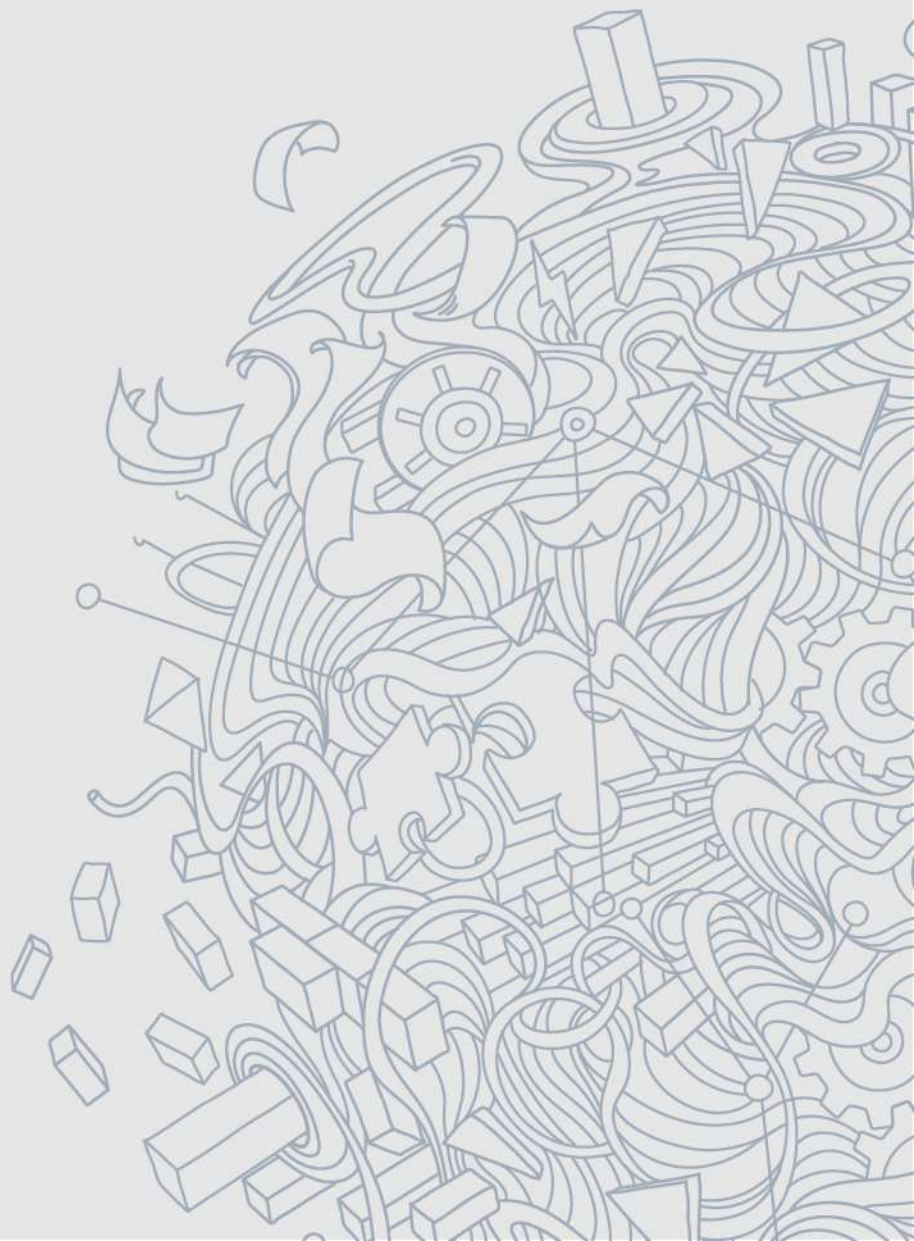


GUIDE FOR EMPLOYERS ON THE COVID-19 OCCUPATIONAL HEALTH AND SAFETY REGULATION (HOME OFFICE, TESTING & MASKING OBLIGATIONS)

April 2021



The "SARS-CoV-2 Occupational Health and Safety Regulation" (*SARS-CoV-2-Arbeitsschutzverordnung*, "**Regulation**") came into force on 27 January 2021, initially limited until 15 March 2021, and was in April 2021 prolonged until (presently) 30 June 2021. It obliges employers to implement stricter occupational health and safety measures. The Regulation amends the existing SARS-CoV-2 Occupational Health and Safety Standard (April 2020) and the SARS-CoV-2 Occupational Health and Safety Rule (August 2020) but leaves further-reaching federal states' own infection protection regulations untouched.

The Regulation's key contents are:

OFFER OF HOME OFFICE

- Employers must offer employees "in the case of office work or comparable activities" (*Büroarbeit oder vergleichbare Tätigkeiten*) to carry out these activities at home if there are no opposing "compelling operational reasons" (*zwingende betriebsbedingte Gründe*) against it
 - "Comparable activities" are activities suitable to be carried out from home using e.g. IT equipment
 - "Compelling operational reasons" may preclude the obligatory offer of home office if without the activity, which is in principle suitable for home office but which cannot be relocated there for provable and comprehensible operational reasons, the remaining operations can only be maintained to a limited extent or not at all

This includes, in particular, tasks associated with the office activity, e.g. processing mail/receiving goods, issuing materials, repair/maintenance tasks (IT services) or emergency services to maintain operations

Technical or organisational reasons, such as the unavailability of required IT equipment or a necessary change in organisation of work, can regularly only justify declining home office for a very limited period of time until the reason for prevention is eliminated in due time

In individual cases, however, increased requirements for operational data protection can be claimed, which, for example, require technical and/or spatial requirements that go beyond the usual encryption systems

- The implementation of home office is possible by way of individual amendments to the employment contract or, in companies with a works council (*Betriebsrat*) (mandatory co-determination rights to be observed), a works agreement (*Betriebsvereinbarung*)



These rules on home office should be structured with clear reference to the Regulation and the current pandemic, and should be limited in time to avoid the possible occurrence of a company practice (*betriebliche Übung*).

The home office agreement shall in particular contain provisions on availability/core working hours, technical design of the home office, cost coverage and occupational safety as well as data protection aspects

- According to the reasons of the Regulation, it is not necessary to set up a teleworking place (*Telearbeitsplatz*) in the sense of the Workplace Ordinance (*Arbeitsstättenverordnung*) (i.e. the fixed installation of a fully furnished computer workstation by the employer); enabling mobile working (i.e. work independent of location without a permanently set up home workstation) is sufficient
- It is not possible to take legal action against the employer for enabling home office. However, employees can turn to their representative body (e.g. works/staff council) or use their right of complaint against the employer under the Occupational Health and Safety Act (*Arbeitsschutzgesetz*). If this also remains unsuccessful, employees can turn to the competent occupational health and safety authority (*Arbeitsschutzbehörde*) or their accident insurance institutions (*Unfallversicherung*)
- Employees are obliged to accept the offer of home office unless there are reasons on their part to the contrary ("simple" reasons sufficient, e.g. no space for working properly at home). An explanation by the employee that working from home is not possible is sufficient
- To carry out its monitoring task (i.e. to check whether there are compelling operational reasons against offering home office), the competent occupational health and safety authority may demand that the employer provide the information and documents necessary

Important note: If during its inspection, the occupational health and safety authority determines that home office was not offered despite the legal obligation to do so, it can order the immediate performance of the work in the home office.

- The provision regulating the above was deleted from the Regulation and inserted to the German Infection Protection Act (*Infektionsschutzgesetz*) with effect from 23 April 2021

HINTS FOR EMPLOYERS:

- In order to be able to present such "compelling operational reasons" precluding an offer of home office in the event of inspections by the occupational health and safety authority, employers should specify their considerations in this regard for the respective groups of employees and put them in writing
- If the employee rejects the offer of home office, both the offer and the rejection should be also documented in writing



For 2021, the legislator will also introduce tax relief for employers. Certain "digital assets" such as computers, software and other IT infrastructure shall be fully depreciable with immediate effect retroactively from 1 January 2021

STATUTORY OBLIGATION TO OFFER COVID-19 TESTING

- Employers must offer employees, unless they work exclusively in their home office, testing for direct detection of the SARS-CoV-2 coronavirus (details see below) at least twice per calendar week



In general, there is no corresponding obligation for employees to make use of the testing offers. In addition, regulations of federal states can provide for further rules.

- Employers need to order, organise and cover costs for these tests for direct detection of the SARS-CoV-2 coronavirus
- Permitted test types are PCR tests or rapid antigen test for professional or self-use (so-called "self-tests"); employers may also engage an external medical contractor to perform e.g. PCR tests or professional rapid antigen tests at the operation
- No obligation for employers to document whether employees used the opportunity to get tested. In addition, regulations of federal states can provide for further rules



Employers need to keep evidence of the procurement of tests or copies of the agreements with third parties on the testing of employees until 30 June 2021

REVIEW & UPDATE OF RISK ASSESSMENTS / HYGIENE CONCEPTS

- Regular review and update of risk assessments (*Gefährdungsbeurteilungen*) particularly taking into account the "SARS-CoV-2 Occupational Health and Safety Rule". During this process, the employer is obliged to involve the occupational safety specialist, company doctor and employee representatives (if any, otherwise employees)
- If not already in place, establishment and review of occupational hygiene concepts (*betriebliche Hygienekonzepte*) on the basis of risk assessments as well as definition and implementation of necessary measures for occupational infection protection. Sector-related action aids of the accident insurance institutions (*Unfallversicherungsträger*) can be used as a guide for suitable measures. Employers especially need to adhere to the aforementioned when re-opening their businesses and lifting of prohibition and restrictions under infection protection law



These occupational hygiene concepts need to be made accessible to the employees (e.g. by posting it on the intranet, putting a notice on the establishment's black board)

MINIMUM SPACE REQUIREMENTS PER EMPLOYEE

- The minimum space per employee must not be less than 10 square metres if the simultaneous use of the room by several persons is required and the activities to be performed permit this minimum space
- If compliance with this minimum space per employee is not possible due to "compelling operational reasons" (especially adhering to the requirements of the activities, e.g. in assembly or production, or due to structural conditions), the employer must protect its employees by other equivalent measures. Such measures can be e.g. ventilation, installing partitions between employees present, mandatory masking obligations for all employees present or other measures lined out in the occupational hygiene concepts

MANDATORY MASKING

- Employers are obligated to provide medical facemasks ("**Mouth-Nose-Covering**") if
 - compliance with the minimum space requirement cannot be ensured (see above)
 - the minimum distance of 1.5 metres between persons cannot be maintained or
 - moving from and to the individual workplaces inside the operation's buildings

- Where the risk assessments determine that Mouth-Nose-Coverings are not sufficient for infection protection of employees and masks with the function of self-protection are necessary, employers are required to provide respirator masks (e.g. FFP2 or FFP3, N95 or P2). This particularly applies where
 - Activities carried out are likely to involve a risk of increased aerosol emission or
 - Operational activities involve contact with other persons and a person present does not have to wear a Mouth-Nose-Covering (e.g. due to a medical certificate exempting the person from masking obligations)
- Wherever employers are required to provide any kind of masks, employees are obliged to wear these masks or masks with at least equal protection value
- Employers may deviate and are allowed to implement other protection measures as long as they are equally effective and protective for its employees (deviation potential in practice to be considered as very limited and associated with risks)



Employees refusing to wear masks without any sufficient reason (e.g. medical indication) may be subject to warnings or even terminations due to behavioural reasons (depending on the individual case at hand)

- The Regulation leaves the specific infection protection rules of the respective Federal states untouched. This means that even if medical, FFP2 or comparable masks do not have to be provided and worn according to the Regulation, Federal states' rules continue to apply (e.g. wearing "community" (cloth) masks)

REDUCTION OF OPERATIONAL GATHERINGS

Employers must take all appropriate technical and organisational measures to reduce business-related personal contacts. In particular, business-related gatherings of several people (e.g. meetings) shall be reduced to the minimum necessary for the business and, where possible, replaced by the use of IT infrastructure or other equivalent protective measures (e.g. ventilation, partitioning or other measures lined out in the occupational hygiene concepts). Same applies to break areas

DIVISION INTO SMALL WORKING GROUPS

- Employers with more than 10 employees are also obliged, within the framework of operational conditions, to divide their workforce into working groups that are as small as possible, avoiding changes in composition wherever operable
- In addition and as far as operationally feasible, flexible working shall be offered in order to guarantee time-shifted working and staggered use of e.g. canteens and break rooms



POSSIBLE CONSEQUENCES IN THE EVENT OF NON-COMPLIANCE

The competent occupational health and safety authorities, supported by the supervisory services of the accident insurance institutions, monitor compliance with these occupational health and safety regulations. In the event of serious violations, fines of up to EUR 30,000 may be imposed in individual cases and, in the most extreme case, operations in the affected area may be banned.



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