Covid is not reason enough for an employment ban and therefore cannot justify a termination for person-related reasons. It is different when it comes to employees who work as doctors or nursing staff. Here, the lack of a vaccination often leads to a limitation of the owed performance.[115]

3.4.3.3. Redundancy

A redundancy could be the consequence, if the employer decides that being vaccinated is a requirement for practising certain tasks. Particularly, this could be the case when it comes to nurses and doctors working in intensive care units.[116]

3.4.4. Getting an offer to get the vaccine

Interesting legal questions emerge when it comes to the offer of the vaccination against the virus, e.g. if a fault - as laid down in the right to receive compensation - is given if the employee does not make use of an offer of vaccination.[117] According to Sec. 3 EntgFG an employee can claim compensation if their inability to work is the result of sickness without any fault on their part. If one considers it as the fault of the employee when he is getting infected with the virus because of their refusal to get vaccinated,

[113] *Ibid*.
[114] *Ibid.*
[115] *Ibid*.
[116] *Ibid*.
[117] Sagan/*Brockfeld*, NJW 2020, 1112, cf. Krainbring, NZA 2021, 247.

they cannot be entitled to receive compensation in consequence.[118] The opinions on this question differ extremely. The ones who support fault on part of the employee argue with Sec. 56 (1), sentence 4 IfSG.[119] According to this provision governmental compensation can be refused if one does not make use of provided protection against Covid given in the form of the vaccination. For such a refusal, there must be a gross infringement against the own interests of a reasonably observant and circumspect person through particularly negligent or intentional behaviour, which indeed could be justified with the right line of argument at this point.[120]

V. Sanctions for violation of the safety obligation - rights of employees

1. Overview

In case that safety obligations are violated there are various rights for employees and these are - like all the regulations for occupational safety and health - in different statutes. Simultaneously there are also different forms in how the legislature compensates for the violated rights of employees. On the one hand there is the possibility for authorities to declare offences against the employer. On the other hand employees themselves have the right to appeal or even to refuse work on certain conditions. Also there is a possibility for them to gain damages or compensation. In the end of this chapter we will also present which (special) rights employees have in times of Covid-19, what has changed and what are the rights for people with special needs.

2. Sanctions for violation of safety obligation

2.1. Administrative offence/ criminal offence

One possibility for sanctioning employers for violating safety obligations are administrative or criminal offences. These are regulated in the particular statute. In the following there will be presented selected examples of these. Chosen were those from the Occupational Safety and Health Act (*ArbschG*), Working Hours Act (*ArbZG*), the

[118] ErfK/*Preis* BGB Sec. 611a para. 690n., see also Noack, NZA 2021, 251.
[119] Krainbring, NZA 2021, 247.
[120] *Ibid*.

Act for Occupational Safety for Young People (*JArbSchG*) and the Maternity Protection Act (*MuSchG*).

Sec. 25, 26 ArbschG

Employers can be mandated to pay a penalty up to 30.000 € (Sec. 25 (2) ArbschG) when they e. g. violate a statutory instrument that defines the limitation of employees for fending particular dangers (Sec. 18 (2), no. 1 ArbschG).

Administrative offences in Sec. 25 ArbschG can turn into criminal ones in special cases. Additional condition for complying with a criminal offence is that either the health of the employee has to be endangered or the violation has to be persistently replicated. The punishment can be a penalty or imprisonment up to one year(Sec. 26 ArbschG).[121]

Sec. 22, 23 ArbZG

Employers can be mandated to pay a penalty up to 30.000 € (Sec. 22 (2) ArbZG) when they e. g. do not grant the required breaks for employees (Sec. 22 (1), no. 2 ArbZG).

Administrative offences in Sec. 22 ArbZG can turn into criminal ones in special cases. This can happen if regulations for maximum working hours, breaks or balanced rest periods are violated (Sec. 23 ArbZG). Additional conditions for complying with a criminal offence and punishment are the same as in the ArbschG.[122]

Sec. 58, 59 JArbSchG

The JArbSchG is the law for occupational safety for young people and a substantiated form of the ArbSchG. The legal consequences for violations against this law are regulated in Sec. 58, 59 JArbSchG. An administrative offence is e. g. if an employer hires a young person that has the obligation to go to school (Sec. 58 (1), no. 1 JArbSchG). The consequence of an administrative offence in Sec. 59 JArbSchG can be a penalty up to 5.000 €, these in Sec. 58 JArbSchG up to 30.000 €. The listed violations against occupational safety in Sec. 58 JArbSchG turn into a criminal offence when the employer acts deliberately and endangers the health of a young person. This

[121] *Schmid/ Hofmann,* SPA, 142.
[122] *Ibid*.

or the persistent or the reputation of safety obligation result in imprisonment or a penalty.[123]

Sec. 32, 33 MuSchG

Sec. 32 MuSchG contains administrative offences in case that the Maternity Protection Act is violated. For example, Sec. 3 (1) MuSchG states that a pregnant woman has to be released from work at least six weeks before childbirth. If the employer violated this or one of the other requirements of this Act he/she can get a penalty up to 30.000 € depending on how incisive the violation was.[124] Similar to the other regulations these turn into criminal offences when the health of the woman or the child is endangered. The difference to the prior presented offences is that if this happens, it is not possible anymore to just handle the violation as an administrative offence - it turns automatically into a criminal offence.[125]

3. Rights of employees

3.1. Right to appeal

Sec. 17 ArbSchG

Another option is that employees react themselves to violated safety obligations. Sec. 17 (1) ArbSchG entitles the employees to make proposals to their employer for safety or health protection. There is also the possibility for them to file a complaint to a competent authority. Sec. 17 (2) ArbSchG allows this if the employee has reasons to believe that the implemented security measures are not adequate to fulfil the safety demands.

The purpose of these regulations is on one hand to give employees an active role in realising a safe working environment and on the other hand to improve the supervision of this by the authorities. The people that are directly at the place where the work happens know best what goes wrong and can be improved. In return this law saves them from any disadvantages: Employers are not allowed to treat the complaining

[123] *Weyand*, Sec. 60 para. 3 ff.
[124] *Pepping*, Sec. 32 para. 35.
[125] *Häberle*, Sec. 33 para. 1.

employee badly in any way. That means that either indirect discrimination, warning letters nor even a termination because of a complaint is allowed.[126]

Due to the narrow requirements, this right of appeal is a catch-all for companies with an inactive or non-existent works council. In companies with a functioning works council, workers should instead approach the works council and make use of their right to complain under Sec. 85 BetrVG.

3.2. Refusal to work

Sec. 275 (3) BGB

In case of violated safety obligations there is also the possibility for employees to refuse to work. The legal basis for this can be derived from different Acts: There are e. g. two in the Civil Code (BGB) and one in the General Equal Treatment Act (AGG).

One option for that is Sec. 275 (3) BGB: This so-called right of retention entitles the obligor to withhold performance if this performance would be unreasonable for him/her. In the context of labour law this means that the employee has the right to withhold work performance if the obstacle makes it unreasonable for him/ her to continue working. An example for this is the right to removal for employees if there is an immediate substantial risk to their health. Sec. 275 (3) BGB is mostly used in the labour law context for justifying work-refusal because of moral conflicts or conflicts with religious beliefs. There was also a change while the COVID-19-pandemic: Because of the changed situation some reasons were added which are considered as reasonable for refusing work. For instance, it is permissible for employees to refuse to work if employees have to take care of their children on their own because of the shutdown of childcare-institutions.[127]

Sec. 273 (1), 618 (1) BGB

The right to refuse work can also be derived from Sec. 273 (1), 618 (1) BGB. This one is not a general right of retention which is adaptable e. g. to sales rights like Sec. 275 BGB. This is a special right focused on the refusal of work. This form of right of

[126] *Schucht*, Sec. 17 para. 31, 68.
[127] *Reichold, Moll (ed.)*, Sec. 41 para. 15.

retention requires special requirements in relation to labour law e. g. that the working place does not comply with the safety safeguard provisions.[128]

It is constructed out of two acts: the second clarifies which safety obligations the employer has to implement, while the first one contains rights for employees if these are violated. An immediate risk to life or health is not required to make use of this right, but it has to be at least a long-term violation of the employer with lasting damage for the employee. Otherwise they cannot make use of this right. If this requirement exists the employee can refuse to work without losing his/her payment entitlement.[129] He/She can do that until the employer fulfils his/her obligation to comply with the safety obligations.[130]

Sec. 9 (3) ArbSchG

In case of special dangers Sec. 9 ArbSchG contains also the right for employees to leave the working place. In contrast to Sec. 273 BGB this law does not require a culpable breach of the employer; it only takes up direct danger.[131]

3.3. Compensation

Sec. 280 (1) BGB ff.

If Sec. 618 BGB is violated there is also another right for the employee: the right to compensation. One of them is regulated in Sec. 280 (1) BGB and the following Sections. If the employer causes damage due to culpable non-compliant behaviour, he/she has to replace the loss. The condition is that the employee violated obligations which are part of the employment contract and that this behaviour is causal for the damage. The employee has to state and prove this.[132] If these legal requirements are satisfied the employee can demand compensation for the damage e. g. medical expenses.[133]

If the health of an employee is affected, the legal requirements for this legal right are satisfied. But it is debated if the possibility to work is also a legally protected right.

[128] *Preis/ Temming*, Sec. 37 para. 1795; *Sagan/ Schüller*, p. 294.
[129] *Reinfeld/ Moll (ed.)*, Sec. 34 para. 15.
[130] *Koch*, Zurückbehaltungsrecht.
[131] *Hamm/ Faber*, ArbR, Sec. 9 para. 6.
[132] *Linck*, ArbR-Hdb, Sec. 59 para. 1.
[133] *Ibid*. para. 7.

The Federal Supreme Court (*Bundesgerichtshof, BGH*) follows the opinion that the restricted possibility to work is not satisfactory for compensation.[134]

Sec. 823 BGB

It is also possible that the employer is liable for doing an offence. If an employee's body or health is getting hurt the responsible person is obligated to pay damages. The offence has to happen unlawful - that means that the employer did not act justified e. g. because of self-defence.[135] Also the employer has to act deliberately or negligently, which means that he/ she acts knowingly and willingly or at least violates its essential due diligence obligations.[136]

3.4. Various offences of sanctions

There are a lot more offences of sanctions. In the following these will be stated and shortly explained to complete the listing. These either belong to the technical or the social occupational safety.[137]

Technical occupational safety

Sec. 12, 13 ASiG (*Gesetz über Betriebsärzte, Sicherheitsingenieure und andere Fachkräfte für Arbeitssicherheit*)**:** This Code of Law includes regulations for company doctors, safety engineers and other occupational safety specialists. These sections regulate the possibility for the responsible authority to order measures if the employer violated safety obligations. Also the employer is legally required to give information to the authority relating to meet the requirements of this Code of Law.

Sec. 20 BlmSchG (*Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigung, Geräusche, Erschütterungen und ähnliche Vorgänge*)**:** The BlmSchg is the Emission Protection Law for the federal republic. If the employer is not taking care of the fact that their facilities have damaging environmental affects the responsible authority is allowed to prohibit it from running (until the requirements are fulfilled).

Social occupational safety

[134] *Ibid*. para. 12.
[135] *Katzenmeier*, Dauner-Lieb/ Langen (ed.), Sec. 823 para. 7.
[136] *Dauner-Lieb*, Sec. 276, para. 10 ff.
[137] *Preis/ Temming*, Sec. 1 para. 23.

Sec. 42, 43 BDSG (*Bundesdatenschutzgesetz*): These sections include sanctions against the employer (such as administrative or criminal offenses) if he/she violates regulations of the Federal Data Protection Act.

Sec. 18 BEEG (*Gesetz zum Elterngeld und zur Elternzeit*)**:** The legislation on parental allowance and parental leave includes a special dismissal protection.

Sec. 16a HAG (*Heimarbeitsgesetz*)**:** The responsible authority can take actions so that the employer implements the regulations for home-based work.

Sec. 13, 14, 15, 16 AGG (*Allgemeines Gleichbehandlungsgesetz*)**:** Employees have the right to appeal or to refuse work if the employer violates regulations of the General Equal Treatment Act. It is not allowed to discriminate against them because of the rights from this Code of Law and employees might have a claim for damages.

4. Covid-19

4.1. Labour Law regulations

The presented sanctions for violated safety obligations apply also with regard to the Covid-19 situation. If an employer refuses to take safety measures to reduce the risk of infections the employee has - if all further requirements are met - the right to refuse work in accordance with Sec. 273 (1), 618 (1) BGB.[138]

Also there is the possibility of administrative or even criminal offences if public law protection provisions e. g. these especially for the Covid-19 situation (SARS-CoV-2-ArbSchV) are violated. If the employer is not implementing the duty to wear the mouth and nose protection or the right to work from home the consequence can be a penalty up to 30.000 € (see 2.1.).[139]

4.2. Criminal law

It is also possible that even the criminal law can be relevant if measures for health protection are violated. If an employer does not implement these and in consequence of this an employee gets infected a negligent physical injury can be committed. In accordance with Sec. 229 StGB the consequence for this can be imprisonment up to 3

[138] *Temming*, Kluckert (ed.), Sec. 16 para. 36.
[139] *Winkelmüller/ Gabriel*, Sec. 1 para. 90.

years or a financial penalty. Even an involuntary manslaughter is possible in serious cases; the possible imprisonment can be up to 5 years (Sec. 222 StGB).[140]

4.3. Infection Protection Act

Since Covid-19 started there have been more regulations in addition to the existing ones to react to the new situation. An important regulation is part of the Infection Protection Act. Sec. 56 IfSG took effect on 28 March 2020 and was originally limited until the end of that year. Because of the unpredictable persistence of the pandemic it was changed continually and temporally extended.[141]

Sec. 56 (1) IfSG provides the possibility for compensation if the employee is not allowed to pursue his/her work because he/she is in quarantine due to the possibility that the person is infected with the Covid-19-Virus.

Due to subsection 1a employees receive compensation in case of a pandemic situation if the requirements for that are satisfied. One possibility is that either public institutions for child care or people with disabilities have to be closed officially due to the pandemic situation. The second alternative is that there is no other option for the employee for taking care of the child or the person with disabilities except doing it on his/ her own. This is not the case if the person has a claim for emergency child care or the other parent is able to take care of the child. Also the reasonable possibility to work from home excludes this claim.[142] And last thing is that the employee has to suffer a loss of earnings. This is not the case if the employee receives already continued payment due to another law.[143]

In case of subsection 1 the employer gets a compensation in the amount of the regular payment and in case of subsection 1a it is 67 % of that.[144]

4.4. Reasonable accommodations for people with disability/ risk groups

A lot of people have special needs and so especially in the epidemic it has to be reacted to these needs so they can go through to it best possible. In relation to the working place this emerges from Sec. 12 AGG: Employees with disabilities have the right to

[140] *Ibid*.
[141] *Pepping*, Sec. 56 para. 2.
[142] *Ibid*. para. 6 f.
[143] *Ibid*. para. 8.
[144] *Ibid*. para. 10.

a working place that suits their special needs. Employers are not allowed to discriminate against employees because of their disabilities and have to take care of reasonable accommodations. If they do not pursue this obligation the employee has e. g. a claim to damages in accordance with Sec. 280 BGB.[145]

Usually for people with disabilities there are special regulations in the Social Code, Book IX (Disabled Persons Act, SGB IX). E. g. Sec. 164 (4) SGB IX guarantees a working place adapted to the needs of severely disabled people. But there are some persons whose condition is not picked up in that Act. For them there is another regulation: Sec. 4, no. 6 ArbSchG implies the obligation for employers to take measures to respond to special risks for vulnerable persons.[146] These have to be considered relating to all kinds of safety measures, so also in the risk assessment, for risk minimization, for the adjustment of the working conditions and the briefings for the employees.[147]

Especially in the pandemic it has shown how important this legal regulation is: It reacts to the needs of risk groups, e. g. people with chronic diseases, which have a higher risk to suffer a serious course of a COVID-19-infection. For members of such a group the employer has to take reasonable protective measures. This can e. g. be the possibility for them to work from home instead of taking the risk of an infection at the working place.[148]

Sec. 4, no. 6 ArbSchG is designed as a group-oriented occupational safety measure: This so-called universal design is targeted at avoiding as many dangers for the most vulnerable people as possible. The aim is that just little individual measures are necessary afterwards.[149]

VI. Conclusion

The pandemic was (and still is) a pressure test for the German government and its legal system which has not been passed very well by our leaders. The constant change of

[145] *Eichenhofer*, p. 54.
[146] *Kohte*, Kollmer/Klindt/Schucht (ed.), Sec. 4 para. 36.
[147] *Ibid*. para. 37.
[148] *Kohte*, Kollmer/Klindt/Schucht (ed.), Sec. 4 para. 37a.
[149] *Ibid*. para. 38.

the law left workers feeling confused. Everybody had to live day by day, uncertain about which rules to follow, how to behave right and how to keep up the daily work life in the best possible way without endangering co-workers, families, their own health, violating the law or getting into an argument about the current legal situation. Anger and fear were widespread. Opacity shaped the German legal situation since the beginning of the pandemic.

Especially Germany's federalism made it impossible to have a perfect overview over the current situation in the country since every federal state took different steps to overcome the pandemic. Workers in one federal state would have to follow some different rules than the ones in another federal state. Everybody gave up on listening to, watching and reading the news eventually after the law continued to change. Politicians were fighting in front of the camera and nobody seemed to have a precise plan which would guide Germany through these hard times of Covid. The impression reinforced that the politicians had no control over the situation and simultaneously the trust in the German government faded more and more day by day.

One did also question the effectiveness of certain measures such as getting tested to be allowed to enter the workplace or wearing masks. Oftentimes, those approaches to solve the problems were good and plausible but the implementation was a failure. The compliance has not been monitored sufficiently. The system had holes and was not stable. Because people got tired of the constant changes they started to apply their own rules. Some people wore masks, others did not, some because they did not want to follow the rules of government because all trust was gone, others just because they were too confused and missed the last changes concerning mandatory masks. It has been a vicious circle consisting of relaxing of regulations and tightening up the rules again, so that in consequence the German government could not be taken seriously anymore at all.

To mention a positive aspect, Covid-19 brought great progress into the sector of operational work through increasing digitisation. Germany knows now that people can be trusted with getting their job done no matter where they are, offices are not a mandatory necessity anymore. Also, better work equipment was provided for most workers since technology had to be upgraded to be suitable for workers who work over

long distances and in home offices. It was also thrilling to obtain how fast things could suddenly be arranged and the amount of money that could be spent.

But the worst was yet to come when the fight about compulsory vaccination began. The discussion is still going on. There does already exist an institution-related compulsory vaccination but the effectiveness of it can be seriously questioned since this obligation lapses as soon staff shortage occurs. This topic splits families, groups of friends, coworkers, but also our politicians into two. In the end everybody is simply concerned about their well-being and everything comes down to a single question: How can we protect our basic rights which include on the one hand our physical integrity and our personal freedom and on the other hand the well-being of every single one of us as a unit?

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