



Dealing with vacation and sickness in the employment relationship.

Know (latest) pitfalls and developments and
optimize internal processes

Your speakers



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Overview | Vacation topics

01

**Origin of leave |
Partial leave**

02

**Expiry and duty to
inform**

03

Long-term sicknesses

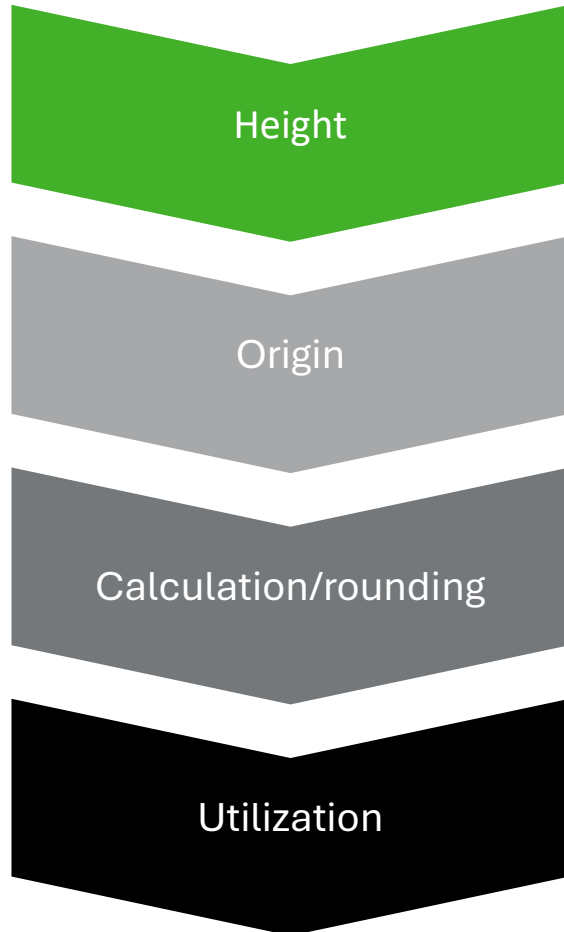
04

Statute of limitations

05

**Waiver of
vacation/compensation**

Principles I Origin and amount of leave



- Statutory entitlement: 24 working days giving a 6-days week; 20 working days giving a 5-days week
- Entitlement to **full** annual leave arises after 6 months of employment with the company
- Prior to this, a **pro rata entitlement** arises; this also applies in the event of the employment relationship's end (i) before the waiting period has been completed or (ii) in the first 6 months of the calendar year
- to be based on completed months
- Fractions of vacation days that add up to at least ½ day must **be rounded up** to full days
- Rounding off (*Abrundung*) **is not** regulated by law
- Employer is bound by vacation requests; refusal only under defined conditions
- Granted in the current calendar year
- Transfer as an exception, Sec. 7 para. 3 sent. 2 Working Time Act (*Bundesurlaubsgesetz, BUrlG*)

Principles I Vacation forfeiture



Granted in the current calendar year

Vacation must be granted and taken in the current calendar year, Sec. 7 para. 3 BUrlG.



Union law: conformity with directives required

Member States shall take the necessary measures to ensure that each employee receives a minimum of four weeks' paid annual leave:

No need to enforce, but employer's **obligation to cooperate**

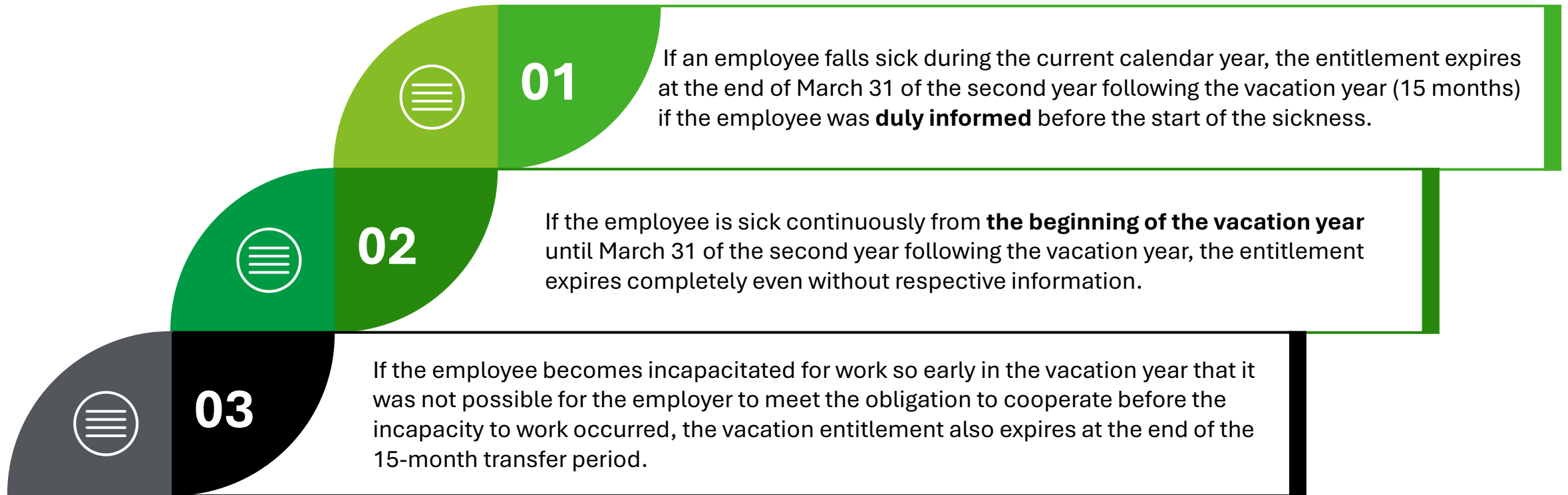


Obligation to request and inform

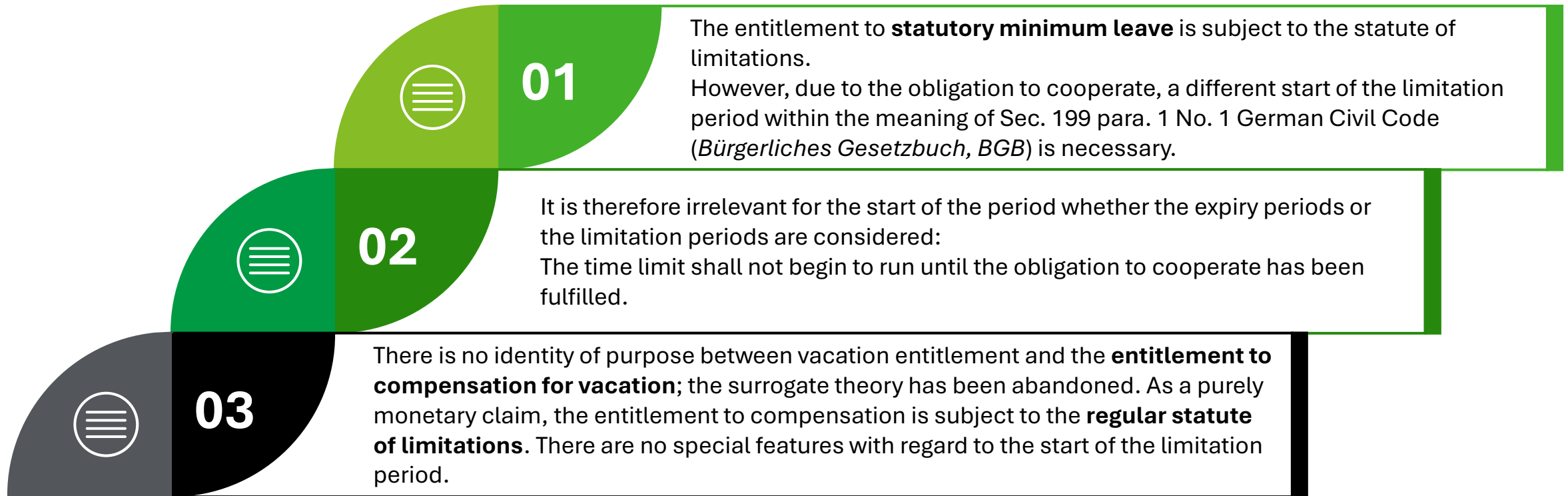
Timely information in text form about

- Height of vacation entitlement
- Request to take vacation and
- Reference to expiry of entitlement

Vacation & long-term sickness



Statute of limitations I Vacation & vacation compensation



Waiver of vacation & vacation compensation



No waiver in the current employment relationship

It is not possible to waive the (statutory) vacation entitlement during the current employment relationship; Sec. 13 para.1 sent. 3 BUrlG.



Waiver of compensation claim in a termination agreement/settlement

- Unproblematic if the employment relationship has **ended** at the time of the waiver, as the claim is a purely monetary one.
- In the event of future termination: Remission agreement invalid due to statutory prohibition, Sec. 134 BGB in conjunction with Sec. 13 BUrlG, according Regional Labour Court of Cologne (not yet binding).



Practical tip

- Until the decision of the Federal Labor Court, in any case in which there is no irrevocable leave of absence which consumes the leave in its entirety and is intended to regulate the end of the employment relationship for the future, undisputed (minimum) leave should not be waived.
- Preferably, the number of vacation days should be specified.

Practical tips

Consistent information about
(remaining) vacation entitlements

Information



Consider irrevocable release and
settlement wording as structuring
options

Design



Contract



Contractual distinction between
statutory minimum vacation
entitlement and statutory, contractual
vacation entitlement

Reduction



Reference to reduction in leave during
parental leave -

Reduction **not permitted** in the case
of employment bans under maternity
protection law

Overview | Sickness topics

01

**Basic principles |
Continued payment
of remuneration in the
event of sickness**

02

**Obligations of the
employee in the event
of incapacity to work**

03

**Response options |
Suspicion of a feigned
sickness**

04

**Burden of presentation
and proof | Existence of
incapacity to work**

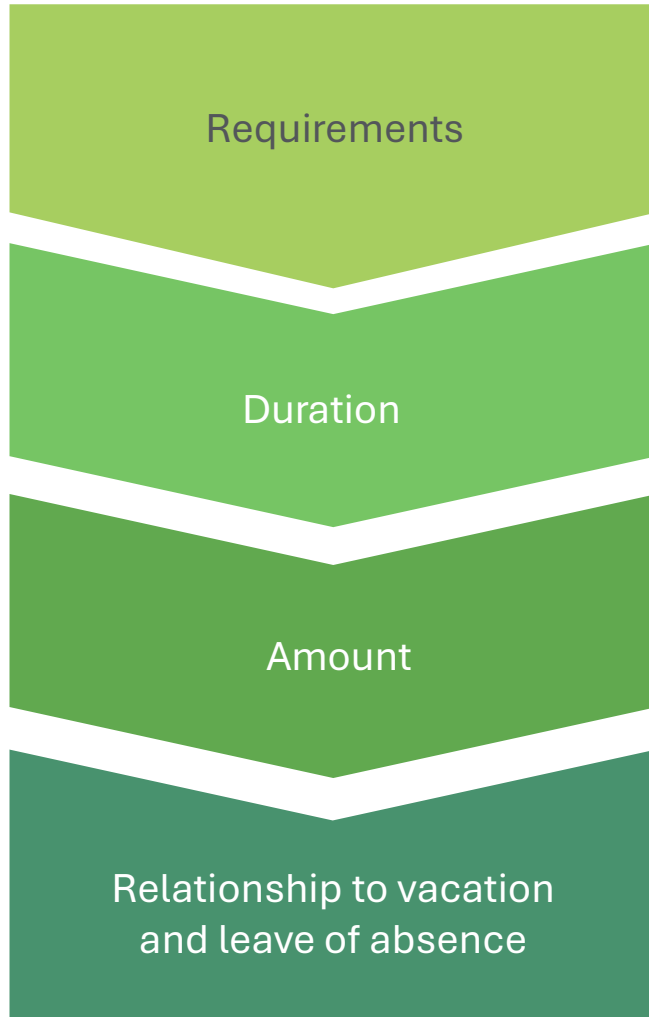
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**Undermining the
evidential value of a
certificate of incapacity
to work**

06

**Opportunities | Reducing
the sickness rate**

Basic principles | Continued payment of remuneration in the event of sickness



- Initial Situation: Sickness that caused the **incapacity to work** through no fault of the employee
- Entitlement arises after an uninterrupted **4-week period of employment** (waiting period)
- Entitlement exists for each sickness for **up to 6 weeks**; in the event of recovery in the meantime, a new entitlement is possible for the same sickness
- During the waiting period and after 6 weeks, people with statutory health insurance are entitled to **sickness benefit for a maximum of 78 weeks or 72 weeks**
- **70 %** of the regular gross remuneration subject to contributions
- Special features apply to overtime, expense allowances and variable remuneration
- In the event of incapacity to work during **vacation**, the vacation days are credited for the sick days
- **Compensatory time** off from work, on the other hand, can in principle also be fulfilled during incapacity to work

Obligations of the employee in the event of incapacity to work



Notification obligation

Obligation of the employee to notify the employer immediately of the inability to work and its expected duration, Sec. 5 para. 1 sent. 1 EFZG.



Obligation to submit or determine (incapacity to work lasts longer than 3 days)

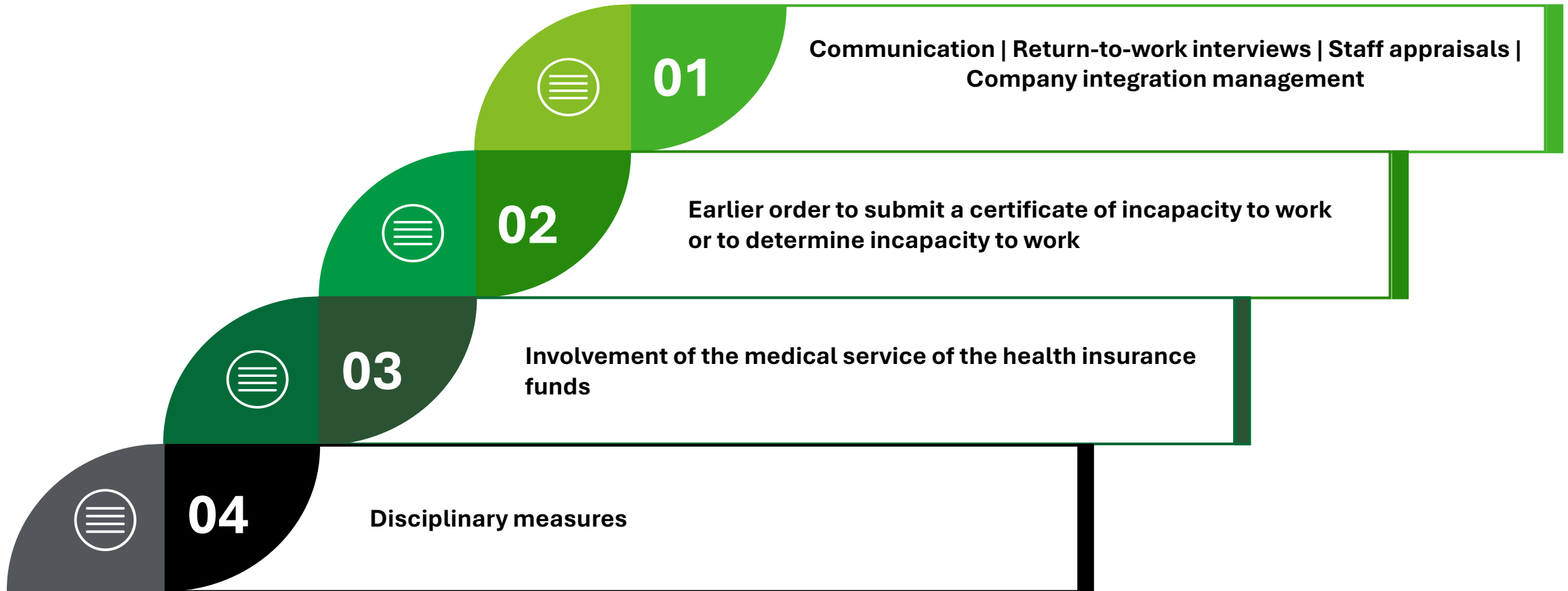
- **Obligation** of the employee with private health insurance **to submit** a certificate of incapacity to work, Sec. 5 para.1 sent. 2 EFZG.
- **Obligation** of the employee with statutory health insurance **to determine** the existence of incapacity to work, Sec. 5 para. 1a EFZG.
- **Breach** of the obligation to submit or determine by the employee: Employer can refuse to continue to pay remuneration, Sec. 7 para. 1 EFZG.



Disciplinary measures

If the employee fails to comply with the obligation to notify or the obligation to submit or determine, disciplinary measures by the employer may be considered.

Response options | Suspicion of a feigned sickness



Burden of presentation and proof | Existence of incapacity to work



01

Basic principles

- The employee must present and prove the requirements of Sec. 3 EFZG (**incapacity to work due to sickness**) in the lawsuit.

02

Procedural significance of the certificate of incapacity to work

- A substantiated submission by the employee is already assumed by the submission of the certificate of incapacity to work.
- The certificate of incapacity to work has a high evidential value.

03

Undermining the evidential value of a certificate of incapacity to work

The employer must present specific facts that are likely to cast doubt on the incapacity to work due to sickness as evidenced by the medical certificate of incapacity to work and to undermine the evidential value of the certificate of incapacity to work.

04

Continuation of proceedings after the evidential value of the certificate of incapacity to work has been called into question

- The employee must provide further proof of the accuracy of the certificate of incapacity to work, for example by naming the attending physician as a witness.

Undermining the evidential value of a certificate of incapacity to work | Case constellations



01

Examples of rules in Sec. 275 para. 1a SGB V

- Conspicuously frequent or conspicuously frequent short periods of incapacity to work
- Incapacity to work often starts at the beginning or end of a week
- Determination of incapacity to work by a doctor who has become conspicuous by the frequency with which he issues certificates of incapacity to work

02

Older case law of the Federal Labor Court (BAG)

- Notification of incapacity to work by the employee in advance
- Secondary employment of the employee during the period of incapacity to work that is incompatible with the sickness
- Principle of the unity of the case of prevention

03

Recent case law of the Federal Labor Court (BAG)

- Coincidence between notice period and duration of the employment relationship
- Repeated sickness after vacation
- Conflicts in the employment relationship in connection with the incapacity to work (further evidence required)
- Violations of the provisions of the Incapacity to Work Directive

Opportunities | Reducing the sickness rate



Health premium

Introduction of a "**health premium**", which is reduced in the event of incapacity to work

- in the form of a special payment or
- in the form of additional vacation



Reform considerations

- Introduction of partial incapacity to work
 - Introduction of unpaid sick leave
 - Reduction in continued remuneration
- No mention in the coalition agreement

Q&A





**Thank you very
much**
for your attention

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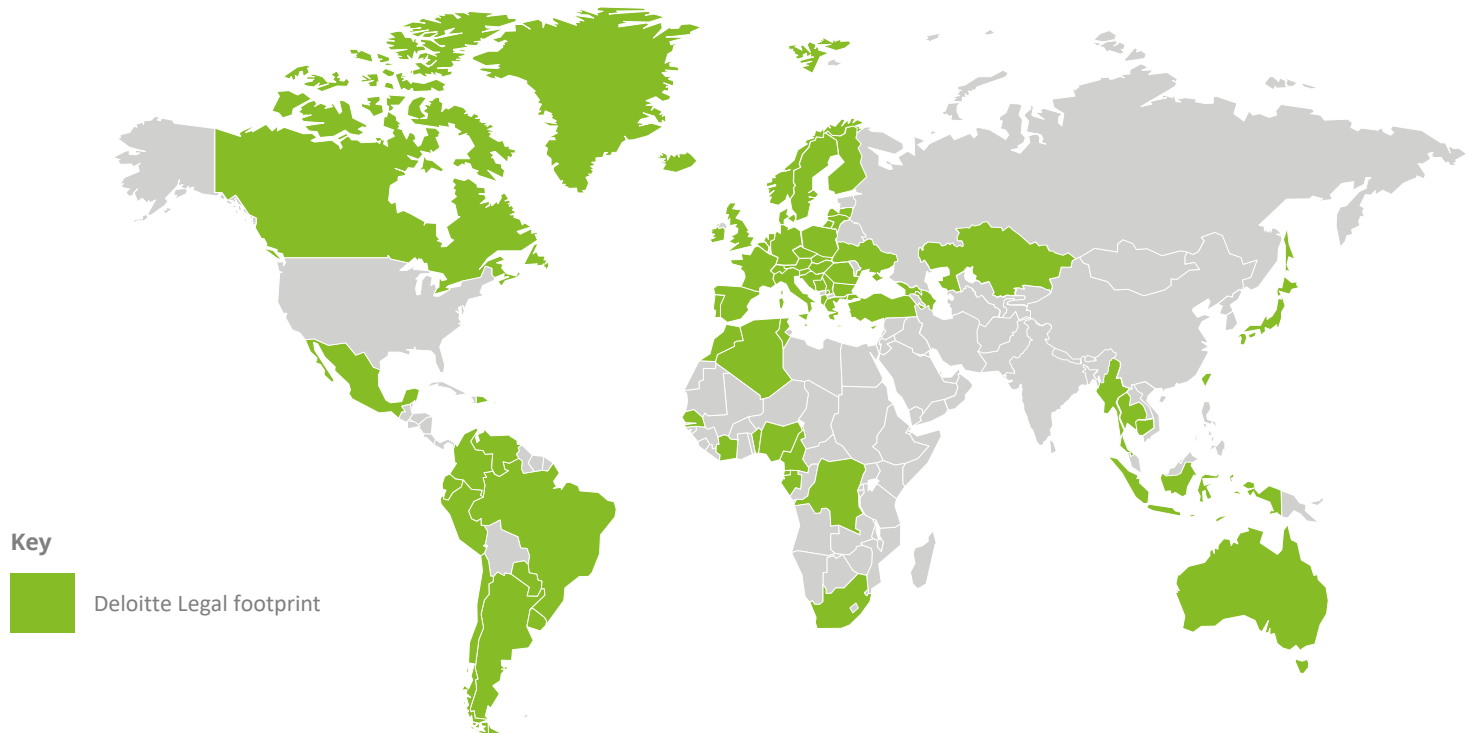
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