

PRESS RELEASE

Officially Ordered Business Closures during the Pandemic - Does the Employer Bear the Risk regarding Remuneration?

Munich, 12 October 2021 – The German Federal Labour Court will make a decision tomorrow on whether an Employee is entitled to remuneration during a business closure by official orders during the coronavirus pandemic (5 AZR 211/21).

The Employer trades in sewing machines and accessories. He operates a branch where the Employee has been working as a marginal part-time worker (*geringfügig Beschäftigte*) in sales since October 2019. The branch was closed during the month of April 2020 by general order of the city of B. dated 23 March 2020 due to the coronavirus pandemic. If this had not been the case, the Employee would have worked earning a net remuneration of EUR 432.00. The Employee claimed this amount as so-called remuneration in the case of default in acceptance (*Annahmeverzugslohn*). She is of the opinion that the closure of a branch by official order due to the coronavirus pandemic constitutes a case where the Employer must bear the operational risk.

The lower courts have granted the claim. They argued that the provisions regarding remuneration in the case of default in acceptance referred to all circumstances where the Employer was not able to provide the necessary work equipment either for factual or legal reasons. Pursuant to Sec. 615 sentence 3 of the German Civil Code (*BGB*) the Employee may demand the agreed remuneration for the services not rendered as the result of the "default" without being obliged to provide cure if the Employer is in default in accepting the services. A default is defined as the Employer not accepting the work performance offered to them. Making an offer is not required, for example, if the Employer closes a shop due to an official order. The courts also argued that the general order of the city of B. had only banned opening retailers to the public. Thus, it would have indeed been possible to assign other reasonable tasks to the Employee. The courts believed that this situation came close to the general commercial risk borne by the Employer.

"Whenever it is not possible for the employer to respond to business closures with short-time work (*Kurzarbeit*), it needs to be determined who will bear the risk regarding remuneration," says *Dr Wolfgang Lipinski*, a licensed labour law specialist, Partner and practice group head at the international corporate law firm ADVANT Beiten. "This is true, for example, for all marginally-employed workers like in this case. As they are not subject to social security contributions, they may not be paid short-time allowance (*Kurzarbeitergeld*)," the lawyer continues. "Should the Federal Labour Court negate the realisation of general life risks in this case, it thus takes the side of the employees and imposes the risk regarding remuneration on the employers as part of their business risk."

This means that entrepreneurs should take special precautions for future cases of business closures due to the coronavirus pandemic. Provisions set forth in employment or collective agreements could avoid such costs for continued remuneration in the future. However, these stipulations need to be laid down meticulously so that they may later be upheld by a court of law," *Lipinski* emphasises.

Dr Wolfgang Lipinski is a Labour Law Specialist and a Partner at ADVANT Beiten. He is the head of the Labour & Employment Law practice group comprising approx. 65 lawyers and available for interviews and guest contributions.

Contact

Dr Wolfgang Lipinski
Phone: +49 89 35 065-1133
Email: Wolfgang.Lipinski@avant-beiten.com

Public Relations (Labour & Employment Law)

Markus Bauer
Phone: +49 89 35 065-1104
Email: Markus.Bauer@advant-beiten.com

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