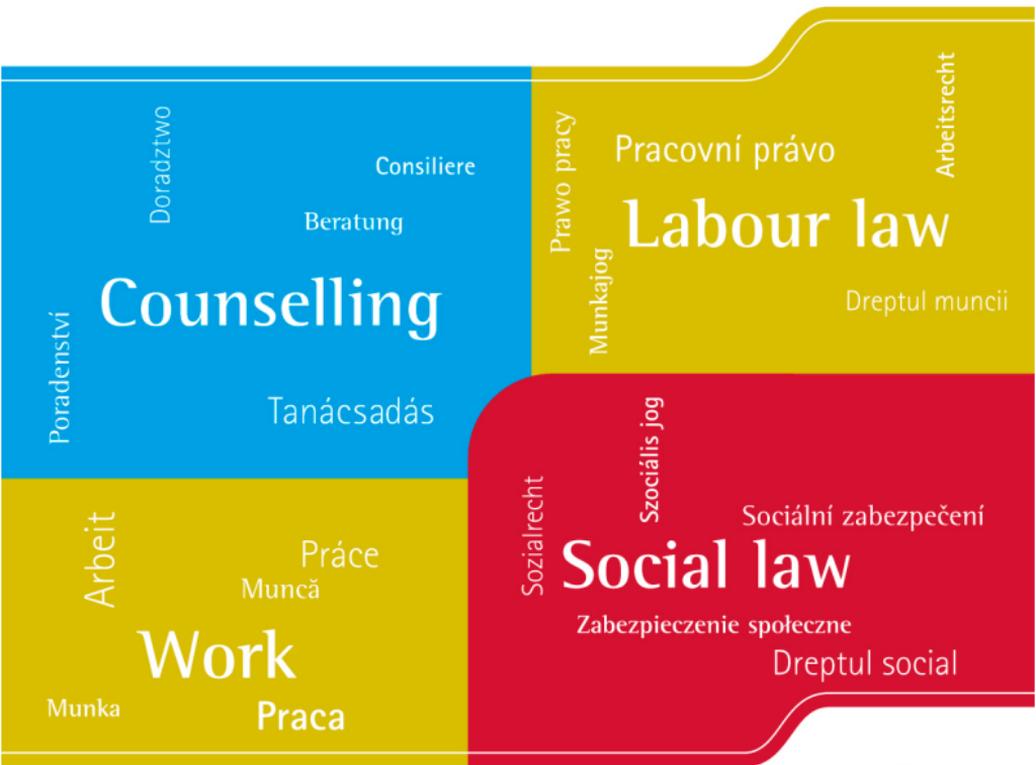


Undeclared labour can be expensive!



EN

GUTE ARBEIT FÜR
SACHSEN



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ausländische Beschäftigte
in Sachsen

www.babs.sachsen.de

Characteristics of undeclared labour:

- No employment contract, or a contract for undeclared work -
ATTENTION = INVALID!!!
- Money is paid out in cash; no pay slip is issued.
- You have not received an insurance card from your health insurance company.
- You do not have a social security number and/or tax number.

Consequences of undeclared labour for employees and fictitiously self-employed persons:

- No contributions to health insurance = You are not insured in the event of illness!
- No contributions to social security insurance (unemployment and pension insurance) = no entitlement to unemployment benefit (ALG I) or social welfare benefits; little or no future pension entitlement!
- Wages or fees are not taxed = tax evasion = criminal proceedings may be initiated!
- No entitlement to file claims against employers or clients

What is undeclared labour?

Undeclared labour is characterized by the fact that the **work** is performed for remuneration without being registered with an **authority or insurance company**. As a rule, workers are paid in cash and no receipt or other proof of employment is issued.

Employers supposedly benefit from such arrangements because they save on **taxes and social security contributions** and because no one checks to verify compliance with the statutory provisions of labour law. Undeclared workers receive their wages immediately and without tax deductions.

Both parties run a **considerable risk!** Undeclared labour is **illegal** and is considered a misdemeanour, at the very least, and in many cases even as a criminal offence. There is also **no valid employment contract**, which means that neither employers nor undeclared employees are entitled to assert legal claims against the other party.

Example: If the employer does not pay the promised wage after the work has been performed, the undeclared worker has no way to demand it **by legal means**. Nor can the worker compel the employer to take precautions in the interest of work safety.

Undeclared labour also has disadvantages for the employer. For example, the employer cannot demand compensation for damages resulting from work performed by the undeclared worker.

The **German Law Against Undeclared Labour and Illegal Employment** (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG) took effect on 1 August 2004.

The term undeclared labour refers to the performance of work in violation of applicable law, to include:

- violations of tax laws - tax evasion
- violations of social security law
- non-compliance with the obligation to notify authorities and social welfare agencies
- failure to register a trade
- absence of an entry in the register of craftsmen

The statutory provisions on undeclared labour described above (§ 1 Para. 3 Schwarz ArbG) are subject to certain restrictions.

Services or work performed for relatives, as a courtesy, for neighbours or as self-help measures and which are not aimed at making profit, are not regarded as undeclared work and are therefore not illegal. If only a **small remuneration** is paid for the work performed, the requirement of the absence of profit orientation is regarded as met in the eyes of the law. If you do voluntary work for family members, friends, neighbours or colleagues without expecting any remuneration and they pay you a **small amount of money** as an expression of gratitude, then it is not undeclared labour.

There is no limit to how high remuneration may be. Generally speaking, however, remuneration that is significantly lower than the economic value of the work performed is more likely to be viewed as evidence of the absence of profit orientation and therefore does not fall under the definition of undeclared labour.

Fictitious self-employment as a special form of undeclared employment

We speak of so-called fictitious or bogus self-employment when a person performs independent work or services for another company under the terms of a corresponding contract, but actually performs non-independent work within the context of an employment relationship. Many freelancers and self-employed persons are actually fictitiously self-employed – and do not know it. This can have costly legal and other consequences.

If the authorities determine that you are working as a fictitiously self-employed person, you will be subsequently classified as an employee. The client must then pay all social security contributions and income taxes retroactively for you. You will have to pay your share of social security contributions yourself (up to a maximum of 3 months). You may then have to pay a fine, and your client may even face a very high fine.

Self-employed people are their own bosses. Unlike employees, they do not receive instructions. They are paid to do a certain job and not for the hours they work. They negotiate the price for their work with the client. They decide for themselves when to go on holiday. They do not receive holiday pay or sick pay from their clients.

Self-employed people are required to issue invoices; they maintain their own business premises, they have to buy their own tools and working materials, and they also take care of transport.

If you suspect that you are employed as a fictitiously self-employed person or are not sure of your status, you should go to an Advisory Center!

More information on this subject is provided at:

www.existenzgruender.de

www.fuer-gruender.de

www.faire-mobilitaet.de

Accident insurance coverage for undeclared labour

Employees are covered by statutory accident insurance pursuant to § 2 Para. 1 No. 1 SGB VII. This also applies if the employee performs undeclared labour in the above sense.

However, undeclared labour is ordinarily not performed within the framework of a dependent employment relationship. In the vast majority of cases, undeclared workers are not employees of the client, but work for the employer on the basis of a general or independent service contract.

However, undeclared labour in the form of self-employment is generally not covered by statutory accident insurance. The employers' liability insurance associations primarily affected by undeclared labour in particular those in the construction industry, insure self-employed persons (entrepreneurs) against occupational accidents and occupational illnesses only on request.

Undeclared workers receiving Hartz IV benefits: obtaining social security benefits by way of fraud

Anyone who receives Hartz IV benefits and engages in undeclared labour is guilty of benefit fraud. Hartz IV recipients may be fined for benefit fraud if they are engaged in undeclared labour. Hartz IV is a social security benefit which is intended to ensure a basic level of security for people whose income is not sufficient to cover their basic needs. Therefore, recipients of this benefit are obliged to report all income to the Job Center.

Anyone who performs undeclared labour and conceals the resulting income in order to obtain Hartz IV is liable to prosecution. § 263 StGB (German Criminal Code) provides for a fine or imprisonment of up to 5 years for persons found guilty of doing so. In addition, the recipient can ordinarily expect that the benefit will be discontinued or reduced.

Undeclared labour is performed not only by unemployed and self-employed persons. Many employees also work "on the side" in addition to their regular, legal jobs in order to supplement their income. If, however, the employer learns that the employee is performing such undeclared labour, the employer may be justified in dismissing the employee. This is possible, for example, if the undeclared labour is performed for a competitor of the employer.

Illegal employment

The following types of employment are considered illegal:

- the employment of foreign nationals without the required residence and work permits and the employment of such foreign nationals under less favourable working conditions than comparable German employees (**illegal employment of foreign nationals**);

Note: Since 28 August 2007, self-employed third-country nationals have also been required to obtain a residence permit entitling them to engage in this gainful employment;

- employment without payment of the minimum wage in accordance with the Minimum Wage Act (MiLoG), the Employee Posting Act (AEntG) or the Temporary Employment Act (AÜG), or in the absence of compliance with the provisions of the AEntG regarding minimum working conditions (e.g. leave entitlements, holiday fund contributions);
- the illegal provision of employees to third parties (**illegal agency work**); the provision of temporary workers to third parties always requires a licence and providing construction firms with agency workers is prohibited.

The duties and requirements set forth here, the monitoring of which is the responsibility of the Customs Administration, are not based on the Undeclared Labour Act, but on other statutory provisions, such as the Social Security Code, the Income Tax Act, the Trade Code, the Residence Act, the Minimum Wage Act, the Posting of Workers Act and the Temporary Employment Act.

Where can I report undeclared labour?

Your point of contact in cases of undeclared labour or illegal employment is the Financial Control of Undeclared Work Department of the **competent Central Customs Office**, to which you can report possible cases of undeclared labour in writing or by telephone.

In principle, your name and your statements are subject to data protection regulations, which means that your data may not be passed on without your consent. Of course, you may also provide information anonymously.

The fight against undeclared work and illegal employment requires support from various other agencies. The following authorities and sites are obliged to cooperate with each other - tax authorities, Federal Office for Goods Transport, Federal Employment Agency, health insurance funds, pension insurance institutions, Employer's liability insurance associations, trade authorities, social welfare offices, competent authorities under the Asylum Seekers Benefits Act, foreigners' offices, Federal Network Agency, police enforcement authorities of the federal states, occupational health and safety authorities, Ordnance departments.

What does Customs seek to verify?

Among other things, the employees of the Financial Control of Undeclared Labour Office of the Customs Administration check to determine whether

- employers have correctly registered their employees for social security;
- social security benefits, such as unemployment benefits I and II, have been obtained under false pretences;
- employment certificates or supplementary income certificates have been issued correctly;
- foreign nationals are not engaged in gainful employment without the required permits,
- foreign workers are employed under less favourable working conditions than comparable domestic workers,

- employers are complying with laws regarding working conditions, such as the obligation to pay the minimum wage in accordance with the Minimum Wage Act (MiLoG) and the industry minimum wage according to the Employee Posting Act (AEntG) as well as the minimum wage limit as set forth in the Employee Lending Act (AÜG),
- there are indications that taxpayers have not met tax obligations arising from services or work performed, such as payment of wage and value-added taxes.

Customs performs unannounced checks without reference to suspected violations. It also takes past periods into account.

Documents which must be presented by employees and self-employed persons:

- identity cards, passports, replacement passports or ID cards
- for foreign nationals: passports, passport and identity card replacements, residence permits, temporary exemptions from deportation, certificates of temporary permission to remain in Germany

Employer must provide proof that they have informed their employees in writing of the obligation to carry and present their identity cards, passports or replacement passports and/or identity cards. Said notice must be kept for the duration of the service or labour performed and presented on request.

Minimum wage violations?

The Customs Administration is responsible only for prosecuting your employer for minimum wage violations. You must take legal action to enforce your claim for payment of the minimum wage.

If employers do not provide their employees the working conditions required by law or collective agreements in accordance with the Minimum Wage Act (MiLoG), the Employee Posting Act (AEntG) or the Temporary Employment Act (AÜG) or working conditions based on regulations issued for the health-care sector,

employees may assert their claims against their employers in court. Employees can file claims with the Labour Court for that purpose.

If, as a contractor as defined in § 13 MiLoG or § 14 AEntG, the employer has been commissioned by another entrepreneur (client) to provide labour or services, employees may also assert their claims against their employer's client before German labour courts on the basis of the statutory provisions regarding guarantor liability.

The right to take legal action does not apply only to German employees. Employees who have been posted to Germany may also file claims for compliance with working conditions in accordance with collective agreements as set forth in the AEntG or the statutory provisions of the MiLoG. Such action can be filed against employers based abroad or against their clients. Claims are admissible only as they pertain to periods of employment in Germany.

Further information on the subject of undeclared labour and illegal employment is provided at www.zoll.de

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