

Reclaim of short-time work subsidies by the Labour Market Service ("LMS") based on a "mandatory" one-month period of employment

Currently, an increasing number of companies is confronted with considerable claims for re-payment of subsidies granted by the LMS for phase I of the Corona short-time work model. The approach of the LMS makes the impression that it intends to take advantage of self-caused legal uncertainties to the clear disadvantage of these companies. Thus, companies should refrain from making premature re-payments.

- **What is behind the reclaims?**

The LMS has granted and already paid out short-time work subsidies to many companies for employees who had not yet been employed by the company for a full month at the time short-time work was initially implemented. The LMS now takes the legal view that the subsidies for such employees were received unlawfully by the companies and, thus, reclaims any paid subsidies in this respect. It needs to be highlighted that at the time these subsidies were granted, the short-time work guidelines did not include clear provisions on a one-month minimum employment period or on the possibility to reclaim subsidies in this respect. Such provisions are clearly missing in the initial guidelines for phase I (period from March to May 2020). Thus, the legitimacy of these reclaims issued by the LMS regarding phase I of the short-time work remains more than questionable.

- **Which legal framework must be particularly considered in this context?**

The Covid-19 short-time work subsidy is a support measure of the LMS within the scope of the private sector administration. Thus, at the time the LMS has granted or extended (the date of positive subsidy notification is decisive) the company's application for Covid-19 short-time work, a subsidy contract under Austrian civil law entered into force between the parties (LMS and company). This contract provides for the company's legal claim to the subsidy in accordance with the provisions of the subsidy contract (integrated parts of the contract are, in particular, the notification on subsidy granting, the social partner agreement and the short-time work guidelines effective at the time the contract entered into force). The subsidy contract is subject to regular restrictions of civil law and therefore, a reclaim by the LMS must be in line with civil law principles.



- **Should companies repay short-time work subsidies in the light of respective reclaim by LMS?**

No, at least not before the concrete legal situation has been assessed in detail on an individual basis. In our legal perspective, any unclear and incomplete legal framework resulting from the short-time work guidelines cannot be exploited to the disadvantage of companies now. As a fact, we do consider reclaims on the basis of a guideline that does clearly not provide for a minimum duration of employment to be unlawful. Whether or to what extent a reclaim by the LMS may be permissible after all should therefore be assessed based on the concrete contractual framework, in particular with regard to the applicable short-time work guidelines.

- **"Goodwill approach" by LMS?**

The LMS currently offers companies kind of a "goodwill solution". Consequently, companies may submit a new application for short-time work subsidies in retrospective, at the latest by September 30, 2020, with respect to those employees who have not yet worked a full month at the time short-time work was initially applied for. Such application additionally requires a fully renewed social partner agreement as well as a payroll account statement indicating the employee's remuneration for one full calendar month. If companies agree to this approach, the amount of reclaims would relate to the first month of employment only.

Conclusion

Whether a claim by the LMS is lawful or not must be carefully assessed in detail on a case-by-case basis (considering the complete and individual contractual framework). Thus, a general valid statement with regard to the legitimacy of such reclaims is not possible, as this always depends on the result of the contractual interpretation. In any case, the lawfulness of the reclaim of the LMS for phase I of the Corona short-time work – based on the one-month period of employment – is indeed questionable. Affected companies should therefore clearly refrain from paying back such reclaimed subsidies too fast. Based on these legal uncertainties it also remains doubtful if the offered "goodwill approach" really is a fair solution after all.

If you have further questions, our specialists will be glad to help:



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