

### No mask, no job ... no pay?

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Employers are allowed to make it mandatory for mouth-nose coverings to be worn during working hours. In order to be exempt from this obligation to wear a mask, a doctor's note that contains specific, comprehensible information why a mouth-nose covering cannot be worn is required. If such a doctor's note is not submitted, the employee concerned may not carry out their work in the workplace nor be permitted to work from home. This was the ruling of the Siegburg Labour Court (Arbeitsgericht, ArbG) in December of last year ([Siegburg ArbG, judgment dated 16.12.2020 – 4 Ga 18/20](#)).

#### What happened?

After the employer made it mandatory for staff and visitors to wear a mouth-nose covering in the Town Hall, the claimant who worked for the employer submitted a doctor's note which stated they were exempt from wearing a mask, but did not give reasons why. The employer then ordered the claimant to wear a face visor in communal areas, in hallways and bathrooms, as well as in break rooms and printer rooms. The claimant submitted a further doctor's note which stated they were exempt from wearing a face visor of any type, again without giving reasons why. The employer then refused to allow the claimant to work. In an interim relief hearing the claimant requested that they be allowed to work at the Town Hall without a face covering or alternatively that they be allowed to work from home.

#### What did the court decide?

The Siegburg Labour Court rejected the submissions following an oral hearing. In the court's opinion, protecting the health of staff and visitors to the Town Hall and preventing them from becoming infected overrode the claimant's interests in working without a mouth-nose-covering or face visor of any type. The submitted doctor's notes raised serious doubts concerning their reliability. Like the North Rhine-Westphalia Higher Regional Court (NRW OVG, cf. its [judgment dated 24.9.2020](#)), the Siegburg Labour Court also required comprehensible information in the doctor's notes as to why such a covering could not be worn and

thus why the addressee must be granted the benefit. It argued that it would not be reasonable for the employer to be expected to let the employee continue to work in these circumstances.

#### Practical relevance:

The obligation to wear a mouth-nose covering continues to apply for the foreseeable future. This does not apply only in public spaces, but also remains the norm in the workplace for public health reasons where it is not possible to avoid contact with other people. The court's ruling is not only in line with the statements of the NRW OVG, but rather likewise persuasively reflects the legal situation in the relationship between an employee and an employer. The decision covers only one of several aspects in an employment contract regarding the unjustified refusal to wear a mouth-nose covering and calls for a brief outline of this and other issues that have practical relevance.

#### No work without a mask

The employer is obligated as part of its duty of care within the meaning of section 618 and section 241 (2) [German Civil Code \(BGB\)](#) to take suitable measures to protect the health of its staff. The public law occupational health and safety regulations describe this obligation in more concrete terms and are accompanied by practical recommendations for action from the Federal Ministry of Labour and Social Affairs (BMAS). If the employer falls short of these protective measures, it faces the risk of liability and the possibility of administrative fines. The employer does have some leeway with the specific implementation within the scope its right to give instructions within the meaning of [section 106 German Industrial Code \(Gewerbeordnung, GewO\)](#). This leeway ends, however, where the Covid-19 protective ordinances enacted at Federal and state level introduce binding regulations to protect public health. [Section 3 \(2\) no. 1 North-Rhine Westphalia Covid-19 Protection Ordinance \(Coronaschutzverordnung NRW\)](#) in the version dated 7 January 2021, for example, expressly states that there is an obligation to wear a cloth face mask covering the mouth and nose in enclosed public spaces, regardless of maintaining a minimum distance, provided these public

spaces are also available to customers or visitors, with or without admission control. If an employee then refuses to accept these mandatory stipulations without demonstrating a significant justification for this, they have no right to perform their job, including working from home. The latter arises after the draft Right to Work From Home bill submitted last year was rejected and there continues to be no statutory right to work from home. In fact, the employer properly exercises its right to give instructions as per [section 106 GewO](#) when it instructs its employees to wear a mouth-nose covering.

The employer's duty of care fundamentally also includes offering a workplace that meets the employee's health needs. However, such a workplace needs to be provided only if the doctor's note meets the requirements of the case law of the Higher Administrative Court and thus provides meaningful information. To some extent, the ordinances themselves state specific requirements regarding the contents of the doctor's note. This is the case, for example, [in section 1 \(2\) no. 2 Bavarian Infection Protection Ordinance \(Bayerische Infektionsschutzverordnung\) dated 15 December 2020](#). In Hamburg, face visors are not classed as eligible mouth-nose coverings ([section 8 \(1\) Hamburg SARS-CoV-2 Containment Ordinance \(Hamburgische SARS-CoV-2-Eindämmungsverordnung\) dated 10 January 2021](#)). The doctor's note submitted by the claimant was only of lower evidential value, unlike a certificate of incapacity for work, which is attributed a higher evidential value.

When answering the question whether appearing at the workplace without a mouth-nose covering is a reason for dismissal, caution is called for and circumstances should be reviewed individually on a case-by-case basis. If an employee vehemently refuses to wear a covering, however, and ignores the employer's repeated express instructions, it is ultimately entirely possible that such a step is taken as the last resort.

## No mask no pay

If the employer does not put the employee to work because they have appeared at the workplace without a mouth-nose covering and without a doctor's note that provides meaningful information, then there are sufficient grounds for the employer to respond to the refusal to wear a mask with a refusal to pay that employee. The employer will not be in default of acceptance as per [section 615 sentence 1 BGB](#), because the employee's performance offer does usually not represent a valid offer and the employer cannot reasonably be expected to accept the offered performance. The employer is not allowed to put the employee to work without appropriate health protection measures. This certainly applies if the employee, as was the case here, works in a publicly accessible building and comes into contact with other workers and visitors. Something else may, of course, apply if the employee sits at their desk and is not at risk of infection or an infection risk to others due to protective equipment, such as perspex screens.

## Participation of the Works Council

If the company has a Works Council, it will have to be involved when it comes to the specific implementation of the provisions in the workplace. There is generally a right of co-determination resulting from [section 87 \(1\) no. 1 and/or no. 7 Works Council Constitution Act \(BetrVG\)](#).

## Conclusion:

Protecting the health of employees must also be ensured in the workplace. There are effective instruments available to the employer in its legal relationship with its employee to enforce the implementation of the required protective measures. If the relevant Covid-19 ordinances of the federal states prescribe mandatory stipulations, these are to be implemented accordingly by the employer as part of their right to give instructions.

## Note

This overview is for general information only and does not substitute for specific legal advice in individual cases. Please contact the authors if you have any questions. Information on the authors can be found on our homepage [www.goerg.de](http://www.goerg.de).

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