The new electronic certificate of incapacity for work

Revolutionary or obstacle in practice?

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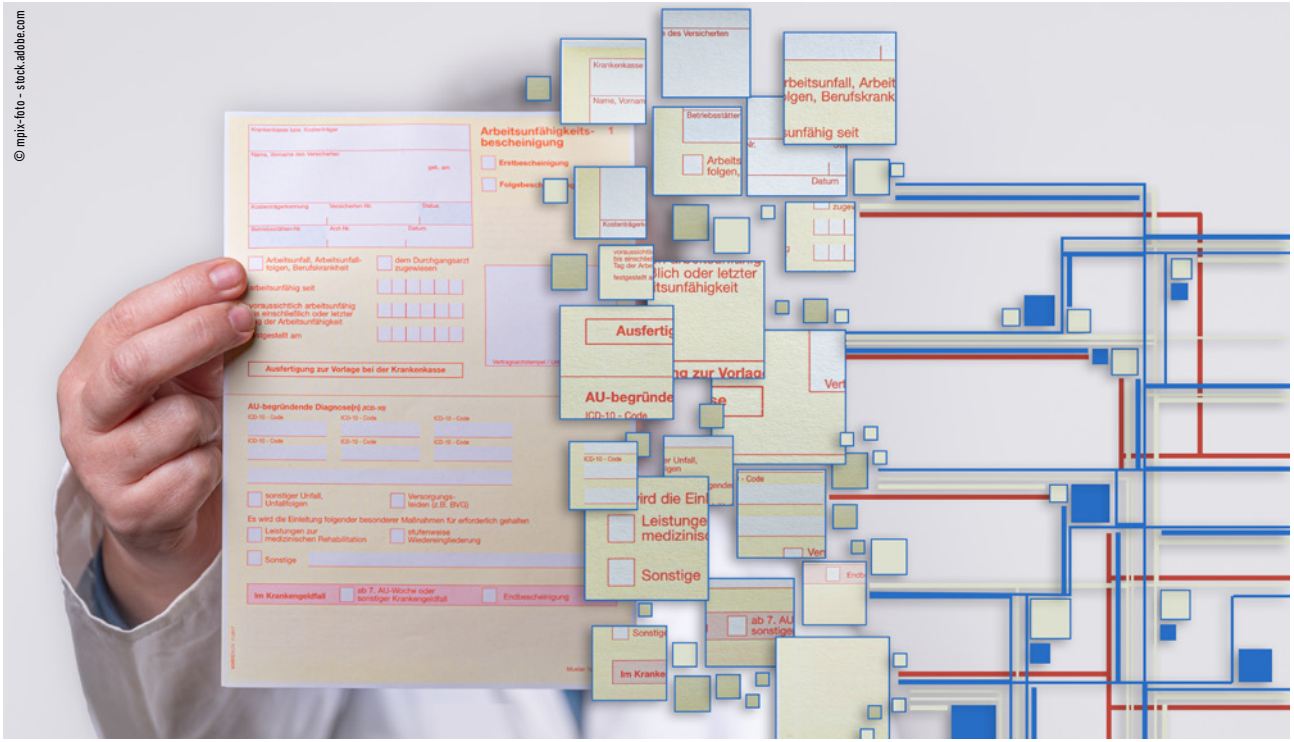

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Introduction

The previously familiar certificate of incapacity for work in paper form was originally envisioned to become a thing of the past as early as 1 July 2022. Due to technical implementation issues and the continuing effects of the COVID-19 pandemic, the pilot phase for the changeover was extended until the end of 2022. Since 1 January 2023, new regulations regarding continued payment of remuneration have come into force and most employees are no longer required to actively submit a certificate of incapacity for work to their employers.

The digitization and reduction of bureaucracy in labor law intended by the German government continues to make progress. This article takes a closer look at the effects of these changes on employers.

Previous legal situation

Employees are generally entitled to receive their contractual remuneration even during any incapacity for work for which they are not at fault. Pursuant to § 3 of the German Continued Remuneration Payment Act (Entgeltfortzahlungsgesetz – "EFZG"), continued remuneration has to be paid for a period of up to six weeks. Incapacity for work is defined as an impediment that prevents employees from performing their duties. There is no partial incapacity for work, and whether an employee could perform any less intense activities is irrelevant.

Initially, four copies of the certificate of incapacity for work were issued. One copy was for the affected employee, one for the examining doctor, one for the health insurance company (Krankenkasse), and one, as the so-called "yellow sheet" ("gelber Schein"), as an informationally reduced copy for the employer. In its old version, § 5 EFZG standardized the obligation of all employees to notify their employers of their incapacity for work and its expected duration without undue delay. If the incapacity for work would last longer than three days it also established an obligation to submit a certificate of incapacity for work in paper form (the yellow sheet) to their employer no later than on the fourth day. If the incapacity for work lasted longer than originally anticipated, employees were obliged to submit a follow-up certificate (Folgebescheinigung) to their employer.

In the event of a missing or delayed certificate of incapacity for work, a formal warning or even termination for reasons of misconduct (verhaltensbedingte Kündigung) could have been considered.

New legal situation for most employees and resulting difficulties for employers

As of 1 January 2023, pursuant to the newly introduced § 5 (1a) EFZG, the obligation described above to submit a certificate of incapacity for work to the employer now no longer applies to employees who are members of the statutory health insurance scheme (gesetzliche Krankenversicherung).

The new legal situation changes the previous procedure of proving incapacity for work. Employees will still receive a certificate in paper form after the examining doctor has established their incapacity for work. After this has been established, however, the doctor then takes action by electronically transmitting the incapacity for work data to the competent health insurance company. The competent health insurance company then uses the data to create a report for the employer that contains the name of the employee, the beginning and end of the incapacity for work, the date of the medical examination and the classification as an initial or a subsequent illness. It also includes an indication of whether the incapacity for work is due to an occupational illness, an accident at work or another accident. Now, employers must retrieve the relevant incapacity for work data electronically directly from the competent health insurance company. This data can also be retrieved by third parties (such as external payroll providers or tax consultants) on behalf of the employer as long as the data transmission method is secure and encrypted, and employees have previously notified their employer about their incapacity for work. Employers are not allowed to retrieve the data on suspicion. The obligation to notify the employer has thus been retained. The amendment to § 5 EFZG with the implementation of paragraph 1a is also in line with the recently revised § 109 of the German Civil Code Volume IV (Sozialgesetzbuch Band 4 – "SGB IV"). Pursuant to § 109 SGB IV, as of 1 January 2023 the health insurance company must prepare a report for the employer to retrieve after receiving the incapacity for work data transmitted by the doctor. The report then contains the name of the employee, the beginning and end of their incapacity for work, as well as the date on which the incapacity for work was established by the examining doctor, and its designation as an initial or subsequent report.

Based on the data transmitted by the examining doctor, the health insurance company also checks whether the continued payment of remuneration has expired due to creditable periods of previous illness. In this case, it automatically informs the employer that it does not need to actively retrieve the incapacity for work data.

These changes in legislation may have significant effects on employers' business operations. Employers still have the right to shorten the period for establishing incapacity for work in accordance with § 5 (1) EFZG. However, existing policies or instructions in that respect may have to be revised as there is no longer an obligation for employees in the statutory health insurance scheme to present the yellow sheet. In businesses with works councils, due to the orderly nature of such an instruction, § 87 (1) 1 of the German

Works Constitution Act (Betriebsverfassungsgesetz – "BetrVG") will have to be observed. In addition, the introduction of the electronic certificate of incapacity for work and the associated creation of an IT interface between employers and the health insurance company as potential technical equipment could trigger a right of co-determination of the works council pursuant to § 87 (1) 6 BetrVG. This applies, in particular, if an employer wishes to introduce special retrieval and processing systems or control and monitoring measures in this context. However, the existence of a right of co-determination regarding the implementation of the electronic certificate of incapacity for work as such is unlikely. It ultimately only implements binding legal requirements, so that employers and works councils have little room to maneuver.

Although legislators must have intended to conclusively regulate the electronic certificate of incapacity for work by the amendment of § 5 EFZG, they may have overlooked § 7 EFZG. This provision allows employers to refuse to provide benefits to employees who fail to submit a certificate of incapacity for work. Now that there is no longer an obligation for employees in the statutory health insurance scheme to submit a sick certificate, for this group of employees at least, § 7 EFZG seems to be void. It remains to be seen whether § 7 EFZG will be amended or whether it becomes a historic remnant causing confusion for future generations of human resources professionals. In the absence of a subsequent amendment to the law, the courts may have to decide whether the retention of the provision should be seen as a drafting error, or whether § 7 EFZG should be interpreted in such a way that employers have a right to refuse payment in cases where employees have not had their incapacity for work established by a doctor within three days.

For the avoidance of doubt, the elimination of the obligation to submit a sick certificate does not apply to privately insured employees or employees whose incapacity for work has been established by a doctor who does not participate in the statutory health insurance scheme. It also does not apply to employees whose incapacity for work has been established by a doctor who is based abroad. These groups of employees must continue to submit a sick certificate to their employer in paper form.

Comment and recommended actions for employers

The presentation of the changes to the EFZG that came into force on 1 January 2023 has shown that the elimination of the obligation for employees to submit certificates of incapacity for work will have some administrative and legal consequences for employers. Not only do employers now have to actively retrieve their employees' incapacity for work certificates from the relevant health insurance company, but failure to submit the certificate of incapacity for work will also no longer constitute grounds for warning and dismissing an employee for conduct-related reasons.

If they have not already done so, employers should inform their employees of the new legal situation. This is because corresponding provisions in old employment contracts are void as a result of the new legal situation and therefore no longer apply. Instead, the statutory regulations apply.

For new hires, employment agreement templates should be adjusted so that they take into account the different alternatives for employees with different health insurance coverage. In any event, it is not recommended to instruct employees in the statutory health insurance scheme to now submit the certificate of incapacity for work handed over to them by the examining doctor in paper form to the employer. The copy of the certificate of incapacity for work issued to the employee is not reduced in informational value as was the case with the copy previously issued for the employer. Consequently, the employer would ultimately obtain sensitive data in breach of existing data privacy laws. § 12 EFZG prohibits deviations from statutory provisions to the detriment of the employee.

With regard to the state of digitization in Germany, which is often and sometimes justifiably criticized, the amendment to the law can certainly be seen as a technical step forward. For employers, however, this step is associated with considerable implementation effort, since on the one hand, internal information channels between HR departments and payroll departments will in all likelihood have to be adapted and technical prerequisites first created in order to be able to retrieve electronic certificates of incapacity for work from health insurers. On the other hand, employment contracts will have to be revised in order to address all employee groups accordingly with regard to the legal situation applicable to them in each case. ←