The dynamic development of the COVID-19 pandemic has brought forth a number of new regulations. On April 20, 2021, the second amendment to the SARS-CoV-2 Occupational Health and Safety Regulation (SARS-CoV-2-Arbeitsschutzverordnung) went into effect, requiring employers nationwide to offer employees who do not work exclusively from home offices COVID-19 tests at least once per week. The regulation also requires employers to offer employees with an increased risk of infection an opportunity to be tested for COVID-19 twice per week. In addition, the regulation requires employers to retain evidence of the procurement of COVID-19 tests or agreements with third parties regarding testing for a period of four weeks.

On April 23, 2021, the third amendment to the SARS-CoV-2 Occupational Health and Safety and Health Regulation went into effect. As a result, employers are obligated to offer their employees COVID-19 test twice per week. The regulation eliminates
the obligation to offer additional tests to employees with an increased risk of infection. Employers’ record-keeping obligations continue to apply until June 30, 2021. The employer’s duty to retain records does not include documentation of how many or even which employees actually took advantage of the test offer.

The regulation requires employers to pay for the tests. The Corona Occupational Health and Safety Regulation does not specify which tests employers must offer, so employers can also presumably offer self-tests.

The process of sample collection and evaluation is simple for self-tests. Individuals can perform these tests with a nasal swab or by collecting saliva, for example. Rapid antigen tests, on the other hand, can be performed only by trained personnel, who typically take nasal and/or throat swabs of individuals for evaluation.

Despite employers’ obligations to offer the test, employees may choose whether they want to be tested. Employees who test positive are obligated to inform their employers immediately. While SARS-CoV-2 must be reported to the responsible health office in accordance with the Infection Protection Act (IfSG), employees’ obligation to report positive test results also stems from the employment relationship insofar as employers require the information to fulfill their duty of care and protection and to protect the health of all employees.

**Employer’s Right to Compensation in the Event of Precautionary Quarantine**

With a positive rapid antigen test result, an individual who has been tested is considered to have a suspected case of COVID-19 and must quarantine. Pursuant to Section 56(1) Sentence 2 IfSG, in the event of such a precautionary quarantine (i.e., even before a quarantine ordered by the authorities), employees have a claim for compensation for loss of earnings. Employees can claim that they are entitled to compensation only if working from home is not possible. The employer must pay the employee in accordance with Section 56(5) IfSG. However, the employer can claim reimbursement by the competent authority.

Once an employee gets a positive rapid antigen test result, he or she must also contact a doctor or a suitable testing center by telephone to have a polymerase chain reaction (PCR) test performed. If the result of the PCR test is also positive, the employee must remain in quarantine. The laboratory will automatically forward positive PCR test results to the appropriate health department.

**Tightening of the Home Office Obligation**

Effective April 23, 2021, the IfSG has been amended with the new Section 28b IfSG, which requires employers to allow their employees to work from home if they perform office work or comparable activities unless there are compelling operational reasons to the contrary. Accordingly, the Corona Occupational Health and Safety Regulation’s requirement that certain employees work from home is no longer in effect and, instead, is incorporated into the IfSG. The obligation to work from home is now extended to all employees unless the employee can demonstrate reasons why he or she would not be able to work remotely. Thus, employees are no longer free to
choose whether they will work in their office, and employees who do not think it is possible to work from home must inform their employers of the reasons why. The remote work requirement will remain in effect as long as the German Bundestag’s determination of an epidemic situation of national scope remains in effect, or until June 30, 2021.

Employers may want to document the presence of and reasons for employees’ activities in the office in order to be able to demonstrate compliance with the home office obligation pursuant to Section 28b(7) IfSG.


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