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Labor Criminal Law

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Introduction & Agenda

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Agenda

I. General Aspects and Overview

II. Examples

- Minimum Wage
- Working Hours
- Employee Status
- Temporary Employment/Employee Leasing
- Employee Representation

III. Risks

IV. Risk Reduction

I. General Aspects and Overview

General Aspects and Overview

Criminal Labor Law

Meaning?

There is no universally accepted definition of the term.

Administrative offense/ Criminal liability for conduct related to labor law standards.

Governmental sanctions imposed in response to misconduct.

General Aspects and Overview

A Wide Range of Grounds for Administrative Offenses and Criminal Liability on the Part of the Employer

II. Examples

Minimum Wage

Examples

Minimum Wage

Example

A company employs a **part-time** worker (20 hours). She wants to prove herself within the company, takes on **additional tasks**, and regularly works significantly more hours. The employee was supposed to record her working hours in an excel-spreadsheet. She did **not record** the **overtime hours**. These are not compensated.

Management and the department head are unaware of the overtime hours worked. A routine audit by customs takes place. The employee states that she has regularly worked significantly more hours. Management and her supervisors had not known about this until then.

Examples

Minimum Wage

Requirements under the Minimum Wage Act (Mindestlohngesetz, MiLoG) not met:

- **Sec. 20 MiLoG**

  Failure to pay the minimum wage

- **Sec. 17 para. 1 MiLoG**

  Insufficient documentation of working hours

Examples

Minimum Wage

Sec. 21 para. 1, 13 MiLoG
(up to EUR 500,000)

Sec. 21 para. 1, 8 MiLoG
(up to EUR 50,000)

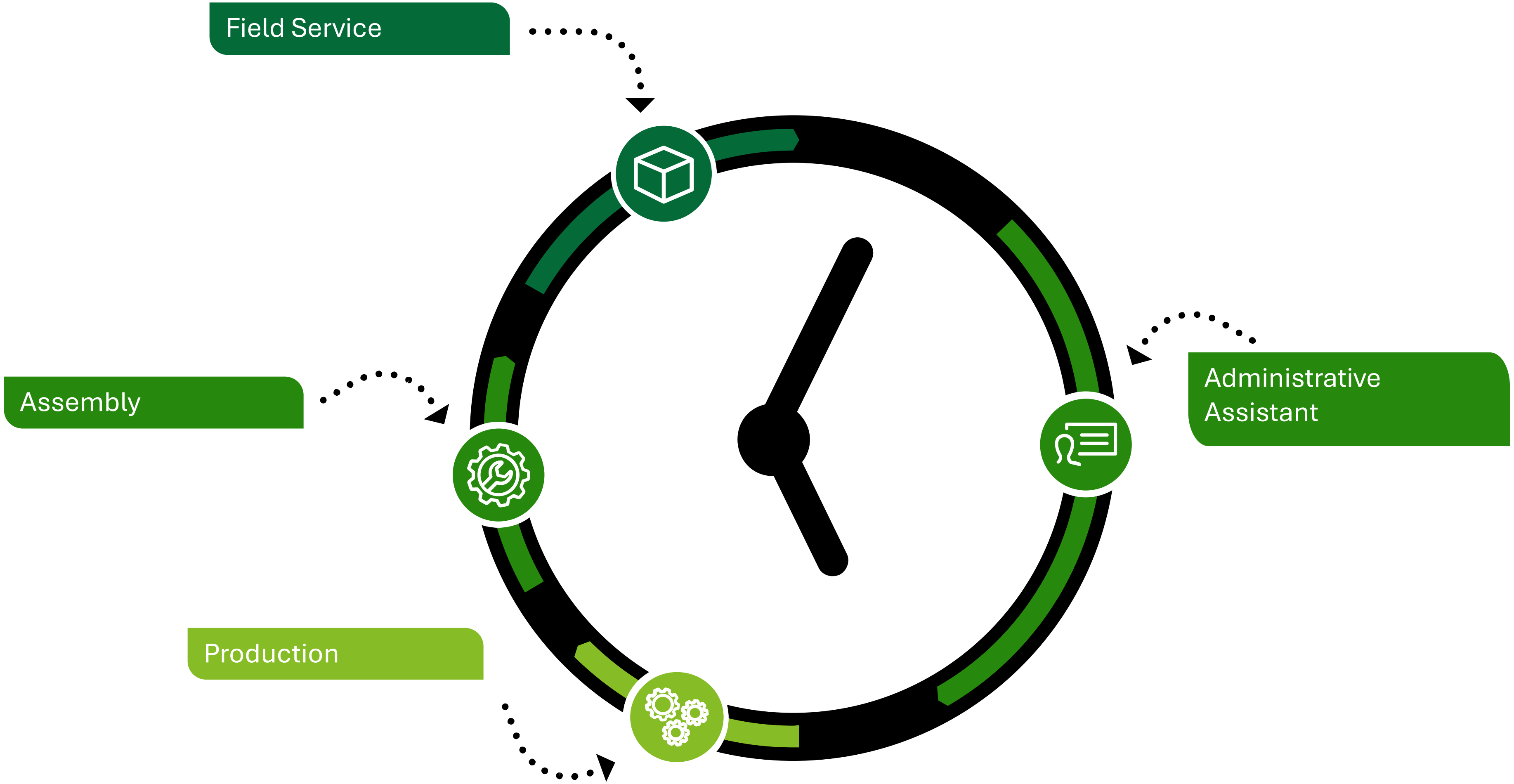
Sec. 8 para. 3 Illegal Employment Act (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG)
(up to EUR 50,000)

Sec. 266a German Criminal Code (Strafgesetzbuch, StGB)
Intentional Withholding and Embezzlement of Wages

Working Hours

Examples

Working Hours



Examples

Working Hours, in particular the list of fines under sec. 22 of the Working Hours Act (ArbZG) and the penal provisions under sec. 23 of the Working Hours Act (ArbZG)

Sec. 22 para. 1 no. 1 Working Hours Act (Arbeitszeitgesetz, ArbZG)
Exceeding working hours

Sec. 22 para. 1 no. 2, 3 Working Hours Act
Violation of break and minimum rest period requirements

Sec. 22 para. 1 no. 9 Working Hours Act
Violation of record-keeping, documentation or retention requirements

Sec. 23 of the ArbZG
Intentional endangerment of health or workforce safety, or persistent recurrence

Employment Status

Examples

Employment Status

<u>Example</u>

- Contract: **“Independent IT** Freelancer” (daily rate)
- Work **performed over an extended period for only one company** (initially 6 months, extended to a total of 2.5 years)
- Works “like everyone else” from **8:30 a.m. to 5:00 p.m.**
- Use of **company IT and email**
- **Participation** in meetings, collaboration “like everyone else” via a ticket system
- **Tasks** are assigned by the IT department head
- **No other clients**
- The CEO and the HR manager consider the freelancer to be self-employed

Examples

Employment Status

Examples

Employee Status

Sec. 111 para. 1 no. 2 Social Code Book IV (SGB IV)
(up to EUR 25,000)

Sec. 8 para. 3 Illegal Employment Act (SchwarzArbG)
(up to EUR 50,000)

Sec. 380 German Fiscal Code (Abgabenordnung, AO)
(up to EUR 25,000)

Sec. 378 German Fiscal Code
(up to EUR 50,000)

Sec. 266a Criminal Code
Intentional withholding and embezzlement of wages

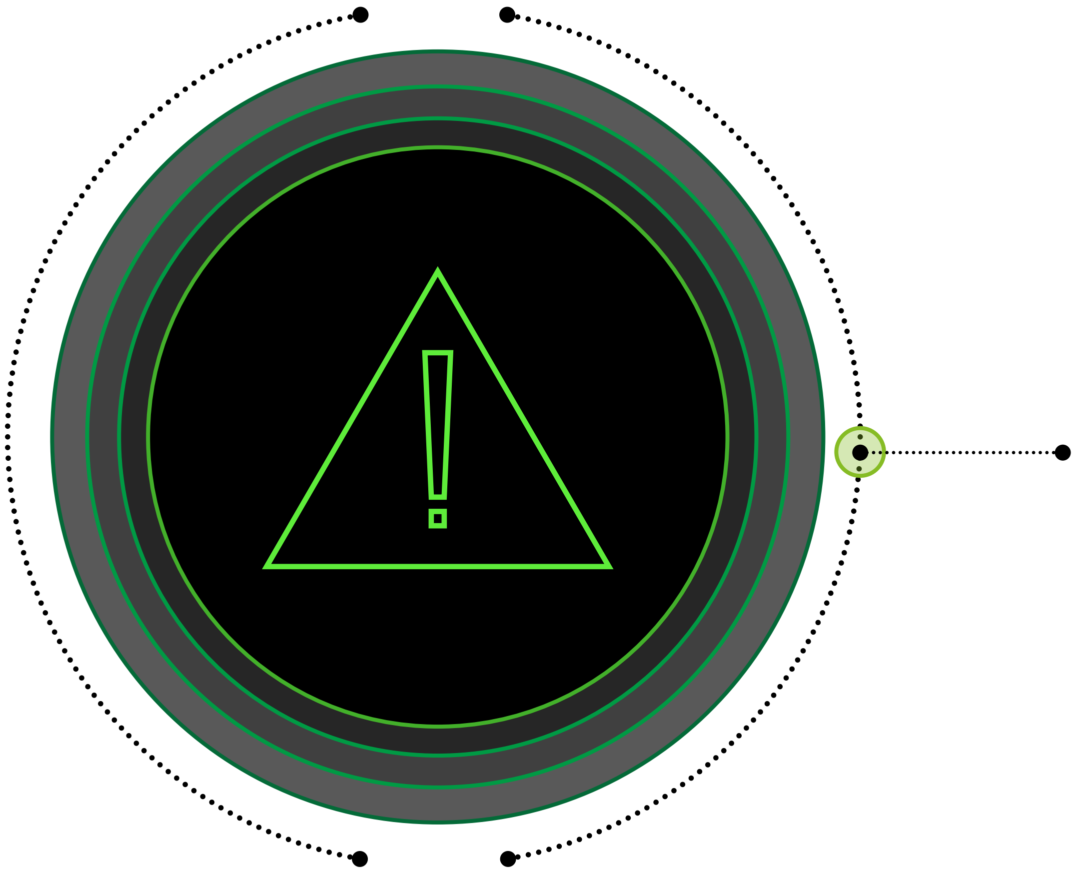
Sec. 370 German Fiscal Code
Intentional tax evasion (Payroll Tax)

Temporary Employment/Employee Leasing

Temporary Employment/Employee Leasing

Examples

Temporary Employment/Leasing – in particular sec. 16 AÜG; Liability of the Temporary Employment Agency and the Hiring Company



Administrative offenses may be punishable by fines ranging from one thousand to five hundred thousand euros.

Sec. 370 German Fiscal Code and Sec. 266a Criminal Codet

Employee Representation

Example

In the run-up to initial for a works council, the management approaches employees and explains in detail the futility of such body.

Once the works council is established, however, the parties get along so well that the works council is paid recognition bonuses.

Examples

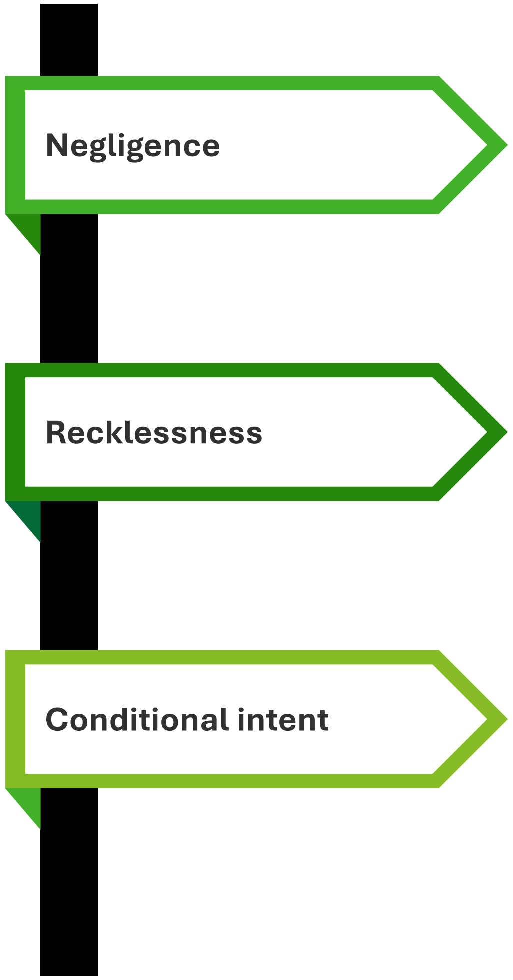
Employee Representation

- **Sec. 119 para. 1 no. 1 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG); Obstruction of elections, influencing elections**
- **Sec. 119 para. 1 no. 2 Works Constitution Act; Prohibition on Obstruction and Disruption**
- **Sec. 119 para. 1 no. 3 Works Constitution Act; Prohibition on Discrimination and Favoritism**
- **Sec. Works Constitution Act; Breach of Confidentiality**

III. Risks

Risks

Degree of Fault



Risks

Additional Risks for Management, Employees, and the Company

Management

- Sec. 9 para. 1 of the German Administrative Offenses Act (OWiG), Section 14 para. 1 of the German Criminal Code
- **Sec. 130 Administrative Offenses Act**

Employees in managerial positions and with special responsibilities

- Sec. 9 para. 2 of the German Administrative Offenses Act, Section 14 para. 2 of the German Criminal Code
- **Sec. 130 of the German Administrative Offenses Act**

Other employees

- e.g., where applicable,
  Sec. 111 para. 1 no. 2 Social Security Code IV, Sec. 21 para. 1 no. 8 Minimum Wage Act
  Sec. 370, 378,
  380 German Fiscal Code

Companies

- **Back payments / liability**: Social security contributions, payroll tax, ancillary consequences (late payment penalties/interest)
- **Input tax adjustment**
- **Assumption of fines/penalties** imposed on individuals, if applicable
- **“Own” additional corporate fines pursuant to Sec. 30 Administrative Offenses Act**
- **Forfeiture** of the value of proceeds from offenses pursuant to Sec. 29a Administrative Offenses Act , Sec. 73 et seq. Criminal Code
- **Register entries** (Competition Register, Central Trade Register)

IV. Risk Reduction

Risk reduction

Preventive and Reactive

Preventively
Generally in advance

- **Immediately "rectify" identified deficiencies** (e.g., by including a lump-sum adjustment in the next income tax and social security filing)
- **Health check:** What risk areas do I have, and how am I positioned? Make adjustments, as needed
- **Documentation** of sound organizational practices or the adjusted, now sound organizational practices - "CMS" = Compliance Management System
- **For new arrangements:** documented, technically sound review
- **Repeat** and document **the health check (see above) on a regular basis**
  -> Special attention: Previously identified violations

Preventive
In an acute situation

- **Retroactive reporting** of social security contributions and income tax
- **Substantive audits by regulatory authorities**

➔ Do not (inadvertently) reveal any deficiencies in organization and supervision.

➔ Description of the facts with a "preemptive defense"

➔ In the case of voluntary disclosures under German Fiscal Code Sec. 378 para. 3 and Sec. 37, ensure the voluntary disclosure is legally sound as a precaution

➔ If necessary, contact the prosecuting authority "first"

= Structured tax audit and late filing processes

Reactive
after proceedings have been initiated

- **Silence**
- **Access to files**
- If necessary, submit **a statement or mount a qualified defense** without revealing organizational or supervisory deficiencies
- No later than now: simultaneously rectify deficiencies and improve, document, or implement a CMS

Q&A

Thank you very much

for your attention

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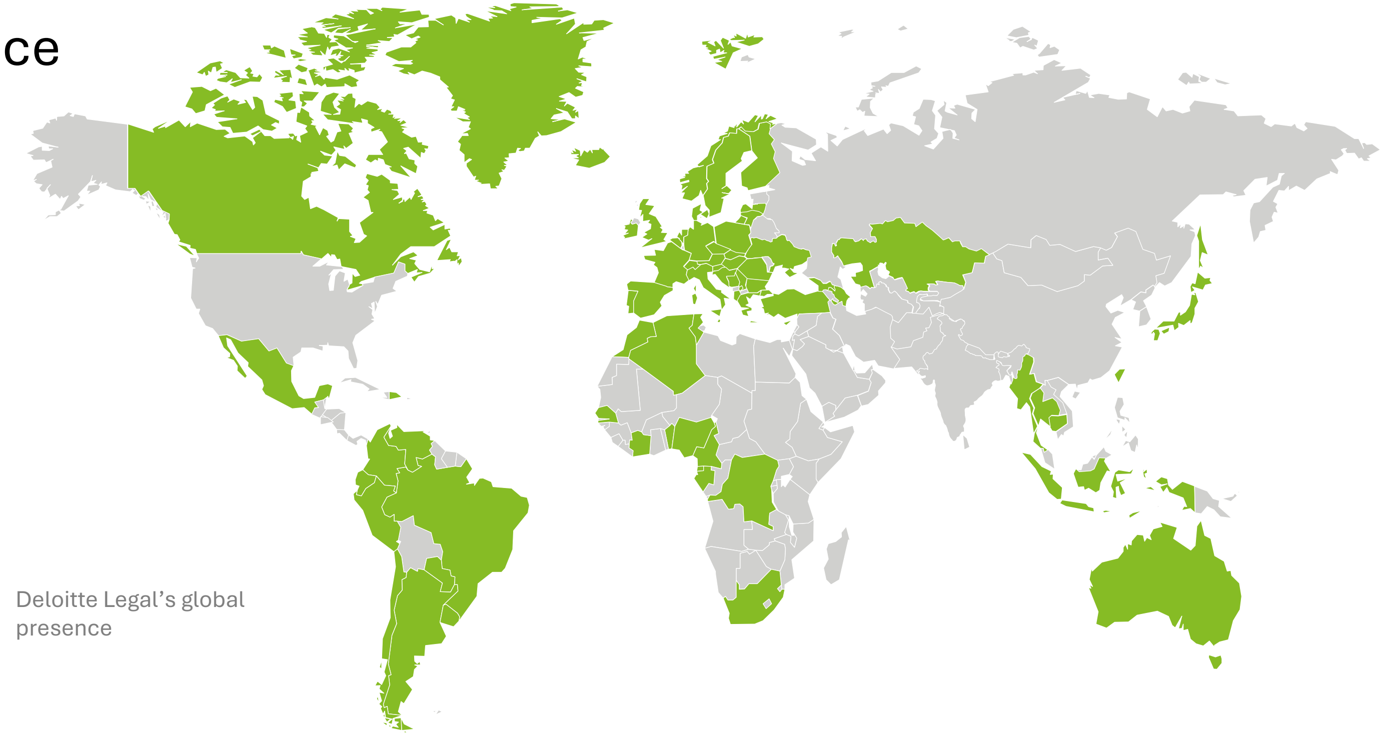

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