



Federal Office  
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and Refugees



# Illegal employment of third-country nationals in Germany

Focussed study by the German National Contact Point  
for the European Migration Network (EMN)

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# Summary

The present study addresses the illegal employment of third-country nationals in Germany, focusing on the political and social context of the topic, the extent of the phenomenon, preventive measures, the legal framework for uncovering, prosecuting, and punishing such employment, as well as its practical implementation.

## Political discourse

Illegal employment in general is a recurring topic of political discourse in Germany. The Federal Government ascribes central significance to the curtailing of illegal employment. The illegal employment of third-country nationals in particular has been a more frequent topic of public debate in recent years, especially in relation to the increased immigration of persons seeking protection. However, the legislature has not addressed the matter specifically.

## Legal framework

The curtailing of illegal employment in general is substantially governed in Germany by the Act to Combat Clandestine Employment, which establishes the authority of the responsible unit of the Customs Agencies, prescribes the manner and scope of co-operation between various government authorities, and defines the regulations on regulatory fines and punishments for violations. The Act to combat Clandestine Employment, the Act on Temporary Employment Businesses and the Posted Workers Act all contain regulations on regulatory fines and punishments for illegal employment, and, in conjunction with the corresponding regulations in the Residence Act, provide the legal framework for prosecuting and punishing employers of third-country nationals and employees alike.

## Extent and available data

Conclusive scientific studies, estimates or assessments on the extent of illegal employment of third-country nationals are lacking so far, making it impossible to determine third-country nationals as a percentage of all illegally employed persons in Germany.

## Prevention

Various measures have been taken in an attempt to prevent illegal employment, although these, too, are general

in nature, with only a few directed specifically at third-country nationals. These measures are primarily campaigns aimed at informing employers of the penalties and risks of illegal employment, as well as offers of legal advice to illegally employed third-country nationals.

## Inspections

Illegal employment of third-country nationals is not uncovered by specialised units, but rather during the course of the inspections of the general Financial Investigation Office for Clandestine Employment (FKS) for illegal employment, within its holistic inspection approach. During these inspections, which are occasionally conducted together with other authorities, the Financial Investigation Office for Clandestine Employment has broad powers (entry powers for the premises of employers or contractors, inspecting company documents, interviewing employees). Cases of illegal employment of third-country nationals that are discovered are forwarded to the public prosecutor's office and the local foreigners authority, which initiate regulatory fine/criminal proceedings and/or take steps regarding the residence status of such third-country nationals where necessary.

## Consequences

Both employers and employees working without the proper residence title or without an entitlement to pursue an economic activity can face criminal and regulatory charges. Employers who hire illegal third-country nationals may be fined up to €500,000. Various violations in relation to the illegal employment of third-country nationals, especially when the offence is particularly severe, are also punishable by imprisonment or disqualification from public contracts and subsidies. Social security carriers will also demand any unpaid social security contributions. The outcomes for employees from third countries range from administrative fines, imprisonment, the shortening of the duration of stay and expulsion to deportation. However, such third-country nationals –whether in Germany with or without permission to reside– generally are entitled to claim unpaid wages for the labour provided with a labour court. Trade union information centres and consulting offices offer legal representation and legal services in many German cities. Often, out-of-court settlements are sought with the employer to avoid lengthy court proceedings.

# The European Migration Network

The European Migration Network (EMN) was launched by the European Commission in 2003 on behalf of the European Council in order to satisfy the need of a regular exchange of reliable information in the field of migration and asylum at the European level. Since 2008, Council Decision 2008/381/EC forms the legal basis of the EMN and National Contact Points have been established in the EU Member States (with the exception of Denmark, which has observer status) plus Norway.

The EMN's role is to meet the information needs of European Union institutions, Member States' authorities and institutions as well as the wider public by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policymaking in these areas. The National Contact Point for Germany is located at the Federal Office for Migration and Refugees in Nuremberg. Its main task is to implement the annual work programme of the EMN. This includes the drafting of the annual policy report "Migration, Integration, Asylum" and of up to four topic specific studies, as well as answering Ad-Hoc Queries launched by other National Contact Points or the European Commission. The German National Contact Point also carries out visibility activities and networking in several forums, e.g. through the organisation of conferences or the participation in conferences in Germany and abroad. Furthermore, the National Contact Points in each country set up national networks consisting of organisations, institutions and individuals working in the field of migration and asylum.

In general, the National Contact Points do not conduct primary research but collect, analyse and present existing data. Exceptions might occur when existing data and information are not sufficient. EMN studies are elaborated in accordance with uniform specifications valid for all EU Member States plus Norway in order to achieve comparable EU-wide results. Furthermore, the EMN has produced a Glossary, which ensures the application of comparable terms and definitions in all national reports and is available on the national and international EMN websites.

Upon completion of national reports, the European Commission drafts a synthesis report with the support of a service provider. This report summarises the most significant results of the individual national reports. In addition, topic-based policy briefs, so-called EMN Informs, are produced in order to present and compare selected topics in a concise manner. The EMN Bulletin, which is published quarterly, informs about current developments in the EU and the Member States. With the work programme of 2014, the Return Expert Group (REG) was created to address issues around voluntary return, reintegration and forced return.

All EMN publications are available on the website of the European Commission Directorate-General for Migration and Home Affairs. The national studies of the German National Contact Point as well as the synthesis reports, Informs and the Glossary are also available on the national website: <http://www.emn-germany.de/>

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# Introduction

The curtailing of illegal employment has long been an important topic on the political agenda of the Federal Republic of Germany. The coalition government of the Christian Democratic Union (CDU), the Christian Social Union in Bavaria (CSU), and the Social Democratic Party (SPD), which emerged in 2013, has continued to pursue the curtailing of illegal employment as a political objective through legal regulations and an increase in practical measures to uncover and punish illegal employment (cf. CDU/CSU/SPD 2013: 90), including legislative initiatives introduced during the 18<sup>th</sup> legislative period to expand the powers of the respective regulatory and enforcement authorities, and improve the exchange of information between the actors involved. These initiatives also facilitated an increase in inspection personnel.

In recent years, illegal employment, specifically of third-country nationals, has also come under greater public scrutiny due to the increase in the immigration of people seeking protection. The debate was characterised by the concern that the high number of those seeking protection and their often precarious living situation, combined with the (at least temporary) restriction of work permits, would increase the occurrence of illegal employment. There were also fears that this could have a negative impact on the labour market and drive down wages for established workers. The various actors largely agreed that the swift integration of new immigrants into the labour market would be the best way to prevent illegal employment. However, the debate often lacks statistical backing. This focus study uses the material available to describe the situation with regards to illegal employment of third-country nationals in Germany and delineates the legal framework used for curtailing this phenomenon. It answers the following questions:

- What is the general definition of illegal employment in Germany and what significance is ascribed to the curtailing of illegal employment?
- What share of illegal employment in general does the illegal employment of third-country nationals make up?
- Who are the authorities responsible for curtailing and uncovering illegal employment of third-country nationals in Germany? What is the legal basis for their activities and how do the responsible authorities and actors co-operate?
- What measures are taken in Germany in order to prevent, uncover, and punish illegal employment of third-country nationals?

- What are the consequences for both employees and employers?

This study uses a wide range of sources, the most crucial of which are legal texts and administrative regulations on curtailing illegal employment, on labour law, and right of residence. Interviews with government officials involved in uncovering, prosecuting, and punishing illegal employment, as well as with non-governmental organisations, provided insight into the functioning of these organisations.<sup>1</sup> Reports and responses by the Federal Government to relevant enquiries provided details on core aspects. Further information came from notices and leaflets by various actors involved with the topic. Parliamentary minutes from the Bundestag and media reports played an important role in assessing the public and political debate on the matter.<sup>2</sup>

Chapter 1 provides an overview of the informal economy in Germany, as well as the phenomenon of illegal employment in general, and of illegal employment of third-country nationals in particular, addressing the scope of political and public debate on and legal developments of the phenomena. Chapter 2 describes the current preventive measures for curtailing illegal employment of third-country nationals. Chapter 3 examines the uncovering of illegal employment of third-country nationals as part of the overall curtailing of illegal employment. It describes in detail the powers exercised by the proper regulatory and enforcement authorities (especially the Financial Investigation Office for Clandestine Employment), how they co-operate with one another, and how inspections are carried out. Chapter 4 addresses the criminal and administrative consequences for employers who illegally hire third-country nationals. Chapter 5 discusses the criminal consequences and consequences to the right of residence for third-country nationals who are illegally employed. Chapter 6 summarises the results of the focus study.

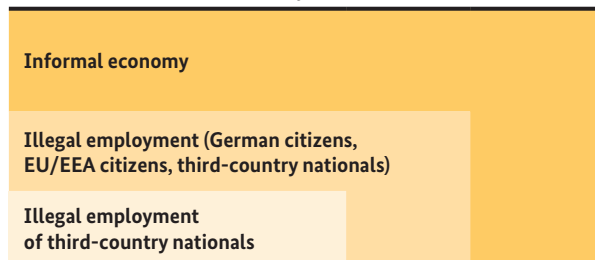
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- 1 We wish to express our sincere gratitude to the following offices and individuals for their assistance: Central Customs Authority, Department VII – German Financial Investigation Office for Clandestine Employment; Alexander Bergant (Senate Department for Integration, Labour and Social Affairs, Berlin); Emilija Mitrović (MigrAr, the German Trade Union Confederation Hamburg information centre for migrants without secured residence); Nuremberg Main Customs Office – Financial Investigation Office for Clandestine Employment; Thomas Klar (national office of the German Pension Fund); Markus Meissauer (Hessen office, the German Pension Fund).
  - 2 We wish to thank Laura Kotzur for her research and editing assistance during her internship at the research centre of the Federal Office for Migration and Refugees.



# 1 Illegal employment in Germany

This study focuses on the illegal employment of third-country nationals<sup>3</sup> in Germany. This topic is inexorably linked to the illegal employment of German and EU citizens, as well as the informal economy, since all three areas, by their very nature, (seek to) escape government detection.

**Figure 1: Relationship between illegal employment and the informal economy**



Source: own illustration; proportions are not derived from any basis of information and do not reflect actual ratios/percentages.

First, the informal economy and the phenomenon of illegal employment in general shall be described below in order to then provide a basis for discussing the illegal employment of third-country nationals.

## 1.1 Informal economy

### 1.1.1 Definition

There is no clear definition of the informal economy (also referred to as “grey economy”). The academic literature contains various definitions, of which most are kept very broad and include both legal and illegal activities. Smith, for example, describes the informal economy as the “market-based production of goods and services, whether legal or illegal, that escapes detection in the official estimates” (Smith 1994: 4). Other definitions are somewhat more specific and emphasise the (non-existent) role of the state. In the view of Schneider and Boockmann, for example, the informal economy consists of “economic activities to obtain income whilst avoiding state regulation, taxation, or detection” (Schneider/Boockmann 2016: 5). The definitions agree on that the activities in the informal economy

escape state regulation or detection. The figure below provides an overview of the activities in the informal economy:

**Figure 2: Definition of “informal economy”**

	Cash transactions	Non-cash transactions
Illegal activities	Dealing in stolen goods, dealing drugs, producing illegal goods and offering illegal services, smuggling, fraud, etc.	Exchanging drugs, stolen goods, smuggled goods, etc., producing or cultivating drugs without intent to sell, stealing without intent to sell.
Legal activities that are unreported	Unreported income from self-employment; wages, salaries, and assets from unreported labour.	Trading and exchanging legal goods without monetary transactions.

Source: adapted from Schneider/Boockmann 2016: 6.

### 1.1.2 Extent

The clandestine nature of the informal economy makes it impossible to quantify its exact extent. However, there are various approaches to approximating its extent that are based on estimates and extrapolations, but occasionally produce radically different results. This can be traced back to each approach’s calculation method and the definitions used (see above), which routinely leads to criticism of the results (Junkert/Kreienbrink 2008: 17 et seq.).

These approaches can generally be divided into microeconomic studies that largely rely on representative surveys and macroeconomic works based on national indicators. An overview of the various calculation methods can be found in Schneider/Boockmann (2016: 13 et seq.). However, the authors themselves note that “all estimation methods are problematic, ultimately leading to inaccurate estimates” (Schneider/Boockmann 2016: 12).

The most frequently cited approach is Schneider’s cash method, a macroeconomic approach based on the notion that goods and services in the informal economy are paid for in cash only. Thus, if the overall need for cash exceeds the overall expected need over a certain time period, informal activities can be suspected and services paid for in cash can be estimated. Together with other variables, an estimate on the extent of the informal economy can then be carried out. For 2016, Schneider and Boockmann

<sup>3</sup> According to Article 2 of the Schengen Borders Code, third-country nationals are persons who are not citizens of the European Union and do not enjoy freedom of movement.

calculate that the ratio of informal economy to gross domestic product for Germany totals 10.4%, which is equivalent to a total volume of €330 billion (Universität Linz/IAW Tübingen 2017: 4).

Critics of the cash method argue that it does not allow for a distinction between gross and net value-added, and that a portion of the total amount of cash is located abroad. Another criticism is that, while it may be possible to determine the amount of black money, it cannot be determined how much of it is spent on illegal employment (Schneider 2006: 36 et seq.).

Another approach is microeconomic in nature and uses representative surveys to attempt to determine how many hours have been worked illegally to then be able to conclude the extent of the informal economy. Feld and Larsen have been conducting such surveys in Germany on behalf of the Rockwool Foundation since 2001. In these surveys approximately 1,100 people are asked for their opinion on illegal employment and whether they themselves have been paid illegally or have paid someone illegally for work.

In their study from 2012, Feld and Larsen determined that the share of the informal economy within the overall economy decreased from 2001 to 2008: “The extent, measured in hours worked, fell from approx. 4% of GDP in 2001 to approx. 2.25% in 2008” (Feld/Larsen 2012: 124). It must be critically noted that this method only provides information on the share of illegal employment within the GDP and that it provides no information on other activities in the informal economy, whilst at the same time suggesting that it represented it entirely.

### 1.1.3 Actors

Various actors are involved in curtailing the informal economy in Germany. The responsibility for combating criminal activity in the informal economy lies chiefly with the police (especially organised and white-collar crime) and state tax authorities (especially tax evasion). The Customs Authorities are primarily responsible for uncovering and investigating illegal employment (see Chapter 3 for details regarding responsibilities).

## 1.2 Illegal Employment in general

### 1.2.1 Definition

Illegal employment constitutes only part of the informal economy, if even the largest part (Gerads 2017). The concept of ‘illegal employment’ cannot be translated one-to-one into German, as in German two terms with slightly different meaning exist to describe the phenomenon:

#### Info box

##### Customs Authority - structure and duties

The Customs Authorities employ nearly 40,000 people and are part of the Federal Ministry of Finance. Operations are controlled by the Central Customs Authority, which is divided into two central departments and seven thematic departments, which are responsible for various areas (e.g., General Fiscal Law and Audits, Cross-Border Trade and Special Customs Law, or the Financial Investigation Office for Clandestine Employment).

The primary duty of each department is “to provide support to the local level, especially by fielding general and specific technical questions. They also supervise local authorities in a legal and technical capacity within the bounds of their respective thematic area” (Generalzoll-direktion 2017a). The duties of the Customs Authority are performed at the local level by 43 main customs offices and eight customs investigation offices (Generalzoll-direktion 2017b).

The duties of the Customs Authority include i.a.:

- Customs border monitoring, border control, and customs supervision
- Monitoring of forbidden items and restrictions on the import, export, and transit of goods
- Federal tax collection (specifically excise taxes: tax on spirits, electricity tax, tobacco tax, energy tax, etc., including beer tax), motor vehicle tax collection, customs duties collection for the European Union, and import turnover tax collection
- **Combating illegal employment**
- Preventing counterfeits from entering the economic cycle
- Enforcement of monetary claims (seizure and, if necessary, disposal) by the Federal Government and federal legal entities under public law (Generalzoll-direktion 2017c)

‘Schwarzarbeit’ and ‘illegale Beschäftigung’. Although the two concepts are very similar, they do differ.

The term ‘Schwarzarbeit’ can be translated roughly with ‘clandestine work’. It is defined in Germany in the Act to Combat Clandestine Employment<sup>4</sup> as the rendering of (or letting others render) services or works in violation of social security and tax obligations, whilst illegally drawing social security benefits, or in violation of reporting and

<sup>4</sup> German “Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung”.

registration requirements under trade laws. Accordingly, a person works clandestinely, if s/he “[...] renders or allows to have rendered services or works and thereby

1. as an employer, entrepreneur, or insurance-liable self-employed person, fails to meet social security reporting, contribution, or documentation obligations resulting from the services or works,
2. as a taxpayer, fails to meet tax obligations resulting from the services or works,
3. as a recipient of social security benefits, fails to meet disclosure requirements to social security benefit providers resulting from the services or works,
4. as the provider of the services or works, fails to register an independent business in a standing trade (Section 14 of the Trade Regulation Code) or failing to obtain the necessary itinerant trade licence (Section 55 of the Trade Regulation Code),
5. as the provider of the services or works, independently practises a licensed trade without being registered in the Crafts Register (Section 1 of the Crafts Code)” (Section 1 subs. 2 of the Act to Combat Clandestine Employment).

This definition exempts services or works that are not sustainably profit-oriented, rendered by family members or life partners, as a courtesy, to help a neighbour, or to help oneself (Section 1 subs. 3 of the Act to Combat Clandestine Employment).

Clandestine work is closely tied to the concept of illegal employment (‘illegale Beschäftigung’). Manifestations of illegal employment are especially violations of the Act Regulating a General Minimum Wage<sup>5</sup>, the Posted Workers Act<sup>6</sup> and the Act on Temporary Employment Businesses<sup>7</sup>, and the illegal employment of foreigners (Deutscher Bundestag 2013c: 3).

In Germany, both terms are often used in conjunction (‘Schwarzarbeit und illegale Beschäftigung’) in legal contexts, public discussion, and academic literature to cover as many types of violations as possible. However, in the vast majority of instances both terms are used interchangeably.

Aside from these two terms, the term ‘unreported employment’ is finding increasing use in academic and trade union discourse (Cyrus/Kip 2015), and is intended

5 German “Gesetz zur Regelung eines allgemeinen Mindestlohns”.

6 German “Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen”.

7 German “Gesetz zur Regelung der Arbeitnehmerüberlassung”.

to depict a broad range of possible employment situations and place greater focus on the employees’ perspective. However, since this study is explicitly investigating violations of applicable law, this term shall not be used here.

The legal definition of ‘Schwarzarbeit’ must be separated from the public understanding of the term. Some actors see racist connotations in the term (along with other terms beginning with ‘schwarz’ [black] to connote ‘illegal’, such as schwarzfahren [fare dodging], Schwarzgeld [dirty money], Schwarzmarkt [black market], etc.) (Lenders 2012). The English version of this study also prefers the term ‘illegal employment’, and shall use it to refer to the violations defined in the Act to Combat Clandestine Employment as well as violations of the Act Regulating a General Minimum Wage, the Posted Workers Act and the Act on Temporary Employment Businesses. ‘Clandestine work’ shall be used when ‘Schwarzarbeit’ appears as such in German in official declarations and publications (e.g., Act to Combat Clandestine Employment) or in direct quotations.

### 1.2.2 Extent

Conclusive data on the extent of illegal employment in general (i.e., the sum of German citizens, EU/EEA citizens, and third-country nationals) are not available given the clandestine nature of this type of employment. Scientific estimates and the results yielded by customs on detected cases of illegal employment offer approximations.

The customs figures show an increase in total loss uncovered by regulatory and criminal investigations, from €795.4 million in 2014 to €818.5 million in 2015, whilst the number of inspections of personnel at the workplace dropped due, among other factors, to the introduction of risk-based inspections (see below).

Based on these figures, Feld and Larsen revised their previous numbers to calculate that 0.75% of GDP in 2008 was generated by illegal employment. This means that “around 10% of the German population from 18–74 [were] clandestinely employed at some point during the year” (Feld/Larsen 2012: 124). Those employed illegally in 2008 worked an average of five hours per week (ibid.).

### 1.2.3 Profiles

The investigations of the Financial Investigation Office for Clandestine Employment show that the illegally employed are primarily found performing ancillary services of the various sectors. The catalogue of sectors listed in Section 2a of the Act to Combat Clandestine Employment is identical to the one for the fast-track registration obligation pursuant to Section 28a subs. 4 of the Fourth Book of the Social Code.

Table 1: Custom's performance in curtailing illegal employment

Category	2010	2011	2012	2013	2014	2015
Inspections of personnel at the workplace	510,425	524,015	543,120	523,340	512,763	360,345
Inspections of employers	62,756	67,680	65,955	64,001	63,014	43,637
Criminal cases closed	115,980	112,474	105,680	94,962	100,763	104,778
Regulatory cases closed	70,146	76,367	62,175	53,993	53,007	47,280
Total fines (in millions of euros)	44.0	45.2	41.3	44.7	46.7	43.4
Total loss uncovered by investigations involving fines and criminal charges (in millions of euros)	710.5	660.5	751.9	777.1	795.4	818.5
Total loss from criminal tax proceedings initiated by state tax authorities based on findings of investigations of the Financial Investigation Office for Clandestine Employment (in millions of euros)	42.4	31.5	46.3	22.0	29.1	36.8
Total fines (incl. compensation of lost value) from rulings and penalty orders (in millions of euros)	29.8	30.6	27.2	26.1	28.2	28.8
Total imprisonment sentenced (in years)	1,981	2,110	2,082	1,927	1,917	1,789

Source: Generalzolldirektion 2017d

However, there are no validated statistics regarding the profiles of illegally employed individuals in Germany. The profile can be approximated by studies based on representative surveys, in which respondents themselves provide information on potential, illegal employment. Two such studies were published in 2012, no later studies are available. On the one hand, Feld and Larsen (2012) analyse surveys from 2001 to 2009 in which respondents indicated whether they had been illegally employed at any point in the 12 months prior to the survey. Some of the data are by year and some are aggregated over the period of 2001-2008. Enste (2012), on the other hand, analyses the results of a single representative survey conducted in 2007.

### Gender

The Feld and Larsen study revealed that an average of 13-14% of men surveyed between 2001 and 2008 responded that they had been illegally employed within the last 12 months, whereas the percentage of women was 6% (Feld/Larsen 2012: 27 et seq.). Enste also confirmed that more men engage in illegal employment, with his study showing that 25% of men and 16% of women had been illegally employed in 2007 (Enste 2012: 137).

### Age

Feld and Larsen found that younger people more often engage in illegal employment, with 18% of

18-19-year-olds and 19% of 20-29-year-olds having been illegally employed in the last 12 months, compared to 8% of 50-59-year-olds and 6% of 60-69-year-olds (Feld/Larsen 2012: 30).

### Education

From their surveys between 2001 and 2008, Feld and Larsen determined that 12% of respondents who had been illegally employed in the last 12 months had no professional qualification and were not seeking one, 9% had a degree from a technical college or similar, 5-6% had a degree from a vocational school, and 9% had a degree from a university. A total of 3% of respondents were university students (Feld/Larsen 2012: 30 et seq.). Enste used different categories than Feld and Larsen to survey education levels, and also did not describe the share of each educational level in total illegal employment, but rather the percentage of those illegally employed at each educational level. Accordingly, 29.9% of respondents with a primary school or lower secondary school education and no vocational training had been illegally employed in 2007. The percentage of respondents with the same educational level but with vocational training was 20.9%. A total of 18.1% had a higher educational level (but without a university entrance qualification), 24.1% qualified for entrance to a technical college or university, and 21.4% had a university degree (Enste 2012: 137).



## Occupation

Amongst the occupational classes, several stood out in the Feld and Larsen study: of those illegally employed at least temporarily in 2008, 23% were university students and apprentices; 13% were self-employed; 12% were skilled workers; 12% were unemployed; and 10% were white-collar workers. On the other hand, at just 4%, pensioners more rarely took up illegal employment (Feld/Larsen 2012: 31). Enste also uses different categories for occupational classes for the following results from 2007: of those who reported they had been illegally employed in 2007, 21.7% were self-employed; 30% were blue-collar workers; 16.8% were white-collar workers; and 23.3% were civil servants. Amongst pensioners, 19.9% stated they had been illegally employed in 2007 (Enste 2012: 137).

## Income

Enste also broke his observations down into income classes. Respondents with a higher income reported more often having been illegally employed in 2007. Amongst those with a net income of over €1,500, 30.2% reported having been illegally employed in 2007, whereas the percentage of those with a net income below this figure was 21.3% (Enste 2012: 137).

### 1.2.4 Sectors and types of businesses in which illegal employment is most prevalent

Illegal employment can be found in almost all sectors of the economy, but especially in labour-intensive branches. The sectors in Section 2a of the Act to Combat Clandestine Employment<sup>8</sup> have in common that they are subject to a constant fluctuation of personnel or that activities are not carried out in fixed places of operation. The following sectors are encompassed by this:

- Building industry
- Hotel and restaurant services
- Passenger transport
- Freight, transport, and related logistics
- Fairground entertainment industry
- Forestry businesses
- Industrial cleaning businesses
- Businesses involved in the building and dismantling of fairs and exhibitions

<sup>8</sup> Section 2a regulates the obligation to carry an identification document. This obligation as well as the fast-track registration obligation in certain sectors were already introduced on 1 January 2009. The obligation to carry an identity document pursuant to Section 2a of the Act to Combat Clandestine Employment enables the Financial Investigation Office for Clandestine Employment to easier establish the identity of the employee and the extent of the employment.

## ■ Meat industry

There is debate whether this list is exhaustive. A progress report by the Research Services of the Bundestag asserts that, aside from the building, agricultural, and restaurant industries, household cleaning is the “classic example” of unreported employment (Deutscher Bundestag 2016a: 3). There are also increasing calls to add certain other sectors to the list (e.g., the agricultural industry) or to evaluate this list yearly and make any necessary changes (cf. Deutscher Bundestag 2016b: 20932; CSU Mittelstandsunion 2015).

The academic literature only partially addresses the sectors in which illegal employment is most prevalent. For example, Feld and Larsen divided illegally worked hours by sector and determined, in the period in question (2001–2008), that a third of those hours were in the building industry, followed by personal services (10%) and the primary sector, i.e., agriculture, fishing, etc. (10%). These were followed by economic services (e.g., tax consulting, cleaning services, office work, clerical work), transportation, trade and repair, and catering, at 5–10% each. Just 1% of the illegally worked hours were in the manufacturing industry. The authors concluded that illegal employment was primarily found in the provision of works and services rather than in the production of goods (Feld/Larsen 2012: 72 et seq.).

Data on the types of businesses (large companies, small- and medium-sized businesses, etc.) most effected by illegal employment are not available. There are also no scientific studies on the distribution of illegal employment across various types of businesses.

### 1.2.5 Political importance and public debate

The coalition agreement between the Christian Democratic Union of Germany (CDU), the Christian Social Union in Bavaria (CSU) and the Social Democratic Party of Germany (SPD) of December 2013 repeatedly emphasised the “fight against clandestine and illegal employment” as a critical part of its financial and labour market policy. When discussing, for example, tax simplification and enforcement, the agreement states, “We shall improve and more effectively develop the general legal conditions in the Act to Combat Clandestine Employment, the Trade Regulation Act, and elsewhere, as well as the staffing and technology at the Financial Investigation Office for Clandestine Employment in order to better combat tax evasion, social security fraud, and clandestine and illegal employment” (CDU/CSU/SPD 2013: 90). Specifically, this means “concentrating, more effectively organising, simplifying, and adequately personalising” the work of the Financial Investigation Office for Clandestine Employment (CDU/CSU/SPD 2013: 69).

The guidelines in the coalition agreement were implemented, for example, through a reform of the Act to Combat Clandestine Employment<sup>9</sup>, which entered into force 10 March 2017. The Act Amending the Act on Temporary Employment Businesses and Other Acts<sup>10</sup> was enacted on 1 April 2017 (BGBl 2017).

The legislative initiative to reform the Act to Combat Clandestine Employment came from the German Federal Government and was justified as follows:

“Clandestine and illegal employment significantly harm the economy, cause a serious loss in social security contributions, and, in doing so, burden the community of solidarity. Clandestine and illegal employment also hinder competition. Law-abiding companies cannot compete against law-breaking businesses with oftentimes significantly less expensive products and are threatened to lose their very existence. This results in a loss of legal jobs and prevents the creation of new, legal jobs. Illegal employment also harms law-abiding employers and employees, who are forced to pay higher social security contributions to offset the resulting losses” (Deutscher Bundestag 2016c: 1).

Every party represented in the Bundestag shares the Federal Government's view regarding the detriment to society caused by illegal employment. However, there are differences in opinion when it comes to approaches to and methods of curtailing illegal employment. The Christian Democratic Union of Germany (CDU) and the Social Democratic Party of Germany (SPD) argue that the Financial Investigation Office for Clandestine Employment had made great strides in curtailing illegal employment in the past, however further statutory regulations were required to increase its effectiveness, to provide better technology, and to minimise co-operation issues (Deutscher Bundestag 2016b: 20934).

Aside from better equipping the Financial Investigation Office for Clandestine Employment, Alliance 90/the Greens (Bündnis 90/Die Grünen) calls for employers found guilty of violations relating to illegal employment to be more consistently disqualified from public contracts (Deutscher Bundestag 2016b: 20932).

The Left (DIE LINKE.) calls for the focus of the Financial Investigation Office for Clandestine Employment to be on combating organised crime, especially in the building

9 Draft for the Act Promoting the Fight against Clandestine and Illegal Employment (German “Entwurf eines Gesetzes zur Stärkung der Bekämpfung der Schwarzarbeit und illegalen Beschäftigung”).

10 German “Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze”.

### Info box Financial Investigation Office for Clandestine Employment (FKS)

The Financial Investigation Office for Clandestine Employment is part of the Customs Authority. Its duties and powers are regulated in the Act to Combat Clandestine Employment. Pursuant to Section 2 of the Act to Combat Clandestine Employment, it is responsible to check the obligations arising from the rendering of (or letting others render) services or works set out in that section and thereby to assess if clandestine work or illegal employment are on hand and, if so, initiate the corresponding regulatory or criminal proceedings.

It is generally responsible for determining the legal status of employment and, if illegal, prosecuting/punishing those involved. Specifically, it determines “whether the obligations resulting from the services or works under Section 28a of the Fourth Book of the Social Code are being or were met, whether social security benefits [...] are being or were illegally obtained due to the services or works, whether employer information substantial for social security benefits [...] was verified, whether foreigners are being or were employed in violation of Section 284 subs. 1 of the Third Book of the Social Code or Section 4 subs. 4 first and second sentence of the Residence Act, and under less favourable working conditions than comparable German employees, or are being or were gainfully employed to provide services or works in violation of Section 4 subs. 3 first and second sentences of the Residence Act, and whether there is or was compliance with working conditions [...] and minimum wages [...]” (Deutscher Bundestag 2013: 17). It also determines “whether there are indications that taxpayers have not met the tax obligations resulting from the services or works” (ibid.).

The Financial Investigation Office for Clandestine Employment conducts its inspections at the workplace and is authorised to enter properties and offices of the employer and the contractor, obtain information from those working there, review company and other documents, and verify the identities of those working there, as well as the residence titles of any non-German citizens present. The co-operation of those persons is mandatory. “Furthermore, in the prosecution of crimes and regulatory offences [that are directly connected to one of the aims of the objects of inspection set out in Section 2 subs. 1 of the Act to Combat Clandestine Employment; J. T.] it has the same authority as the police under the Code of Criminal Procedure and the Regulatory Offences Act [...]. To this extent, their officers are investigators acting on behalf of the public prosecutor” (Deutscher Bundestag 2013: 17 et seq.). Section 3 contains a more detailed description of the Office.

industry, since this were where illegal employment is most prevalent (Deutscher Bundestag 2016d: 19606).

In a hearing of the proper finance committee on the legislative proposal, the German Trade Union Confederation noted that the curtailing of illegal employment should focus more on ‘semi-legal’ forms of employment with excessively low wages or that abuse or undermine employee rights. The bakers’ trade and retail should also be added to the list of risk sectors under Section 2a of the Act to Combat Clandestine Employment, and thus be subject to inspection by the Financial Investigation Office for Clandestine Employment (Deutscher Gewerkschaftsbund 2016).

The German Construction, Agricultural and Environmental Trade Union (IG-BAU), in turn, called for agriculture to be added to the list of risk sectors under Section 2a of the Act to Combat Clandestine Employment, since illegal employment practices were also common there. The Financial Investigation Office for Clandestine Employment should also be able to inspect private residences, since labour is also exploited in these areas (IG-BAU 2016).

### 1.2.6 Legal developments

The legislative debate on curtailing illegal employment has a long history in the Federal Republic of Germany. In 1957, the legislature passed the first standard in this field with the Act to Combat Clandestine Employment, which would equally punish both employers and employees found guilty of illegal employment. In 1981, the Act Combating Illegal Employment was passed, establishing the responsibilities for curtailing illegal employment, as well as the duties of co-operation and mutual disclosure between the responsible authorities (Bundesrechnungshof 2008: 8 et seq.). While the Federal Labour Office was the central authority for preventing and curtailing illegal employment into the 1990s, their inspection duties were first transferred to the Customs Authority in 1992. In the following years, the latter’s powers were continuously expanded until the enactment of the First Act Amending the Third Book of the German Social Code and Other Acts<sup>11</sup> in 1997 ultimately gave inspecting customs agents the same “rights and duties as police officers under the Code of Criminal Procedure and the Regulatory Offences Act” (Bundesrechnungshof 2008: 9). In the early 2000s, the first legal provisions were enacted for individual sectors in which illegal employment was most prevalent, with the Act Curtailing Illegal Employment in the Building Industry and the Act Combating Illegal Employment in Commercial Road Transport both enacted in 2001. In 2002, the Act Facilitating the Fight against Illegal and Clandestine

Employment was passed “along with provisions, e.g., to make general contractors liable for social security contributions in the building industry, to improve inter-agency co-operation, to disqualify offenders from being granted public contracts, and to intensify sentencing and fine guidelines” (Bundesrechnungshof 2008: 10).

Efforts culminated in the passing of the Act to Combat Clandestine Employment in 2004, which, even after several reforms and expansions, still forms the basis for the work performed by the authorities involved in preventing and curtailing illegal employment. It defines the term ‘Schwarzarbeit’ (clandestine work), describes the inspection duties of the various authorities, sets forth their powers and duties of co-operation and mutual disclosure, and contains a catalogue of punishments and regulatory offences (Bundesrechnungshof 2008: 8).

In addition to the Act to Combat Clandestine Employment, the Act on Temporary Employment Businesses, the Posted Workers Act, and the Act Regulating a General Minimum Wage play a primary role in curtailing illegal employment. During inspections, the Financial Investigation Office for Clandestine Employment likewise determines whether “working conditions are being or were met pursuant to the Act Regulating a General Minimum Wage, to the Posted Workers Act, and to Section 10 subs. 5 of the Act on Temporary Employment Businesses” (Section 2 subs. 1 no. 5 of the Act to Combat Clandestine Employment).

The Act on Temporary Employment Businesses, passed 21 June 1972, “protects both temporary employees and the temporary hiring businesses from unreliable temporary employment agencies” (Deutscher Bundestag 2014a: 6). It governs how temporary employment works in Germany, that temporary employment businesses need a permission to lend out employees, and defines the working conditions that must be met for those employees. It is intended to generally prevent the abuse of temporary employment (ibid.). The Federal Employment Agency implements the act (Section 17 subs. 1 of the Act on Temporary Employment Businesses), and is responsible for issuing the permit required of an employment agency. The “Act Amending the Act on Temporary Employment Businesses and Other Acts and the Act to Combat Clandestine Employment” from 20 July 2011 transferred the duty to inspect working conditions for temporary employment to the Customs Authorities, i.e., the Financial Investigation Office for Clandestine Employment (BGBl 2011a: 1506 seq.). This, however, only applies to the minimum wage level, whereas the Federal Employment Agency is in charge of controlling Equal Pay.

11 German “Erstes Gesetz zur Änderung des Dritten Buches Sozialgesetzbuch und anderer Gesetze”.

The Posted Workers Act, enacted 1 March 1996, was originally limited to the building industry. The goal of the legislative initiative was “[to enforce] the applicability of mandatory working conditions in the building industry in Germany to cross-border postings [so that] divided labour markets and the resulting social tension is avoided” (Deutscher Bundestag 1995: 1). In several reforms, the mandatory application of sectoral collective agreements for posted workers has been extended to (as of now) nine sectors explicitly named in the act (Section 4 subs. 1 of the Posted Workers Act)<sup>12</sup>. With the Act Promoting Collective Bargaining Autonomy<sup>13</sup> from 11 August 2014 (BGBI 2014: 1348 et seq.) the Posted Workers Act was reformed to allow sectoral minimal wages to be set for all other sectors not mentioned in Section 4 subs. 1 of the Posted Workers Act by way of issuing an ordinance (Section 4 subs. 2 of the Posted Workers Act).

Simultaneously, the Act Regulating a General Minimum Wage was also enacted, which, for the first time, established the employees’ right to be paid a wage “by the employer [that is] at least the same as the minimum wage” (Section 1 subs. 1 of the Act Regulating a General Minimum Wage). The law initially set the minimum wage at €8.50 (now €8.84) per hour worked (Section 1 subs. 2 of the Act Regulating a General Minimum Wage). The purpose of the law was to “protect workers against unreasonably low wages. Concurrently, the minimum wage helps keep competition between businesses about better products and services and not about burdening workers with lower and lower wages” (Deutscher Bundestag 2014b: 2). The Act Regulating a General Minimum Wage stipulates that the national minimum wage be monitored by the Financial Investigation Office for Clandestine Employment (Section 2 subs. 1 no. 5 of the Act to Combat Clandestine Employment and Section 14 of the Act Regulating a General Minimum Wage) and violations against paying the minimum wage are punishable by fine (Section 21 of the Act Regulating a General Minimum Wage). Generally, criminal prosecution pursuant to Section 266a of the Criminal Code adds to this, as undercutting the minimum

wage also means that social security contributions are withheld from the collecting agencies.

### 1.3 Illegal employment of third-country nationals

Unlike the illegal employment of German and EU citizens, residence status plays a role in the illegal employment of third-country nationals. Accordingly, inspections for illegal employment also require verification of residence status, and other regulatory authorities are involved (especially the local foreigners authority). However, the differences are particularly apparent in the consequences for employers and employed third-country nationals.

#### 1.3.1 Definition

In general, third-country nationals may only perform an economic activity if they are in possession of an appropriate residence title and this title authorises them to perform that economic activity, or if “the economic activity is authorised due to international agreement, law, or regulation without [having to be] authorised by a residence title” (Section 4 subs. 3 third sentence of the Residence Act).

Below, the various ways in which third-country nationals can be illegally employed, are described.

##### Regular residence with residence title

If a third-country national is in possession of a residence title, this title must always state whether and to what extent that person is authorised to pursue an economic activity, and, if so, to what extent. The economic activity can thereby be authorised unrestrictedly, restricted in time or space, or restricted to specific sectors. This information is included in the document, making it possible for both the employee and the employer to determine whether an economic activity can be pursued.

There are five types of residence titles in Germany: visa, residence permit, settlement permit, EU long-term residence permit, and the EU Blue Card.<sup>14</sup> These are issued for different purposes of residence, with some authorising economic activity by act of law from the start; partly an approval from the Federal Employment Agency to pursue an employment is required.

If a third-country national has a residence title that does not authorise economic activity, then pursuing economic

12 This applies to “collective bargaining agreements for 1) the main or ancillary building trades as defined by the Building Companies Regulation of 28 October 1980 (German Federal Law Gazette, I, 2033), last amended by the Regulation of 26 April 2006 (German Federal Law Gazette, I, 1085), as amended, including the provision of assembly services at construction sites outside of the place of business; 2) building cleaning services; 3) mail services; 4) security services; 5) special underground operations in hard coal mines; 6) contract laundry services; 7) waste management, including street cleaning and winter services; 8) education and training services pursuant to the Second of Third Book of the Social Code; and 9) slaughterhouses and meat processing” (Section 4 subs. 1 of the Posted Workers Act).

13 German “Gesetz zur Stärkung der Tarifautonomie”.

14 See Grote/Vollmer 2016: 14 et seq. for a detailed description of residence titles and their general requirements.



activity (being employed, respectively) constitutes illegal employment. If the title authorises economic activity to a certain extent (time, space, or sector) then violating these restrictions can constitute illegal employment or clandestine work. If the residence title authorises unrestricted economic activity, then failing to register the activity, committing social security fraud, or evading taxes constitutes illegal employment (as is the case with German or EU employees) (pursuant to Section 1 subs. 2 of the Act to Combat Clandestine Employment). If a third-country national has a permanent or temporary residence title from another EU Member State and pursues economic activity during an authorised, temporary stay in Germany, then this can also constitute illegal employment (see Section 5).

#### Regular residence of persons eligible for protection, or quota or resettlement refugees

Residence titles for recognised refugees, those eligible for asylum, and those eligible for subsidiary protection authorise unrestricted economic activity (Section 25 subs. 1 fourth sentence and Section 2 subs. 2 of the Residence Act). Quota refugees are issued a residence title authorising unrestricted economic activity immediately upon their arrival (Section 23 subs. 2 fifth sentence of the Residence Act). The same applies to resettlement refugees (Section 23 subs. 4 second sentence of the Residence Act). Employment for this group of third-country nationals can thus only be illegal (or constitute clandestine work) if they (as with German or EU employees) pursue economic activity without this being reported to social security by their employer, commit social security fraud, or fail to meet their tax obligations (pursuant to Section 1 subs. 2 of the Act to Combat Clandestine Employment).

#### Residence without residence title

Aside from the group of third-country nationals with a regular residence title, there are third-country nationals that do not have a valid residence title, but who have permission to remain pending the asylum decision or whose deportation is temporarily suspended (tolerated stay, German ‘Duldung’).

The temporary suspension of deportation is applicable if “deportation is not possible for practical or legal reasons and no residence permit is issued” (Section 60a subs. 2 first sentence of the Residence Act). Third-country nationals, whose deportation has temporarily been suspended, may not receive an authorisation to pursue economic activity if

1. they entered the country to obtain benefits under the Act on Benefits for Asylum Applicants,

2. their stay cannot be terminated on grounds for which they are responsible, or
3. they are citizens of a safe country of origin pursuant to Section 29a of the Asylum Law and a request for asylum made after 31 August 2015 was denied (Section 60a subs. 6 first sentence of the Residence Act).

In addition, third-country nationals “whose deportation has temporarily been suspended [may] be given permission to pursue an economic activity if they have resided in the Federal Territory for three months by virtue of holding a temporary residence or permanent settlement permit, by virtue of his or her deportation having been suspended or by holding permission to remain pending the asylum decision,” (Section 32 subs. 1 first sentence of the Ordinance on the admission of foreigners for the purpose of taking up employment). The local foreigners authority is responsible for granting the authorisation to pursue economic activity after obtaining approval from the Federal Employment Agency.<sup>15</sup>

Permissions to remain pending the asylum decision are issued for the duration of an asylum procedure (Section 55 subs. 1 of the Asylum Law), however they are not residence titles and only allow economic activity if this is authorised by the local foreigners authority. Third-country nationals with such permission are prohibited from pursuing an economic activity for as long as they are required to stay at a reception centre (Section 61 subs. 1 of the Asylum Law). This requirement can last up to six months (Section 47 subs. 1 first sentence of the Asylum Law).

Third-country nationals who have resided in the Federal Territory with permission to remain pending the asylum decision for three months may be authorised to pursue an employment if the Federal Employment Agency has approved this or if a statutory instrument determines that such activity does not require the approval of the Federal Employment Agency (Section 61 subs. 2 of the Asylum Law). Prior legal or tolerated residence is factored into this ‘waiting period’ (Section 61 subs. 2 second sentence of the Asylum Law). Asylum seekers from safe countries of origin (pursuant to Section 29a of the Asylum Law) who requested asylum after 31 August 2015 generally are not granted a permission to pursue economic activity (Section 61 subs. 2 fourth sentence of the Asylum Law).

The following activities do not require the approval of the Federal Employment Agency for the local foreigners

<sup>15</sup> See Gemeinnützige Gesellschaft zur Unterstützung Asylsuchender 2017 for an overview on access to employment for persons, whose deportation has been temporarily suspended (as of 15 January 2017).

authority to grant authorisation to those with a permission to remain pending the asylum decision or whose deportation is temporarily suspended (Section 32 subs. 2 of the Ordinance on the admission of foreigners for the purpose of taking up employment):

1. an internship not subject to minimum wage,
2. a vocational training in an officially recognised or comparably regulated skilled trade,
3. an employment pursuant to Section 2 subs. 1 (highly qualified persons, complying with the requirements for an EU Blue Card, graduates of a German university); Section 3 no. 1–3 (executives); Section 5 (scientific study, research and development); Section 14 subs. 1 (other employment, specifically volunteering); Section 15 subs. 2 (training internships, specifically internships funded by the EU or bilateral development co-operation); Section 22 no. 3–5 (special occupations); and 23 (international sporting events) of the Ordinance on the admission of foreigners for the purpose of taking up employment,
4. an employment at the business of a cohabitating spouse, registered life partner, relative, or immediate in-law, or
5. any employment after four years of uninterrupted residence in the Federal Territory by virtue of the suspension of deportation, on the basis of permission to remain pending the asylum decision or by holding a temporary residence or permanent settlement permit.

If a third-country national has a permission to remain pending the asylum decision or has his or her deportation temporarily suspended and is not (yet) authorised for economic activity under the guidelines above, pursuing economic activity constitutes illegal employment. If this person is authorised to pursue economic activity to a certain extent (time, space, or sector) violating these restrictions can constitute illegal employment. If persons holding a permission to remain pending the asylum decision or a certification of the suspension of deportation are authorised to pursue an economic activity, failing to register the activity, committing social security fraud, or evading taxes can constitute clandestine work (pursuant to Section 1 subs. 2 of the Act to Combat Clandestine Employment).

### Irregular residence<sup>16</sup>

The EU Return Directive (2008/115/EC)<sup>17</sup> defines ‘illegal stay’ as “the presence on the territory of a Member State of a third-country national who does not fulfil or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay, or residence in that Member State” (Article 3 no. 2).

This definition also includes third-country nationals whose deportation has been temporarily suspended as described above. Since it can be assumed that irregularly staying third-country nationals in particular take up employment that is illegal in order to secure their livelihood, two groups of third-country nationals with irregular residence are particularly important for the purpose of this study:

1. **“Irregular migrants who were previously known to the authorities, but whose place of residence is no longer known to the authorities (absconders).** This group includes: asylum-seekers who absconded in the course of the initial distribution among the initial reception centres that are responsible for them, failed applicants for international protection who have absconded following a negative decision on their application, former legal immigrants whose visa has expired (visa-overstayers) and whose place of residence is unknown to the authorities, and other migrants without permission to reside such as persons who have evaded an alternative to detention pending deportation and absconded.
2. **Irregular migrants whose residence on the territory has never been known to the authorities (persons without prior contact to the authorities).** This group includes all those who entered or were trafficked to Germany without valid documents or without registering their residence with the authorities or ever having had contact with them (e.g. who have never been stopped by the police). Persons trafficked involuntarily or under false premises and exploited by forced prostitution whose place of residence is unknown to the authorities are thus classified in this group. There is a wide

<sup>16</sup> The following information on irregular residence is based on Grote 2015: 14–18.

<sup>17</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in the Member States for returning illegally staying third-country nationals.

range of terms for designating this group of people” (Grote 2015: 14 et seq.).<sup>18</sup>

### Types of illegal employment of third-country nationals

The table below summarises the possible types of illegal employment of third-country nationals described above based on employment relationship (legal/illegal) and residence status (regular/irregular).

**Table 2: Constellations in which third-country nationals can be legally/illegally employed/pursuing an economic activity**

		Residence	
		Irregular	Regulär
Employment/ economic activity	Illegal	‘Classic’ case of illegal employment of third-country nationals without residence title, a permission to remain pending the asylum decision or a certification of the suspension of deportation	Third-country nationals with residence title who are not authorised for economic activity nor permitted by international agreement, law, or regulation without the need for authorisation from a residence title  Third-country nationals holding a permission to remain pending the asylum decision or a certification of the suspension of deportation but without the permission to pursue an economic activity  Third-country nationals with a temporary or permanent residence title from another EU Member State who illegally pursue economic activity during a permitted, temporary stay in Germany
	Economic activity that could be legal in principal but is carried out illegally	Not possible under German law	a) third-country nationals employed with a legal contract pursuing economic activity under illegal conditions (e.g., violating minimum wage law, exceeding max. work days per year as a university student, violating work permit restrictions) b) Work permit obtained under false pretences (e.g., bogus posting/ temporary employment) c) Bogus self-employment
	Legal	Not possible under German law	Third-country nationals with residence titles that authorise economic activity or persons holding a permission to remain pending the asylum decision or a certification of the suspension of deportation authorising an economic activity pursuing an authorised activity

Source: adapted from Junkert/Kreienbrink 2008: 22.

18 The more common names include ‘paperless persons’ (Huschke 2013), ‘undocumented persons’ (Angenendt 2007: 10), ‘clandestine persons’ (Vogel 2015), ‘persons without papers’ (Anderson 2011: 173; Bommers/Wilmes 2007), ‘illegalised persons’ (Fleischer 2007; Schreiber 2007), and ‘Sans Papiers’ (Mylius et al. 2011). The terms ‘illegals’ and ‘illegal immigration’ are also widely used, although criticised when used to refer to the individuals themselves rather than the act of immigration/illegal residence (see, e.g., Neue Deutsche Medienmacher 2014: 20 et seq.; Schneider 2012: 20; Angenendt 2007: 10 et seq.; Schönwälder et al. 2004: 6).

### 1.3.2 Extent

As is the case with illegal employment in general, a limited basis of data makes it difficult to determine the extent of illegal employment of third-country nationals in particular.

#### Data of the Financial Investigation Office for Clandestine Employment

The Financial Investigation Office for Clandestine Employment uses a central information system, the so-called ProFiS, in which all data necessary pursuant to the Act to Combat Illegal Employment are automatically processed.<sup>19</sup> It details what company was inspected, when the inspection took place and the results of the inspection. If an investigation is opened up and closed finally, data can be retained for up to five years. The Financial Investigation Office for Clandestine Employment also registers cases during its inspections, in which the suspicion of illegal employment (also of third-country nationals) is determined. However, ProFiS only charts these cases by principal offence as deemed by the investigator.<sup>20</sup> An analysis of the data by all offences does not take place. Data on the number of inspections in which illegal employment of third-country nationals was proven or the number of illegally employed third-country nationals identified is currently not foreseen (interview with the Central Customs Authority). This analytical gap was cited by the Federal Court of Audit in 2008 as a shortcoming during an audit of the Financial Investigation Office for Clandestine Employment.

#### Data on police crime statistics

Police crime statistics are another source of data. “Police crime statistics contain known criminal offences, including inchoate offences, the number of suspects investigated, and an array of other information on cases, victims,

19 Legal basis is Section 16 of the Act to Combat Clandestine Employment. In addition to what data should be logged (subs. 2), this section also sets forth that this data may i.a. only “be used to conduct inspections pursuant to Section 2 subs. 1 and to prevent and prosecute crimes and regulatory offences in relation to the purposes of inspections pursuant to Section 2 subs. 1 and to charge tax in relation to the provision of works or services” (subs. 3). Section 18 of the Act to Combat Clandestine Employment governs the information in the database on relevant individuals and Section 19 describes retention periods (max. five years after the end of the calendar year in which the case was finally closed).

20 “The principal offence shall be deemed by the investigator according to his/her own judgement. Should an act constitute multiple offences, the principal offence shall be the charge considered by the investigator to be the most serious, i.e., that carries the most severe punishment (hence principal offence)” (Bundesrechnungshof 2008: 31).

and suspects” (BKA 2016a). However, these statistics contain no information on convictions. Regarding regulatory and criminal offences resulting from illegal employment they are only useful to a certain extent. This is because the prosecution of violations of the Act to Combat Clandestine Employment primarily lies in the responsibility of the Customs Authority, and the police crime statistics only contain the cases investigated by the police themselves. Section 163 of the Code of Criminal Procedure gives the police this authority. Yet, even the data available in the police crime statistics are not broken down by type of offence under the Act to Combat Clandestine Employment, but only aggregated as “offences in relation to the Act to Combat Clandestine Employment and the Act on Temporary Employment Businesses” (BKA 2016a).

The figures in the police crime statistics also reflect the fact that the prosecution of criminal and regulatory offences in cases of illegal employment is primarily the responsibility of the Customs Authority. Consequently, the number of cases investigated by the police has remained constant for the last five years, at 120–170 per year. Generally, police crime statistics allow further division in regard to individual residence characteristics, which, due to the low number of cases, offers barely any informational value: in 2014, in 95 of the 169 cases of offences in relation to the Act to Combat Clandestine Employment and the Act on Temporary Employment Businesses investigated by the police, the suspects were not German. Of those 95 non-German suspects, 91 had legal residence; the other four suspects did not have legal residence (BKA 2015).

#### Data critique

The available data on illegal employment of third-country nationals in Germany are, accordingly, very limited. Even if the available data could be analysed more extensively, the figures on those caught would only provide limited information on the entirety of illegal employment of third-country nationals. The figures that can be recorded only provide information on inspections conducted and violations uncovered; they would thus be better suited to provide information on activity and awareness of the enforcement authorities (Rabe/Brandt 2015). Similar to the scientific estimates in the CLANDESTINO Project on irregular residence (Vogel/Kovacheva 2008; Vogel/Assner 2011; Vogel 2015)<sup>21</sup>, the data here would also have to be

<sup>21</sup> Estimates on the extent of the number of irregularly staying third-country nationals in Germany are based on police crime statistics. Thereby, a continuous increase has been observed from 2010 to 2014. Calculations estimated that, in 2010, there were 136,000–337,000 individuals residing in Germany who had absconded following contact with authorities or who had never been in contact with the authorities. This estimate was 180,000–520,000 in 2014 (Vogel 2015; Vogel/Assner 2011).

contextualised in order to estimate the number of unreported cases. Only the previously mentioned study by Schneider/Boockmann (2016) on the extent of the informal economy contains a section with an estimate of illegal employment of refugees in Germany (see Section 1.3.4).

#### 1.3.3 Profiles and sectors

Given the inadequate data available, there is also no precise information on the profiles of illegally employed third-country nationals or the sectors in which they are active.

However, there have been studies on the profiles of persons with irregular residence, and while they cannot speak for the entirety of illegally employed third-country nationals, they do at least allow a trend to be derived regarding illegally employed third-country nationals with irregular residence. According to these studies, irregular migrants tend to be young. Gender breakdown depends greatly on the sectors in which those with irregular residence find employment. Women work more often in child care and elderly care than as cleaners or in the sex industry. Men, on the other hand, more frequently work in the building industry (Kovacheva 2010: 8 et seq.).

This is in accordance with the experience of the Financial Investigation Office for Clandestine Employment that illegally employed third-country nationals are primarily found in the risk sectors listed in Section 2a of the Act to Combat Clandestine Employment, typically performing unskilled tasks or tasks requiring little qualification (Interview with the Central Customs Authority).

#### 1.3.4 Public debate

With the significant increase in the number of individuals coming to Germany seeking protection in 2015 and 2016, the topic of illegal employment has once again returned to the public’s attention, with the focus on the illegal employment and the exploitation of the labour of asylum seekers, denied asylum applicants, those whose deportation has been temporarily suspended, and those eligible for protection (Heinzle 2016, Dowideit 2016a, Steiner 2015).

Due to the lack of reliable figures, information such as the study by Schneider/Boockmann (2016) on the extent of the informal economy addressing the issue of how the increased immigration asylum seekers could impact the informal economy, spread quickly across the media. However, Schneider/Boockmann projected scenarios for how the informal economy would change if a few assumptions they had made came true. The results consequently offered little regarding the actual illegal employment of



asylum seekers, even though they were erroneously presented as doing so in various media (see Bund 2016). Accordingly, figures circulated in which 100,000 to up to 30% of the asylum seekers entering the country were employed illegally (Heinzle/Weydt 2016; Huffington Post 2016; Deutschlandfunk 2016; DGB Bildungswerk 2016).

The misrepresentation of the study results in the news influenced overall public debate on the topic and led to believe there were substantiated findings on the extent of illegal employment of refugees. Thereby, most non-governmental organisations and trade associations do not dispute the possibility, given prevailing conditions, of increased illegal employment due to the high number of individuals seeking protection. Diakonie, for example, argues that the insufficient number of integration courses, combined with the continued requirement that such a course must be completed in order to be able to apply for work, would drive refugees to seek illegal employment (Dowideit 2016b).

As a preventive measure, the German Employers' Association (Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA) has called for rapid and effective integration of refugees who are likely to remain in Germany, using temporary employment in particular to keep those without experience away from illegal employment and bring them into legal employment relationships (BDA 2016). The German Trade Union Confederation (DGB) has called for the speedy integration of refugees into the labour market while maintaining labour standards (Handelsblatt 2016).

### 1.3.5 Legal developments

Various areas of law dealing with the illegal employment of third-country nationals have recently undergone reform, particularly the Act to Combat Clandestine Employment and the Act on Temporary Employment Businesses.

#### Reform of the Act to Combat Clandestine Employment

The objective of the Act Promoting the Fight against Clandestine and Illegal Employment which was enacted 10 March 2017 (Deutscher Bundestag 2016c; Deutscher Bundesrat 2017) is “[to improve] the legal framework for the inspection and investigation activities of the Financial Investigation Office for Clandestine Employment and the local foreigners authorities, and [to create] the requirements for optimising the computer equipment of the Financial Investigation Office for Clandestine Employment” (German Bundestag 2016c: 1). With the act, the following changes were implemented (cf. BGBl 2017a):

- IT systems: Section 16 of the Act to Combat Clandestine Employment legitimises the central information

system for the Financial Investigation Office for Clandestine Employment. Through the reform of the Act to Combat Clandestine Employment and the adjunct introduction of a new system (ProFiS 2.0) the workflow management is being optimised and, contrary to the hitherto database, nationwide editing and an access independent of location by all main customs offices and the Central Customs Authority as well as a better data analysis is made possible.

- Access to Central Vehicle Register data: the Road Transport Act is amended to give the Financial Investigation Office for Clandestine Employment customs agents automatic access during inspections and investigations to specific registered owner information on the Central Vehicle Register of the Federal Motor Transport Authority.
- Powers of the Financial Investigation Office for Clandestine Employment when punishing reporting violations pursuant to the Fourth Book of the Social Code: for more efficient investigating, the Financial Investigation Office for Clandestine Employment is now responsible for punishing reporting violations pursuant to the Fourth Book of the Social Code (i.e., social security fraud) also in the case that the violations were uncovered during an investigation of the Financial Investigation Office for Clandestine Employment. Until now, this was only possible if social security fraud was determined during an inspection.
- Powers of the state authorities: the authorities of the Federal States responsible for combating clandestine work in trade and crafts pursuant to Section 2 subs. 1 of the Act to Combat Clandestine Employment are given proper inspection powers (cf. Chapter 3.4.5).
- Service and delivery contracts: employers found guilty of one of the violations listed in Section 21 subs. 1 of the Act to Combat Clandestine Employment (i.a. Section 266a of the Criminal Code, Sections 10 and 11 of the Act to Combat Clandestine Employment) previously could only be disqualified from public construction contracts (cf. Section 4). This disqualification is now expanded pursuant to the regulations set forth in the Act Regulating a General Minimum Wage and the Posted Workers Act to delivery and service contracts.

#### Temporary employment

The Act Amending the Act on Temporary Employment Businesses and other Acts<sup>22</sup> was enacted on 1 April 2017 (BGBl 2017b). The purpose of reforming the Act on Temporary Employment Businesses is both to prevent the misuse of service contracts used for actual, direct employment, and to prevent clandestine temporary employ-

22 German “Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze”.

ment. The latter occurs when companies conclude what is ostensibly a service contract, then in reality perform the contract in the form of temporary employment (Deutscher Bundestag 2016e: 1 et seq.). Specifically, the act encompasses i.a. the following changes:

- The maximum duration of temporary employment with a temporary hiring business is limited to 18 months. Longer periods are only permitted in companies with a collective bargaining agreement (Section 1 subs. 1 of the Act on Temporary Employment Businesses).
- After nine months, temporary employees shall generally receive the same pay as the regular employees of the hiring business (Section 8 subs. 4 of the Act on Temporary Employment Businesses). Further, temporary employees shall not be used when the company of the temporary hiring business is directly affected by an industrial conflict (Section 11 subs. 5 first and second sentence of the Act on Temporary Employment Businesses).

#### 1.4 Human trafficking as a related issue

Although it must remain separate for analytical purposes, human trafficking for labour exploitation is an issue that is tightly intertwined with the illegal employment of third-country nationals. Even though in practice the line between the two is thin, addressing them separately is sensible, since illegal employment differs from human trafficking for labour exploitation, as with illegal employment

- there is not always a clear perpetrator–victim relationship,
- employees can be involved in shaping their working conditions,
- individuals can be employed that possess a regular residence status (see definition),
- types of employment can be meant that are considered as less serious or a regulatory offence under the law.

Also, different actors take the lead on this matter in Germany: whereas illegal employment is primarily considered a financial/business crime, and pursuant to the Act to Combat Clandestine Employment responsibility for inspections lies with the Customs Authorities, human trafficking and exploitation are considered human rights violations, and are combated directly by the police (especially by the Federal State Criminal Police).

The coalition agreement also sets out that human trafficking for labour exploitation shall be given more attention

(CDU/CSU/SPD 2013: 104), resulting during the current legislative period in amendments to several sections of the Penal Code and the creation of a joint federal and state working group to combat human trafficking for labour exploitation<sup>23</sup> (BMAS 2016a; Bündnis gegen Menschenhandel 2015).

#### Amended Penal Code

In order to implement the EU Directive on preventing and combating trafficking in human beings (2011/36/EU)<sup>24</sup>, the crime of ‘human trafficking’ was amended in the Penal Code to reflect the international definition. The reform provided a further differentiation: whereas the offence of human trafficking formerly was only described along with the specific form of exploitation in Sections 232 (human trafficking for the purpose of sexual exploitation) and 233 (human trafficking for the purpose of labour exploitation), the amended version places ‘human trafficking’ in its own category (Section 232 of the Penal Code), then establishes the form of exploitation in the subsequent sections (Section 232a [forced prostitution] and Section 232b [forced labour]).

Whilst ‘human trafficking’ refers to the recruiting, conveying, transferring, harbouring, or receiving of a person in a predicament for the purpose of exploitation (Section 232 of the Penal Code), Sections 232a and 232b now make the manipulation of the victim’s willingness to perform the specified acts punishable by law (the German text now speaks of “veranlassen” (induce) instead of “dazu bringen” (lead to)). The criminal offences of human trafficking for the purpose of begging, committing criminal acts, and organ trafficking, were also added (Section 232 subs. 1 first sentence letters c and d of the Penal Code).

The labour exploitation (Section 233 of the Penal Code) was introduced as a separate criminal offence; the section is intended to facilitate conviction with the aid of objective criteria for exploitation. The amendment came about due to the fact that the old provisions made it necessary to prove that the perpetrator had manipulated the victim’s will; however, victims often were not prepared to testify to such out of fear or because they preferred the exploitation to their living situation in their country of origin (Deutscher Bundestag 2016f: 19) resulting in only few convictions.

<sup>23</sup> Already in 1997 the Joint Working Group on Human Trafficking was established in the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) (KOK 2017).

<sup>24</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

The new criminal offence of 'exploitation of labour' is designed to take this into account, with it now being sufficient to show that the perpetrator "is aware of the victim's predicament, which severely limits the victim's ability to act and make decisions, and takes advantage of this predicament by employing the victim under exploitative conditions" (Deutscher Bundestag 2016f: 20). This provision also includes "that in future cases are included in which the victim takes the initiative to take up exploitative employment out of need and the perpetrator, aware of the victim's predicament, takes advantage of the victim's offer of exploitation" (ibid.).

#### Joint State and Federal Working Group on Trafficking in Women

The Joint State and Federal Working Group on 'Combating Human Trafficking for Labour Exploitation' was established at the German Federal Ministry for Labour and Social Affairs in February 2015 and is tasked with drawing on as many actors from politics and the public as possible to create a comprehensive approach to combat this crime. In addition to Federal Ministries, the Conference of State Labour and Social Affairs Ministers and Senators, the Federal Criminal Police Office, trade unions, employers, and specialised information centres for victims of human trafficking, the Financial Investigation Office for Clandestine Employment also participates in talks on both legal and practical approaches (BMAS 2016b).

#### Extent of human trafficking

Every year since 1999, the Federal Criminal Police Office has released a 'Federal Situation Report on Human Trafficking', containing a condensed outline of the latest situation and developments of human trafficking for sexual and labour exploitation.

In the 2015 reporting year, 364 investigations were completed, registering a total of 573 suspects of human trafficking for sexual exploitation. Compared to the previous year, this is a reduction of 7% in investigations and an increase of 13% in suspects. The number of officially reported victims of human trafficking for sexual exploitation was 416 in 2015; this number only refers to victims in completed investigations by the BKA 2016c: 3 et seq.). A total of 19 investigations of human trafficking for labour exploitation were completed in 2015 (2014: 11), netting 24 suspects (2014: 16). A total of 54 victims of human trafficking for labour exploitation were reported in 2015 (2014: 26). Nearly two-thirds (34) of the victims of labour exploitation in 2015 came from Romania. 81% of all victims were male. They were found primarily in the building industry (18 persons) or in restaurant services (14 persons) (BKA 2016c: 12).

## 2 Prevention

### 2.1 Preventive measures

In the course of the past years numerous measures to curtail illegal employment have been carried out, however these measures mostly addressed illegal employment in general and only to a lesser extent the illegal employment of third-country nationals. Measurements included

i.a. information campaigns directed towards employees and employers, cooperation and partnership agreements between employers' associations, unions and inspection authorities, as well as tax reductions and benefits for the registration of employment contracts in specific sectors of employment, as the following table shows.

**Table 3: Preventive measures and incentives for employers**

Measure/incentives for employers	
<b>Outreach/awareness-raising activities to inform employers</b>	<p>Information for employers on the liability of illegal employment of third-country nationals as well as the advantages of employing third-country nationals legally was disseminated in various ways in different sectors and on different levels (local, regional, federal) in the course of the past years. These information campaigns were organised and financed both by governmental and non-public entities. The following three measures serve as an example:</p> <ol style="list-style-type: none"> <li>1. Flyer of the Central Customs Authority from January 2017 with the Title 'Customs – Against Clandestine Work and Illegal Employment' (Generalzolldirektion 2017j).</li> <li>2. Flyer by the Chamber of Labour Bremen for employers on the advantages of registering domestic aid (Arbeitnehmerkammer Bremen 2014).</li> <li>3. Campaign by the German Pension Fund (Deutsche Rentenversicherung Knappschaft-Bahn-See, in charge of the registration of so-called mini-jobs) calling for the registration of domestic aid. In 30-second humorous television commercials employers were called to register their domestic aid with the Minijob-Zentrale (centre in charge of mini-jobs) (Minijob-Zentrale 2015).</li> </ol>
<b>Information support for employers of third-country nationals</b>	<p>To date no campaigns were carried out with the explicit aim of preventing illegal employment of third-country nationals. However, different institutions offer a wide range of information for employers on possibilities of legal employment of third-country nationals. Most extensively this is done by the Federal Employment Agency and its International Placement Services (ZAV).</p> <p>Party tailored to the needs of employers, they offer information on the requirements, the approval procedures and the legal basis for the different constellations in which third-country nationals can work in Germany – from foreign artists to au-pairs to culinary specialist chefs (Bundesagentur für Arbeit o. J.; Bundesagentur für Arbeit 2015a). Thereby, also innovative and low-threshold information-approaches are provided, such as the 'Migration-Check', an online form that allows the employer to answer questions on the placement and on the possible employee and then directs him or her to the relevant information (Bundesagentur für Arbeit 2013).</p>
<b>Partnership agreements and initiatives by Social Partners</b>	<p>In Germany trilateral partnerships between the Federal Ministry of Finance, employers' associations and trade unions exist on federal level and on level of the Federal States since 2004 in those sectors especially affected by illegal employment. To date, nine such alliances exist on federal level: in the building industry, the meat industry, in the industrial cleaning business, in the freight, transport, and related logistics industries, in the painting and decorating trades, in the dry cleaning and textile care industry, the electrician trade, in the scaffolding trade as well as the hairdressing industry. Further, 13 regional alliances exist, especially in the construction industry and the industrial cleaning business (interview with the Central Customs Authority).</p> <p>The alliances aim to educate employers, employees and the general public about the negative and legal consequences of illegal employment and to ensure and improve the information exchange between the Financial Investigation Office for Clandestine Employment and the employers' associations. They also aim to develop practical approaches to a more effective curtailing of illegal employment through working groups on federal level. The improved information exchange aims at more effective inspections (cf. e.g. BMF 2014). The partners jointly publish leaflets on the inspections carried out by the Financial Investigation Office for Clandestine Employment in different sectors containing information on the inspections themselves, the competencies of the Financial Investigation Office for Clandestine Employment, required documents, the obligation to cooperate and possible infringements as well as their legal consequences (cf. e.g. BMF 2016a). There is no alliance within the hotel and catering industry, however, a joint leaflet is published by the Federal Ministry of Finance, the German Federal Hotel and Restaurant Association (Bundesverband der Deutschen Hotel- und Gaststättenverbände e. V. - DEHOGA) and the Union for Food, Consumption and Restaurants (Gewerkschaft Nahrung-Genuss-Gaststätten - NGG) (Generalzolldirektion 2017e), which is available in German, Chinese, English, Greek, Italian, Serbo-Croatian and Turkish (Deutscher Bundestag 2013: 21).</p>

<p><b>Obligation of the employer to notify the authorities about employing a third-country national</b></p>	<p>A separate procedure for employers to notify authorities of the employment of third-country nationals does not exist. Employers are obliged to register employees from third countries with social security (pursuant to Section 28a of the Fourth Book of the Social Code) and with the taxation office (to request the electronic data necessary for determining the wage tax (German: elektronische Lohnsteuermerkmale)). In general, third-country nationals can only be employed if they dispose of the relevant permission (cf. Section 1.3)</p> <p>Further, since 2009 a general requirement exists to instantly register employment in different risk industries (Section 28a subs. 4 of the Fourth Book of the Social Code). This regulation, that was introduced explicitly to curtail illegal employment, sets out that employers are to register the commencement of employment with the German Pension Fund on the day the employment contract commences or, at the latest, on the day the employment is taken up. This requirement applies to the following sectors: the building industry, the hotel and restaurant industry, the passenger transport industry, the freight, transport, and related logistics industries, the fairground entertainment industry, companies in the forestry sector, the industrial cleaning business, companies involved in the assembly and disassembly of trade fairs and exhibitions, the meat industry (Deutsche Rentenversicherung 2017).</p>
<p><b>Other measures/incentives for employers</b></p>	<p>The Financial Investigation Office for Clandestine Employment has carried out a range of further measures, such as the short term placement of its staff in companies to raise awareness for the work of the Inspectorate (Bundesrechnungshof 2008: 21).</p> <p>Furthermore in certain sectors tax benefits were created to incentivize the registration of employment contracts. This is the case, for example, for employees with minor employment contracts as domestic aids up to €450 (pursuant to Section 8a of the Fourth Book of the Social Code). Private households as employers are thereby especially privileged with respect to contributions: for private households lower employer social security contribution rates apply as within the commercial realm. For so-called minor remunerated employees (“450-Euro-Jobs”), the employer generally pays a lump sum of 5% of the remuneration each for the legal health insurance and the legal pension insurance; commercial employers, on the other hand, pay 10% of the remuneration for health insurance and 15% for pension insurance. Additionally, the process of registration and payment of the contributions is held very simple (cf. Minijob-Zentrale 2017).</p>

**Table 4: Prevention measures and incentives for employees from third countries**

<p><b>Measure/incentive for employees</b></p>	
<p><b>Financial incentives for employees</b></p>	<p>None.</p> <p>The advantages of employment contracts subject to social contribution over illegal employment in general are displayed in several campaigns such as the campaign of the Minijob-Zentrale mentioned above.</p>
<p><b>Information campaigns targeted at employees (potential or current)</b></p>	<p>Information provided by the Central Custom Authority online available in German, English and French (Generalzolldirektion 2017f).</p> <p>The leaflets created by the alliances (see above) are also thought to inform illegally employed persons (esp. the leaflet within the hotel and catering industry that was translated into six languages).</p>
<p><b>Information support for employees from third countries (I)</b></p>	<p><b>Information on legal employment possibilities before departure</b></p> <p>In order to prepare an employment in Germany, the Federal Employment Agency offers a wide range of information. The Virtual Welcome Centre of the International Placement Services (ZAV) offers comprehensive counselling and information on labour market access, on the required residence title, on the legal basis, as well as on further links and publications (Bundesagentur für Arbeit 2016a). Furthermore, the web presence of the Federal Employment Agency presents information for special professional or status groups (i.a. for academics or nursing staff). The information is available in German, English and French (ibid.). The Federal Employment Agency offers a ‘Migration-Check’ for third-country nationals (Bundesagentur für Arbeit 2015b). The online portal ‘Make it in Germany’, which is run jointly by several federal ministries and the Federal Employment Agency, offers detailed information on work and residence provisions, especially for qualified employees (BMWi 2017; also Mayer 2013: 18 et seq.).</p> <p><b>Information on legal employment during regular stay</b></p> <p>For certain groups further information is available. Foreign students can obtain information on the legal conditions of employment for international students in Germany not only from the International Offices of their respective universities, but also from the Deutsche Studentenwerk, the Federal Employment Agency, several ministries and the German Academic Exchange Service (DAAD) (Deutsches Studentenwerk 2017; Bundesagentur für Arbeit 2014; BMI/Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration/DAAD 2012). In the past two years, information and counselling for refugees has been broadened so that today different institutions on local, regional and federal level offer information on legal access to the labour market for this group (i.a. the Federal Employment Agency in German, English, French and Arabic; Bundesagentur für Arbeit 2016b).</p>

<p><b>Information support for employees from third countries (II)</b></p>	<p><b>Information and counselling for irregularly-staying third-country nationals</b>  Different offers of information and counselling exist for irregularly-staying and illegally employed third-country nationals living in Germany. They are mostly provided by trade unions and are of local scope, as they aim for providing counselling and consultation on the ground. The two following consulting services may serve as an example:</p> <ol style="list-style-type: none"> <li>1. 'Migration and Work (MigrAr)' of the German Trade Union Confederation (DGB) in Hamburg. The target group is reached largely by word of mouth, but in parts also addressed by a flyer that explains the consulting services of MigrAr in seven languages (DGB 2015). The main issue of the ca. 30 consulting cases per year is unpaid remuneration. Together with the person seeking advice, the staff of MigrAr tries to claim the outstanding remuneration by establishing direct contact with the employer, sending written assertions or filing lawsuits with the responsible labour court (interview with MigrAr).</li> <li>2. Working group 'Undocumented Labour' of the United Services Trade Union (ver.di) in Berlin. The consulting is offered by volunteers within the union and takes place twice a month. Since the creation of the working group in 2009 up until 2015 it has counselled more than 40 cases, unpaid wages being the prevalent issue here as well (ver.di 2015).</li> </ol>
<p><b>Other measures/incentives for employees</b></p>	<p>Generally speaking, all employees are obliged to notify different government authorities when changing their workplace. In the case of third-country nationals, whose residence title is attached to a specific employment, a specific sector or a specific employer, there normally exists the requirement to apply for changing their employer or their sector. This application is filed with the local foreigners authority that draws its decision on the application in coordination with the Federal Employment Agency (cf. Land Berlin 2017).</p>
<p><b>Offers of information and counselling for victims of human trafficking/labour exploitation</b></p>	<p>For victims of human trafficking for labour exploitation and/or victims of exploitation of labour there exists a wide range of information and counselling services nationwide with specialized counselling centres run by i.a. the welfare associations and the trade unions. Many such centres address victims of human trafficking at large (e.g. also for sexual exploitation). The biggest umbrella organization is the German Network and Coordination Office Against Trafficking In Human Beings (KOK e.V.), which is funded by the Federal Government and represents 37 women's organizations and specialized counselling centres (KOK n.d.).</p> <p>Further, from 2013 to 2015 the Alliance against Human Trafficking for Labour Exploitation existed. The aim of the project was to connect and support all relevant actors in the field of human trafficking for labour exploitation. To this end the alliance published i.a. an educational module that aims to educate participants of integration and language courses about their labour rights and to sensitize them for unlawful working conditions (Bündnis gegen Menschenhandel zur Arbeitsausbeutung 2014). The alliance also published work-time calendars that should urge people affected by labour exploitation to note down their working hours in order to document their being exploited, and that at the same time informed them in simple language about their labour rights. The calendars were published in 13 languages (Bündnis gegen Menschenhandel zur Arbeitsausbeutung 2013).</p>

## 2.2 Risk assessments

Risk assessments and the connected in-depth inspections are also among the preventive measures against illegal employment. The Financial Investigation Office for Clandestine Employment changed its mode of operation in early 2015 and adopted a more risk-oriented approach. To this aim the Central Customs Authority VII (Financial Investigation Office for Clandestine Employment) compiles central risk assessments that determine the risk of illegal employment in certain sectors and serve as a basis for the inspection activities of the main customs offices. According to the Federal Ministry of Finance this change in strategy has led to a decrease of the number of employers inspected, but however, to an increase of the number of cases opened due to illegal employment. This is seen as a success (Bundesregierung 2016).

The risk analysis is thereby not specifically geared towards regularly or irregularly-staying third-country nationals.

### Methods and tools, authorities involved and use in practice

The risk assessments are compiled with insights from former inspections, external tip-offs as well as data from other authorities (e.g. the German Pension Fund). A main indicator is also the number of employees of a company or within a sector (interview with the Central Customs Authority).

After compilation, the assessments are made available to the main customs offices, to allow for easier decision-making on the local level. The main customs offices also create assessments for their respective regional context.



# 3 Identifying illegal employment of third-country nationals

There is no governmental entity in Germany that is explicitly responsible for identifying illegal employment of third-country nationals, whether as an independent agency or as a unit within the agencies responsible for curtailing illegal employment. Illegally employed third-country nationals are identified in the course of general inspections for illegal employment due to the holistic inspection approach (interview with the Central Customs Authority).

## 3.1 Inspecting agencies

In Germany, various actors are responsible for inspecting for illegal employment in general. Section 2 of the Act to Combat Clandestine Employment sets forth the inspection tasks of the Customs Authorities and Sections 3 and 4 its powers. Other actors can also uncover illegal employment as part of their regular inspection duties.

### 3.1.1 Inspections under the Act to Combat Clandestine Employment

#### Customs Authority - Financial Investigation Office for Clandestine Employment

Until the beginning of the 1990s, the local employment offices were solely responsible for inspecting businesses. In 1992, inspection duties for curtailing illegal employment were also transferred to the Customs Authority. In 1997, the Act Amending the Third Book of the Social Code gave customs agents the same rights and duties as police officers, effectively equalling their status to that of investigators of the public prosecutor's office. This eliminated the need to notify the police when there was suspicion of wrongdoing during inspections. In 2004, the Third Act for Modern Services in the Labour Market (Hartz III) grouped these inspection duties once again and transferred them in their entirety to the Customs Authority (Junkert/Kreienbrink 2008: 52). Within the Customs Authority, the Illegal Employment Investigation division was expanded to form the Financial Investigation Office for Clandestine Employment. Personnel was transferred to the Office from the labour market inspection, the German Pension Fund, state tax authorities, and the police (Deutscher Bundestag 2014c: 20).

The Financial Investigation Office for Clandestine Employment is under the supervision of Department VII of the Central Customs Authority and is headquartered in Cologne. The Financial Investigation Office for Clandestine Employment units are present in 41 of the 43 main customs offices across the country. Operations are conducted at a total of 113 locations.

The Financial Investigation Office for Clandestine Employment employs a total of approx. 6,700 people (Deutscher Bundestag 2016g: 309) in two departments: approx. 85% of employees work in Department E (inspections and investigations), also in the field. These employees are tasked with inspecting workplaces and subsequent follow-up investigations. The other approx. 15% of the personnel work in Department F (penalties), processing regulatory offence procedures regarding illegal employment. None of these employees work in the field (interview with the Central Customs Authority). Within the inspections and investigations department, teams can be formed to pool sector-specific knowledge and skills to facilitate more targeted inspections of specific sectors. Each main customs office decides whether to form such teams. Many main customs offices have teams for, e.g., the building or cleaning services industries.

During their inspections pursuant to Section 2 subs. 1 of the Act to Combat Clandestine Employment, the Financial Investigation Office for Clandestine Employment must determine “whether:

1. the obligations pursuant to Section 28a of the Fourth Book of the Social Code resulting from the works or services rendered are being or were met,
2. social security benefits pursuant to the Second and Third Book of the Social Code or benefits pursuant to the Partial Retirement Act are being or were unlawfully received due to the works or services,
3. employer information substantial for social security benefits pursuant to the Third Book of the Social Code was verified,
4. Foreigners are not or were not
  - a) employed under less favourable working conditions than comparable German workers in violation of Section 283 subs. 1 of the Third Book of the

Social Code or Section 4 subs. 3 first and second sentence of the Residence Act.

- b) gainfully employed to provide services or works in violation of Section 4 subs. 3 first and second sentence of the Residence Act”

(Section 2 subs. 1 first sentence of the Act to Combat Clandestine Employment).

Furthermore, the Financial Investigation Office for Clandestine Employment determines whether “working conditions are being or were met pursuant to the Act Regulating a General Minimum Wage, the Posted Workers Act, and Section 10 subs. 5 of the Act on Temporary Employment Businesses” (ibid.). This is why the inspections of the Financial Investigation Office for Clandestine Employment pursuant to the Act to Combat Clandestine Employment are always also inspections pursuant to these three laws within the frame of the holistic inspection approach.

There is no strategic focus on identifying illegally employed third-country nationals, which is why no personnel have been specifically appointed this task. Nevertheless, if there are indications of higher illegal employment of third-country nationals at a business, the Financial Investigation Office for Clandestine Employment can conduct specific inspections. In these cases, the local foreigners authority can either be included in the on-site inspection or at least be notified of the pending inspection (interview with the Central Customs Authority). Section 3.4 describes in detail how the Financial Investigation Office for Clandestine Employment conducts on-site inspections.

#### State tax authorities

The state tax authorities are responsible for determining whether tax obligations were met, although the Financial Investigation Office for Clandestine Employment is authorised to participate in these audits (Section 2 subs. 1 second and third sentence of the Act to Combat Clandestine Employment). Within the state tax authorities, the revenue offices responsible for taxation and the tax fraud investigation office are primarily responsible for curtailing illegal employment (cf. Section 3.4.5). The tax fraud investigation office uncovers and investigates cases involving tax fraud, investigates tax crimes and violations of tax regulations, and determines the tax bases during these proceedings (Section 208 of the Fiscal Code). In some Federal States, the tax fraud investigation office is a part of the revenue office, whilst other federal states have set up separate revenue offices for tax fraud investigation (BMF 2016b). However, inspections by federal state tax authorities do not particularly focus on identifying the illegal employment of third-country nationals.

#### Authorities responsible under State Law for prosecuting and punishing violations to trade regulations

Responsibility for prosecuting and punishing trade violations is governed by State Law, meaning different Federal States have entrusted the same inspection duties to different authorities (see Table 5).

**Table 5: Authorities responsible under state law for prosecuting and punishing regulatory offences pursuant to the Act to Combat Clandestine Employment**

Federal State	Proper authority
Baden-Württemberg	District offices, district cities, administrative districts, and municipalities in metropolitan areas
Bavaria	District administrative authorities
Berlin	Local borough offices and the state criminal police (for monitoring entrepreneurs and prosecuting regulatory offences uncovered whilst monitoring business)
Brandenburg	District regulatory authorities
Bremen	Bremen City Administration, Bremerhaven police
Hamburg	Hamburg-Mitte borough office, Consumer Protection Office (M/VS 14), and Central Clandestine Employment Control
Hessen	Administrative district councils, magistrate in urban districts
Mecklenburg-Western Pomerania	District administrators and mayors
Lower Saxony	Administrative districts, urban districts, independent cities, and the independent metropolitan areas of Bad Pyrmont and Norden
North Rhine-Westphalia	City regulatory authorities in large non-district cities and district cities, otherwise district regulatory authorities; it is possible for neighbouring district cities/districts and urban districts to perform the task together; it can also be the responsibility of the district
Rhineland-Palatinate	District administrations, city administrations of urban districts and large district cities
Saarland	Administrative districts, District of Saarbrücken, and City of Saarbrücken
Saxony	Administrative districts and urban districts
Saxony-Anhalt	Administrative districts and urban districts
Schleswig-Holstein	District administrators, mayors in cities with over 20,000 inhabitants
Thuringia	State administration office

Sources: Section 5 subs. 4 of the Anordnung über Mitteilungen in Zivilsachen (Memorandum on the Order on Communication in Civil Matters) (MiZi). NRW: Ministerium für Wirtschaft, Energie, Industrie, Mittelstand und Handwerk des Landes Nordrhein-Westfalen (2015): Guide for Regulatory Authorities Tasked with Prosecuting and Punishing Clandestine Employment in North Rhine-Westphalia, p. 1. Berlin: Section 1 subs. 2 of the Verordnung über sachliche Zuständigkeiten für die Verfolgung und Ahndung von Ordnungswidrigkeiten in Berlin (Ordinance on Competences for Prosecuting and Punishing Regulatory Offences in Berlin) (ZustVO-OWiG) and no. 23 subs. 6 of the Allgemeines Gesetz zum Schutz der öffentlichen Sicherheit und Ordnung in Berlin (General Act Protecting Public Safety and Order in Berlin) (ASOG Bln).



Pursuant to Section 2 subs. 1a of the Act to Combat Clandestine Employment, these authorities are tasked with determining “whether the requirement to register an independent business in a standing trade was met (Section 14 of the Trade Regulation Act), the required itinerant trade licence was obtained (Section 55 of the Trade Regulation Act), or a licensed trade is being independently practised without being registered in the Trade Register. State authorities may punish violations through a regulatory offence procedure” (Deutscher Bundestag 2013: 22). These authorities are not focused on identifying illegally employed third-country nationals.

### 3.1.2 Inspections by other entities

Other entities that can uncover illegal employment but whose inspections are not regulated by the Act to Combat Clandestine Employment are the police, social security providers, and the Federal Employment Agency.

#### Police

The Federal Police and State Police are required to forward indications of illegal employment discovered during an investigation to the Financial Investigation Office for Clandestine Employment. Investigations of organised crime and human trafficking often lead to cross-overs into the sphere of illegal employment.<sup>25</sup>

#### Social security providers

The German Pension Fund is solely responsible for the inspections of businesses by social security providers. Its inspection service is tasked pursuant to Section 28p of the Fourth Book of the Social Code with inspecting whether employers “duly fulfil their disclosure requirements and other obligations pursuant to the Fourth Book of the Social Code related to the total social security contribution [...]” Inspections occur at least every four years. Any illegal employment uncovered during an inspection is forwarded to the Financial Investigation Office for Clandestine Employment. In addition to these regular employer inspections, the inspection service is also involved when the Financial Investigation Office for Clandestine Employment uncovers violations of disclosure, contribution, or documentation requirements under social security law during their inspections (cf. Section 3.2.1).

Controlling for illegal employment in general or of third-country nationals in particular is not the primary focus of the German Pension Fund’s inspection service. However, the German Pension Fund did establish a project team that composed a manual on the legal aspects of illegal employment for the inspection service (interview with the German Pension Fund).

#### Federal Employment Agency/Job Centres

Anyone in Germany receiving social security benefits, i.e., benefits for promoting employability (pursuant to Chapters 3 and 4 of the Third Book of the Social Code), benefits for labour market integration, or subsistence benefits (pursuant to Chapter 3 of the Second Book of the Social Code), must “disclose all facts relevant to receiving benefits and, at the request of the proper social security provider, consent to the disclosure of these facts by third parties as necessary” (Section 60 subs. 1 first sentence no. 1 of the First Book of the Social Code), and “immediately report changes in circumstances relevant to receiving benefits or regarding which statements have been submitted to receive benefits” (Section 60 subs. 1 second sentence of the First Book of the Social Code). Employment agencies and Job Centres are permitted to extensively review information provided by the recipients of benefits in order to curtail the abuse of social security benefits (cf. Section 3.4.5), however, there is no particular focus on third-country nationals receiving benefits under the Social Code. Furthermore, pursuant to Section 67e of the Tenth Book of the Social Code, the Federal Employment Agency is responsible for reviewing information on social security benefits as part of an inspection by the Financial Investigation Office for Clandestine Employment, and to that end operates a hotline for the Financial Investigation Office for Clandestine Employment (cf. Section 3.2.1).

#### Inspection entities for specific sectors

There are no entities in Germany responsible for inspecting specific economic sectors. The Financial Investigation Office for Clandestine Employment focuses its inspection on all of the risk sectors listed in Section 2a with more focus given to individual sectors depending on the circumstances. Individual main customs offices may create teams on specific sectors (cf. Section 3.1.1).

## 3.2 Legal basis for co-operation and organisation

Various actors cooperate on the municipal, state, and federal level to curtail illegal employment, with a difference between operational and conceptual/coordinating cooperation. The Financial Investigation Office for Clandestine

<sup>25</sup> The Berlin State Police are an exception, since, by state law, they are responsible for prosecuting violations of trade regulations pursuant to the Act to Combat Clandestine Employment, making them directly responsible for combating illegal employment (Land Berlin - Senatsverwaltung für Integration, Arbeit und Soziales n.d.).

Employment is responsible for the tasks enlisted in Section 2 subs. 1 of the Act to Combat Clandestine Employment. This cooperation is described below from their point of view.

### 3.2.1 Operational cooperation

#### Support offices

Cooperation between various authorities to curtail illegal employment is governed by law in Germany, with the Financial Investigation Office for Clandestine Employment being assisted by ‘cooperating authorities’ pursuant to Section 2 subs. 2 of the Act to Combat Clandestine Employment. These offices are:

- Revenue offices
- The Federal Employment Agency
- The Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway
- Collection offices (Section 28i of the Fourth Book of the Social Code, i.e., insurance companies)
- Pension insurance providers
- Accident insurance providers
- Joint institutions and authorised municipal authorities pursuant to the Social Code (i.e., welfare providers), with the Federal Employment Agency providing centralised IT services pursuant to Section 50 subs. 3 of the Second Book of the Social Code
- The proper authorities pursuant to the Act on Benefits for Asylum Applicants
- The agencies listed in Section 71 subs. 1-3 of the Residence Act (i.e., the local foreigners authorities, German embassies and German consulates general, and the Federal Police)
- The German Federal Office for Goods Transport
- The authorities responsible authorising and controlling non-scheduled transportation services pursuant to Section 46 of the Passenger Transportation Act
- The state authorities responsible for occupational health and safety
- Federal and state law enforcement authorities (by request for individual cases)
- The authorities responsible for prosecuting and punishing trade violations pursuant to the Act to Combat Clandestine Employment under state law
- The agencies responsible for registering businesses pursuant to Section 14 of the Trade Regulation Act

Cooperation between these offices is aimed at “a) the mutual reporting of specific indications of violations outside of the investigating authority’s jurisdiction, b) the coordination of operations, and c) the execution of joint operations at large workplaces or companies under inspection” (Generalzolldirektion 2017g). Section 6 of the Act to

Combat Clandestine Employment is the legal basis for this mutual reporting. Section 2 subs. 3 third sentence of the Act to Combat Clandestine Employment, establishes the possibility of joint field inspections between the Financial Investigation Office for Clandestine Employment and the cooperating authorities. The Financial Investigation Office for Clandestine Employment also works with other agencies and offices, such as registry offices, trade offices, or the Building Industry Social Security Fund (Deutscher Bundestag 2013: 4). Personal cooperation between the employees of the authorities involved plays a crucial role, especially at the local level. This cooperation is promoted, e.g., through joint workshops or training courses. “[A] regular sharing of experiences between the Customs Authorities and the support offices at all levels helps analyse, discuss, and rectify issues with cooperation” (Deutscher Bundestag 2013: 5).

#### Collaboration agreements

Statutory cooperation with the cooperating authorities is implemented in practice through collaboration agreements between the Federal Ministry of Finance and these authorities. “They constitute the legal basis and purpose of the cooperation, duties, and powers of the authorities involved and their organisational structure. They also contain provisions for communication channels and making contact at the local level” (BMF 2008: 4 et seq.). The agreements may also contain provisions regarding joint inspections in certain areas, such as joint inspections with the Federal Employment Agency of foreign and domestic temporary employment businesses in Germany pursuant to the Act on Temporary Employment Businesses (Deutscher Bundestag 2014a: 17). Many agreements set forth an annual meeting to exchange information (interview with the Central Customs Authority; cf. Deutscher Bundestag 2013: 19 et seq.).

Due to the federal structure of Germany, there are agreements at both the federal and state level, depending on the location of the authority (interview with the Central Customs Authority). As of the Federal Government’s last reporting year on the Act to Combat Clandestine Employment in 2013<sup>26</sup>, the Ministry of Finance had collaboration agreements with seven cooperating authorities or their respective supervisory state ministries:

- The state tax authorities
- The trade employer's liability insurance associations

26 This being the most recent year the Federal Government released a report on the German Act to Combat Clandestine Employment comprehensively documenting the current state of affairs on the subject. The designated reporting period is four years, meaning the next report be published in 2017 (cf. Deutscher Bundestag 2013).

- The German Pension Fund
- The trade authorities and the authorities responsible under state law for clandestine employment in crafts and trade
- The Federal Employment Agency
- The Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway
- The state authorities responsible for occupational health and safety (Deutscher Bundestag 2013).

No collaboration agreement was concluded with the foreigners authorities (with the state interior ministries as negotiating partners), but rather guidelines for cooperation were established.

#### Evaluation of cooperation

Guidelines and agreements are regularly evaluated and modified by the Federal Ministry of Finance and each partner. For the Financial Investigation Office for Clandestine Employment, the Central Customs Authority surveys the 113 offices of the Financial Investigation Office for Clandestine Employment regarding their experiences with cooperation. The responses are used to draw conclusions regarding best practice and areas of improvement (interview with the Central Customs Authority; Deutscher Bundestag 2013: 20).

#### Information exchange between various actors

The exchange of information is at the centre of operational cooperation between the Financial Investigation Office for Clandestine Employment and the cooperating authorities. The Financial Investigation Office for Clandestine Employment and the cooperating authorities are required to report the results of their inspections to one another and to provide information (including data on personal information) necessary for each authority to perform its duties (Section 6 subs. 1 first sentence of the Act to Combat Clandestine Employment).

##### 1. Social security

For example, if the Financial Investigation Office for Clandestine Employment uncovers violations of disclosure, contribution, or documentation requirements under social security law during an inspection, they must report them to the proper pension insurance provider to determine the amount of lost contributions. To ensure the necessary protection of social (security) information, a secured communication channel, called the Bidirectional Data Channel, has been set up between the Financial Investigation Office for Clandestine Employment and the pension insurance providers (interview with the German Pension Fund).

Inversely, pension insurance providers notify the Financial Investigation Office for Clandestine Employment if illegal employment is uncovered during a routine inspection.

##### 2. Trade offices

Trade offices and the start-up departments of tax assessment offices are other authorities that cooperate with the Financial Investigation Office for Clandestine Employment on an operational level to report violations of craft and trade laws, particularly in regard to bogus self-employment. If there are indications that self-employment is being feigned, the proper authorities report this to the Financial Investigation Office for Clandestine Employment and vice-versa.

##### 3. Law enforcement

The Act to Combat Clandestine Employment emphasises the mutual exchange of information between the Financial Investigation Office for Clandestine Employment and law enforcement, in particular, requiring them to “exchange the information necessary to prevent and prosecute crimes and regulator offences relating to any of the inspection areas specified in Section 2 subs. 1, [of the Act to Combat Clandestine Employment]” (Section 6 subs. 1 second sentence of the Act to Combat Clandestine Employment). Protection of social (security) information plays a decisive role in the transfer of data from the Financial Investigation Office for Clandestine Employment to law enforcement. The Financial Investigation Office for Clandestine Employment may only transfer personal data if “there are actual indications that the information is necessary to prevent and prosecute crimes or regulatory offences relating to any of the inspection areas specified in Section 2 subs. 1 [of the Act to Combat Clandestine Employment]” (Section 6 subs. 1 third sentence of the Act to Combat Clandestine Employment).

##### 4. Foreigners authorities

If a review of a third-country national reveals indications of a violation of residence law and the available documents have been confiscated, the Financial Investigation Office for Clandestine Employment is required to send these documents immediately to the local foreigners authority (Section 6 subs. 3 second sentence of the Act to Combat Clandestine Employment). Customs authorities are also required to report indications of illegal employment of non-German nationals to the proper authorities under Section 71 of the Residence Act (Section 18 subs. 2 of the Act on Temporary Employment Businesses).

##### 5. Federal Employment Agency

Since 2012, the Federal Employment Agency has

been the central information office for telephone enquiries by the Financial Investigation Office for Clandestine Employment, enabling it to directly receive information during on-spot inspections on whether an individual is receiving benefits under the Second Book of the Social Code and, if so, from whom (Deutscher Bundestag 2013: 5). The Financial Investigation Office for Clandestine Employment is also authorised to automatically retrieve the data of the Federal Employment Agency on issued EU work permits and approvals for employment, as well as on employees from third countries employed under service contract quotas, as long as they are used to conduct inspections pursuant to the Act to Combat Clandestine Employment, and prosecute crimes and regulatory offences (Section 6 subs. 2 first sentence of the Act to Combat Clandestine Employment).

#### Joint investigation teams

At the state level, the Financial Investigation Office for Clandestine Employment can form joint investigation teams with other authorities. These so-called Joint Investigation Teams Labour are partnerships between the Customs Authority and other law enforcement authorities, such as state police forces, the Federal Police, and state tax authorities (Wirth 2011: 243). They may be necessary for certain cases (cf. Generalzolldirektion 2015) or formed at the state level for prolonged cooperation. These formal agreements help “[combine] investigations by tax fraud investigation offices and the Financial Investigation Office for Clandestine Employment more easily with the consent of the public prosecutor to avoid parallel investigations by both authorities and concentrate forces” (Generalzolldirektion 2016a).

#### Joint inspections

The Financial Investigation Office for Clandestine Employment can conduct joint inspections with the cooperating authorities (Section 2 subs. 2 third sentence of the Act to Combat Clandestine Employment) in which the Financial Investigation Office for Clandestine Employment controls for illegal employment and the other authorities involved control for violations in their jurisdiction. However, these joint inspections do not affect the regulations on reporting and cooperation (Section 2 subs. 2 third sentence of the Act to Combat Clandestine Employment).

Joint inspections are intended to be conducted especially by the Federal Employment Agency and Financial Investigation Office for Clandestine Employment as part of the monitoring of foreign and domestic temporary employment businesses in Germany pursuant to the Act on

Temporary Employment Businesses (Deutscher Bundestag 2014a: 17): “The employment agencies routinely inform the Customs Authority of planned inspections. The Financial Investigation Office for Clandestine Employment routinely invites the employment agencies to inspections” (Deutscher Bundestag 2014a: 22 et seq.).

The police are mostly included if an inspection is potentially dangerous or when a particularly large perimeter must be secured. With the illegal employment of third-country nationals in particular, the Financial Investigation Office for Clandestine Employment may call on the police during inspections if facts are discovered that fall under police jurisdiction or their expertise is required, such as to review documents when forgery is suspected (cf. Section 6 subs. 4 of the Act to Combat Clandestine Employment).

Joint inspections with tax authorities, especially tax fraud investigation offices, can occur in larger cases when it can be assumed that illegal employment also involves tax evasion, such as is the case with organised illegal employment in the building industry. The Financial Investigation Office for Clandestine Employment can also conduct inspections along with the local foreigners authority if there are indications that a particularly high number of cases pertaining to residence law will be uncovered (interview with the Central Customs Authority).

#### Joint days of action

In order to better educate the public on illegal employment, these organisations can organise joint days of action in which as many organisations as possible conduct joint inspections in a federal state or a region that are centrally coordinated and prepared for media impact (Landtag von Sachsen-Anhalt 2008: 68).

### 3.2.2 Coordination on federal and state level

Aside from operational cooperation to exchange information and conduct inspections, there are various bodies at the level of the Federal States (state level) and federal level that work on approaches to and on coordinating the curtailing of illegal employment.

#### Federal level

The Federal Ministry of Finance, as the lead ministry for combating clandestine work and illegal employment at the federal level, regularly exchanges information with other federal ministries (Ministry for Economic Affairs and Energy, Federal Ministry of Labour and Social Affairs) and the state ministries responsible for curtailing illegal employment on a national platform known as the Federal and State Information Exchange for Curtailing

Clandestine Employment, which is also used to collaborate with representatives from non-governmental organisations (interview with the Berlin Senate Department for Integration, Labour and Social Affairs).

#### State level

Various departments in the Federal States are tasked with curtailing illegal employment. Some federal states have established coordination offices to coordinate cooperation by organising regular exchange forums at the state level. In Berlin, for example, an initiative by the 'Central Information Office for Curtailing Clandestine and Illegal Employment in the State of Berlin' organises a workshop at least once per year called 'Prosecuting and Punishing Clandestine Employment in the State of Berlin' where the various actors meet. The working group 'Combating Clandestine and Illegal Employment in Berlin and Brandenburg' also meet at least once per year to consult bi-stately on specific key issues (interview with the Berlin Senate Department for Integration, Labour and Social Affairs).

Numerous Federal States have also established coordination groups that are not supervised by the proper state ministries, but "primarily serve to allow the proper federal and state authorities to exchange information and experience, help identify points of contact, and discuss specific issues" (Deutscher Bundestag 2013: 5). A specific example is the Coordinating Offices to Curtail Illegal Employment in Hessen (German: Koordinierungsstellen zur Bekämpfung der illegalen Beschäftigung, KIB), which bring together representatives from labour administration, pension insurance providers, employer's liability insurance associations, customs and tax authorities, city administrations, trade offices, chambers of trade, and the police at regular coordination meetings under the auspices of the various public prosecutor's offices (Meissauer 2015: 10).

### 3.3 Identifying illegally employed third-country nationals

Illegally employed third-country nationals are not specifically identified, but identified rather during general inspections by the above mentioned authorities.

### 3.4 Inspections

The Financial Investigation Office for Clandestine Employment carries out its inspections by routine inspections, on the one hand, and on the other hand by so-called in-depth inspections at the federal and regional level. The inspections by the offices of the Financial Investigation

Office for Clandestine Employment are derived from the mandate to inspect and investigate (Sections 2 and 14 of the Act to Combat Clandestine Employment). The inspections are carried out mostly through on-site inspections pursuant to Section 2 of the Act to Combat Illegal Employment.

In-depth inspections are conducted nationally, regionally, or locally, and are planned long in advance, involving every office of the Financial Investigation Office for Clandestine Employment (nationwide or in the region in question) and focus on companies in a specific sector over at least two days (interview with the Central Customs Authority).

#### 3.4.1 Selecting employers for inspection

The main customs offices generally plan routine inspections and base them on local or regional circumstances (e.g., large cities or more rural areas, sectors of regional or local importance, etc.). The in-depth inspections are largely based on risk analyses by the German Central Customs Authority.

#### 3.4.2 Inspection planning

Both in-depth and routine inspections are extensively planned by the local offices of the Financial Investigation Office for Clandestine Employment. Information from risk analyses and data provided by other authorities play an important role. Inspections are conducted on-site at the workplace and the results are subsequently evaluated (further inspection, criminal or regulatory offence procedures, consulting with other authorities, reporting information). These results are then factored into further inspection planning (interview with the Central Customs Authority).

#### 3.4.3 Reports and tip-offs

The inspections of the Financial Investigation Office for Clandestine Employment are typically unannounced and do not require reasonable grounds, although they can be conducted on suspicion of wrongdoing (cf. BMF 2016a). An inspection on suspicion of wrongdoing can be conducted based on a tip-off submitted by mail, e-mail, or telephone. Tip-offs from the public are sent to the local Financial Investigation Office for Clandestine Employment offices and are compiled centrally at each office. The first step is to obtain additional information to determine which tip-offs could actually be legitimate. If a tip-off does not offer enough specific information or cannot be pursued further, it may be decided that an on-site inspection for illegal employment would not be worthwhile. This decision is at the discretion of the main customs



office. For logistical reason, not all tip-offs can be pursued; for example, around 400 tip-offs of illegal employment are received in Cologne each month, and around 1,000 in Berlin (interview with the Central Customs Authority).

Illegal employment can be reported directly to any of the 43 main customs offices. Current privacy regulations are explicitly observed and reports can be submitted anonymously (Generalzolldirektion 2017h). There is no central hotline for reporting cases of illegal employment.

Some federal states allow extensive reporting forms to be completed on their websites, which are then subjected to preliminary review before being forwarded to the proper enforcement authorities.<sup>27</sup>

#### 3.4.4 Decision to conduct an inspection

In general, decisions to conduct routine inspections lie with the main customs offices or the local offices of the Financial Investigation Office for Clandestine Employment, which then conduct the inspections themselves. The Central Customs Authority is always involved when one or more main customs offices plan large-scale operations. It also coordinates between multiple offices of the Financial Investigation Office for Clandestine Employment when one office requires support from other offices to conduct large-scale inspections. Department VII of the Central Customs Authority is also involved when extensive public or media reaction is to be expected (e.g., when inspecting charitable organisations).

#### 3.4.5 Inspection powers, conducting inspections, and reporting information

##### Inspecting employees

The Financial Investigation Office for Clandestine Employment and the cooperating authorities pursuant to Section 2 subs. 2 of the Act to Combat Clandestine Employment are authorised to enter the offices and property of an employer, a business contracting a self-employed individual, and a temporary employment business (as part of an inspection pursuant to Section subs. 1 no. 5 of the Act to Combat Clandestine Employment)<sup>28</sup> dur-

ing an inspection (Section 3 subs. 2 of the Act to Combat Clandestine Employment). This authorisation applies during the working hours of anyone employed at these locations, with no distinction made in the individuals under inspection between immediate employees and employees of third parties who are present at the time (Section 3 subs. 2 of the Act to Combat Clandestine Employment). In particular, the Financial Investigation Office for Clandestine Employment is authorised:

1. “to collect information from these individuals regarding their employment relationships or activities, and
2. inspect documents on their person of which can be assumed that they contain or allow the deduction of information on the extent, nature, or duration of their employment or activities” (Section 3 subs. 1 of the Act to Combat Clandestine Employment).

The Financial Investigation Office for Clandestine Employment and the Cooperating authorities are also authorised “to review the personal information of persons active in the offices or on the property of an employer, a client, or a third party, or a temporary employment business as part of an inspection pursuant to Section 2 subs. 1 no. 5 [inspection determining whether working conditions are being or were met pursuant to the Act Regulating a General Minimum Wage, Workers Act, and Section 10 subs. 5 of the Act on Temporary Employment Businesses, J. T.]. For this purpose, they may stop the [...] person, ask for personal information (first name, family name, name at birth, place and date of birth, occupation, residence, address, and nationality) and demand for them to produce identification for inspection” (Section 3 subs. 3 of the Act to Combat Clandestine Employment).<sup>29</sup> Agents are also authorised under Section 67e first sentence of the Tenth Book of the Social Code to ask for additional social (security) information, such as:

1. whether and what kind of social security benefits under the Social Code or benefits under the Act on Benefits for Asylum Applicants the individual in question is receiving, and from which provider,
2. with what health insurance company the individual is insured or whether the individual is self-employed,
3. whether and what type of contributions under the Social Code the individual is making, and

<sup>27</sup> Berlin has an online reporting form of this type on the website of the Senate Department for Integration, Labour and Social Affairs: <https://www.berlin.de/sen/arbeit/berlinarbeit-ziel-/schwarzarbeitsbekämpfung/anzeigenaufnahme/formular.337738.php> (15 February 2017).

<sup>28</sup> Inspections determining whether working conditions are being or were met pursuant to the Act Regulating a General Minimum Wage, the Posted Workers Act, and Section 10 subs. 5 of the Act on Temporary Employment Businesses.

<sup>29</sup> Section 3 subs. 5 of the Act to Combat Clandestine Employment also stipulates that customs agents are permitted to stop and inspect vehicles. The provision also stipulates that the Customs Authority must notify the state law enforcement agencies about large-scale inspections.

4. whether and what foreign workers the employer is employing with the approval required for their activity and not under less favourable working conditions than comparable German employees.

This information may be forwarded directly to the appropriate authorities (benefits provider, collection office, and/or Federal Employment Agency), where it must be immediately reviewed (Section 67e second sentence of the Tenth Book of the Social Code).

In general, the Financial Investigation Office for Clandestine Employment may act within the limits of its powers pursuant to the Act to Combat Clandestine Employment only if they encounter individuals at who are working. Part of a proper preparation of an inspection is exploring the place of action. Following means of transportation to the place of action and/or assigning means of transportation to possible employers/contractors can, if necessary, come into consideration with a crowd of persons (e.g., so-called labourers looking for under-the-table work). Since questioning can only be held at the place of employment, it must be reviewed on-spot whether the statements made are plausible and coherent, and the documents required by law are present. Inspections of private residences are an exception in regard to the right of entry: since it infringes on basic rights (Article 13 of German Basic Law), entry requires either the consent of the occupant or a court order (interview with the Central Customs Authority).

**Inspecting company documents**

Company documents can only be inspected during business hours (not during employee working hours). The Financial Investigation Office for Clandestine Employment and the cooperating authorities pursuant to Section 2 subs. 2 of the Act to Combat Clandestine Employment are authorised to inspect payroll and registration documents, ledgers, and other company documents containing information on the extent, type, or duration of employment arrangements, and on compensation of works or services. This power applies not only to documents on regular employees, but to documents regarding compensation of temporary employees, as well (Section 4 subs. 1 and 2 of the Act to Combat Clandestine Employment). If the client is not an entrepreneur as defined in Section 2 of the Value Added Tax Act, the Financial Investigation Office for Clandestine Employment may also inspect their relevant documents (Section 4 subs. 2 of the Act to Combat Clandestine Employment).

Section 5 of the Act to Combat Clandestine Employment governs the duties of employers, employees, clients, and third parties to tolerate and cooperate with the

inspections of the Financial Investigation Office for Clandestine Employment by allowing an inspection of the offices and furnishing all necessary documents. However, information may be withheld if disclosure would serve to incriminate the person being questioned or a related party (Section 5 subs. 1 third sentence of the Act to Combat Clandestine Employment).

Non-German nationals are specifically required to furnish their passport, passport substitute, or identification, along with their residence title, the certificate showing that their deportation has been temporarily suspended, or permission to remain pending the asylum decision at the request of agents; if there are indications of violations of residence requirements, the documents may be confiscated by agents to be forwarded to the local foreigners authority. In this instance, the person in question must be issued a certificate stating the documents were confiscated and to which foreigners authority they shall be forwarded. The certificate also indicates that the person in question must appear immediately before the proper authorities, where the next steps are clarified (Section 5 subs. 1 fourth to eighth sentence of the Act to Combat Clandestine Employment).

The results of the inspections of the Financial Investigation Office for Clandestine Employment are entered in Work Statistics and retained for up to five years, if necessary (Section 19 of the Act to Combat Clandestine Employment). Other authorities involved in curtailing illegal employment have the power to conduct on-site inspections on the grounds of other legal regulations, although the purpose of these inspections is not explicitly to uncover illegal employment. Table 6 provides an overview:

**Table 6: Other authorities’ power to conduct on-site inspections**

Inspecting authority	Powers during field inspectionv
Tax authorities	Tax authorities have the right to conduct field inspections during a tax audit (Sections 193–203a of the Fiscal Code). The revenue office responsible for taxation is responsible for conducting the inspection (Section 195 of the Fiscal Code). Analogous to the inspections of the Financial Investigation Office for Clandestine Employment, these inspections are conducted during regular business or working hours, and the agents are authorised to enter and inspect property and working areas (Section 200 subs. 3 of the Fiscal Code). The Financial Investigation Office for Clandestine Employment is authorised to participate in these inspections (Section 2 subs. 1 third sentence of the Act to Combat Clandestine Employment).

Inspecting authority	Powers during field inspection
Tax fraud investigation offices	Tax fraud investigation offices are also authorised to conduct field inspections (Section 208 of the Fiscal Code). Tax fraud investigators are investigators for the public prosecutor's office (Section 404 second sentence of the Fiscal Code) and may order seizures, forced sales, searches, investigations, and other actions pursuant to the regulations in the Code of Criminal Procedure relevant to a prosecutorial investigator (Section 399 of the Fiscal Code).
Pension insurance providers	The inspection services of the pension insurance providers have the power to enter an employer's offices pursuant to Section 28p of the Fourth Book of the Social Code in order to determine whether the employer has met disclosure requirements when deemed necessary by circumstance (Section 7 subs. 1 fourth sentence of the Contribution Scheme Regulation). "The employer shall provide all viewers, machine time, and other aids, e.g., personnel, monitors and scanners necessary [for the inspection]" (Section 10 of the Contribution Scheme Regulation). Under Section 67e of the Tenth Book of the Social Code, inspection services may also enquire about additional social (security) information during an inspection, similar to inspections pursuant to the Act to Combat Clandestine Employment.
Federal Employment Agency and Job Centres	Recipients of social security benefits and their employers or contractors must ensure "access to payroll and reporting documents, ledgers, and other company documents and records" as well as "entry to [their] properties and premises during business hours" (Section 319 subs. 1 first sentence of the Third Book of the Social Code and Section 64 subs. 1 of the Second Book of the Social Code). This inspection may also involve a third party, e.g., a (former) employer (Section 319 subs. 1 second sentence of the Third Book of the Social Code and Sections 60 subs. 5 and 64 subs. 1 of the Second Book of the Social Code). On-site inspections are conducted on reasonable grounds and refer to facts that cannot be determined from available records. The Federal Employment Agency also shares inspections with Customs Authorities under the Act on Temporary Employment Businesses, inspecting the reliability of temporary employment businesses by inspecting company documents and offices (Section 7 subs. 3 of the Act on Temporary Employment Businesses, cf. Deutscher Bundestag 2014a: 17-20).
Proper authorities under state law	The reform of the Act to Combat Clandestine Employment gave the authorities responsible for prosecuting and punishing regulatory offences under state law expanded powers of inspection (see Section 1.3.5). As the Financial Investigation Office for Clandestine Employment, their agents shall now "[be authorised to] enter the offices and properties of a self-employed individual, an employer, or a client during employee working hours [...] and inspect documents [...] that are likely to contain information pertaining to the extent, type, or duration of the performance of a trade, an itinerant trade, or a licensed trade, or employment arrangements, provided there are indications of clandestine employment as defined in Section 1 subs. 2 no. 4 and 5 [of the Act to Combat Clandestine Employment]" (Deutscher Bundestag 2016c: 7). The disclosure requirements for employees under Section 2a of the Act to Combat Clandestine Employment are also be extended to these authorities.

### 3.4.6 Frequency and interval

The main customs offices conduct routine inspections daily. In-depth inspections, on the other hand, are conducted at specific intervals: at the federal level, four national in-depth inspections are currently conducted per year; at the regional/local level, each main customs office conducts two in-depth inspections per year.

### 3.5 Tools and methods

The inspections of the Financial Investigation Office for Clandestine Employment focus on the employment relationship of the person in question, which is determined through direct questioning and a precise audit of furnished documents and records. The questioning is conducted using a personal information sheet that also contains a section regarding residence. If language difficulties are encountered during an inspection, the Financial Investigation Office for Clandestine Employment can enlist an interpreter (interview with the Central Customs Authority). Many main customs offices are also equipped with mobile devices for authenticating furnished documents and train their agents in recognising forged residence titles and work permits.

### 3.6 Identifying human trafficking/labour exploitation

Third-country nationals can be identified during an inspection by the Financial Investigation Office for Clandestine Employment. If they have fallen victim to human trafficking for labour exploitation or to the exploitation of their labour, police stations are informed. However, the Financial Investigation Office for Clandestine Employment "has no authority to independently investigate cases of human trafficking; any indications of human trafficking uncovered shall be reported to the proper police station" (GRETA 2015: 17). Law enforcement are responsible for formally identifying victims of human trafficking (GRETA 2015:9).



# 4 Outcomes for employers

## 4.1 General illegal employment sanctions

Illegal employment is defined in Germany as an offence that is committed not only by the employee, but also by the employer/individual having the works or services provided whilst failing to meet their reporting, contribution, or documentation obligations under social security and/or fiscal law (Section 1 subs. 2 of the Act to Combat Clandestine Employment). Sanctions are based on a series of legal regulations on regulatory offences and crimes.

At the core is Section 266a of the Criminal Code, which defines the penalty for withholding or misusing wages and salaries, especially social security contributions. It states: “Whosoever, as an employer, withholds contributions of an employee to the social security system including employment promotion, regardless of whether wages or salaries are actually being paid, shall be liable to imprisonment not exceeding five years or a fine” (Section 266a subs. 1 of the Criminal Code). The same applies to an employer who “makes incorrect or incomplete statements regarding facts relevant to the social insurance system to the agency responsible for collecting contributions, or, contrary to his duty, withholds from the agency responsible for collecting contributions information about facts relevant to the social insurance system and thereby withholds the contributions to be paid by the employer for social insurance, including employment promotion” (Section 266a subs. 2 of the Criminal Code). This applies regardless of whether salary or wages are being paid at all (ibid.). Aggravated cases are punishable by imprisonment of six months to ten years (Section 266a subs. 4 of the Criminal Code). In addition, “whosoever, as an employer, otherwise withholds parts of wages or salaries which he is under a duty to pay to another on behalf of the employee but does not pay them to the other and fails to inform the employee about the failure to make the payment no later than the due date or without undue delay thereafter” shall be liable to imprisonment for up to five years or a fine (Section 266a subs. 3 of the Criminal Code). On the other hand, punishment may be waived if the employer reports the amount of contributions withheld no later than the due date and explains why payment could not be made on time despite earnest efforts to do so (Section 266a subs. 6 first sentence of the Criminal Code). If these requirements are met and the contributions are subsequently made, the employer shall not face punishment (Section 266a subs. 6 second sentence of the Criminal Code). Further criminal

sanctions may apply relating to tax evasion. All of these offences carry severe custodial penalties or substantial fines. Beyond, other regulatory offences can come into consideration.

Additionally, other regulations also apply to the sanctioning of employers, such as the regulatory offences defined in the Act Regulating a General Minimum Wage, when violating the statutory minimum wage, the Posted Workers Act when compulsory sectoral minimal wages are undercut and the Act on Temporary Employment Businesses (for illegal temporary employment or violations of the minimum wage level defined there).

## 4.2 Sanctions for illegally employing third-country nationals

### 4.2.1 Legal framework

Several penal provisions focus explicitly on sanctioning the illegal employment of third-country nationals. Employers may only hire third-country nationals or commission them to perform works or services against payment if their residence title authorises them to do so (Section 4 subs. 3 of the Residence Act).<sup>30</sup> When hiring third-country nationals, employers are obliged to determine whether the residence title, permission to stay pending the asylum decision or the certificate showing that the deportation has been temporarily suspended authorises such economic activity. They must also retain a copy of this document for the duration of employment. This copy can be either electronic or in print (Section 4 subs. 3 fourth and fifth sentences of the Residence Act).

The following laws form the core legal framework for sanctioning employers who illegally employ third-country nationals:

- Act to Combat Clandestine Employment (specifically Sections 10, 10a, and 11)
- Act on Temporary Employment Businesses (specifically Sections 15, 15a, and 16)

<sup>30</sup> “This restriction shall not apply if the foreigner is permitted by virtue of an intergovernmental agreement, a law, or a statutory instrument to pursue an economic activity without requiring due authorisation via a residence title” (Section 4 subs. 3 third sentence of the Residence Act).

- Residence Act (specifically Sections 98a–98c)
- Third Book of the Social Code (specifically Section 404)
- Criminal Code, specifically for human trafficking, forced prostitution, forced labour, or exploitation of labour (Sections 232–233a)

**4.2.2 Situations**

Two situations are possible when illegally employing third-country nationals (cf. Section 1.3.1) that differ in terms of how the employer is punished:

1. The employer hires an irregular resident and the irregular residence status is known to the employer (see Section 4.4 for cases in which third-country nationals were hired unintentionally). In this case, the employer is typically prosecuted for aiding illegal residence (Section 27 of the Criminal Code in conjunction with Section 95 subs. 1 no. 2 of the Residence Act)<sup>31</sup>. Punishment is determined by the penalty for the irregular resident (Section 27 subs. 2 first sentence of the Criminal Code). A con-

- viction of aiding nullifies any imposable regulatory fine. Other penal provisions on illegally employing third-country nationals may also apply (see below).
2. The employer hires a regular resident, yet the employment is illegal. On the one hand this can occur, e.g., when the residence title does not conform with the requirements of such employment. On the other hand, the employment relationship between the employer and the regular resident (similar to illegally employing German nationals) can also be illegal if statutory reporting requirements are not met, the minimum wage is not paid, or social security contributions are not made. In this case, the employer faces the sanctions for illegal employment in general.

**4.2.3 Penal provisions and provisions for fines**

The following table lists the penal provisions and the provisions for fines in cases of illegal employment of third-country nationals. Where indicated, a distinction is made according to the two situations described above. Other sanctions applicable to illegal employment in general (e.g., provisions on tax evasion or reporting obligations pursuant to the Fourth Book of the Social Code) and imposable in addition to the sanctions below are not included.

<sup>31</sup> The concept of aiding requires that the employer’s conduct “enables, facilitates, promotes, or supports” the continuation of illegal residence, regardless of whether irregular third-country nationals decide in advance to remain or to do so only after obtaining employment. Current commentary considers the employment of irregular third-country nationals as “aiding the violation of a duty to depart” (Kluth/Heusch 2016: Section 95 of the Residence Act, margin no. 26).

**Table 7: Penal provisions and provisions for fines in cases of illegal employment of third-country nationals**

Sanctions	Irregular residence/ illegal employment of third-country nationals	Regular residence/ illegal employment of third-country nationals
	Whosoever employs third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same shall be guilty of a regulatory offence punishable by fine of up to €500,000 regardless of whether the illegal employment was due to intent or negligence (Section 404 subs. 2 no. 3 and subs. 3 of the Third Book of the Social Code).	
	Whosoever, as an entrepreneur, knowingly (or, though negligence, unknowingly) has works or services provided to a ‘substantial degree’ by another company that employs, or subcontracts with companies that employ, third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same may also be fined up to €500,000 (Section 404 subs. 1 of the Third Book of the Social Code).	
<b>Fines (I)</b>	Whosoever wilfully or recklessly hires third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same to provide works or services against pay for a prolonged period with the intent to profit shall be guilty of a regulatory offence punishable by a fine of up to €500,000 (Section 98 subs. 5 of the Residence Act).	
	Whosoever wilfully or negligently employs temporary employees without the required residence permit, permission to stay pending the asylum decision or the certificate showing that the deportation has been temporarily suspended authorising such employment, or without the required authorisation, shall be fined up to €500,000 (Section 16 subs. 2 of the Act on Temporary Employment Businesses).	
	If the temporary employment business does not have a valid permit (i.e., is illegally providing temporary employees), the contract between the business and the employee shall be null and void (Section 9 subs. 1 of the Act on Temporary Employment Businesses). Pursuant to Section 10 subs. 1 of the Act on Temporary Employment Businesses, the temporary hiring business shall automatically become the employer. If temporary employees without a valid residence title or work permit were hired by the temporary employment business and placed with the temporary hiring business, the temporary hiring business, as the new employer, may be fined up to €500,000 pursuant to Section 404 subs. 2 no. 3 of the Third Book of the Social Code.	

Sanctions	Irregular residence/ illegal employment of third-country nationals	Regular residence/ illegal employment of third-country nationals
<b>Fines (II)</b>		Any employer who wilfully or negligently fails to provide working conditions regulated in collective agreements established under Section 8 subs. 1 of the Posted Workers Act (e.g., fails to pay the sector-specific minimum wage or to make the social security contributions) or to make the contributions owed to an institution jointly stipulated by the parties to the collective bargaining agreement shall be guilty of a regulatory offence (Section 23 subs. 1 of the Posted Workers Act). This also applies to the use of subcontractors (Section 23 subs. 2 of the Posted Workers Act). Both instances are punishable by a fine of up to €500,000 (Section 23 subs. 3 of the Posted Workers Act).
		Any employer who fails to, does not fully, does not properly, or does not in a timely manner report the employment of posted workers shall also be guilty of a regulatory offence (Section 23 subs. 1 no. 5 of the Posted Workers Act) punishable by a fine of up to €500,000 (Section 23 sub. 3 of the German Posted Workers Act).
<b>Imprisonment of employer (I)</b>	Whosoever wilfully employs third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same under conditions that “are noticeably disproportionate to the working conditions of German employees performing the same or similar activity” shall be imprisoned for up to three years (or pay a fine). If the employer’s actions are determined to be out of gross self-interest or should the employer have committed repeated acts, it shall constitute a serious offence punishable by imprisonment of six months to five years (Section 10 of the Act to Combat Clandestine Employment).	
	Whosoever employs or engages to provide works or services for more than five third-country nationals at the same time without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same shall also be imprisoned for up to one year or pay a fine. The employment of minors without a permit or residence title, and the persistent employment or engagement of third-country nationals without a permit or residence title also carries the same punishment (Section 11 of the Act to Combat Clandestine Employment). ‘Persistent’ shall refer to whosoever has already violated the prohibition and continuously violates it out of disregard or indifference (Erbs/Kohlhaas 2016: Section 11 of the Act to Combat Clandestine Employment, margin no. 12). If the offence was committed out of gross self-interest, punishment can be extended to up to three years (or fine) (Section 11 subs. 2 of the Act to Combat Clandestine Employment).	
	Any employer who exploits the predicament of a third-country national without residence title following prostitution or labour the third-country national has been forced to by a third party (Section 232a subs. 1-5 or Section 232b of the Criminal Code) may be imprisoned for up to three years (or fine) (Section 10a of the Act to Combat Clandestine Employment).	
	Cases of exploitation of labour are also punishable by imprisonment. Whilst Section 233 of the Criminal Code does not explicitly mention third-country nationals, it does however refer to the exploitation of the “helplessness associated with residing in a foreign country”. Exploitation is defined as “when employment is provided in the reckless pursuit of profit under working conditions that are noticeably disproportionate to the working conditions of workers performing the same or a similar activity (exploitative employment)” (Section 232 subs. 1 second sentence of the Criminal Code), when an individual is made to beg, or commit criminal acts (Section 233 subs. 1 of the Criminal Code), and is punishable by imprisonment for three years or a fine (Section 233 subs. 1 of the Criminal Code). Attempted exploitation of labour is punishable (Section 233 subs. 3 of the Criminal Code), as is the brokerage of an exploitative employment (Section 233 subs. 5 no. 1 of the Criminal Code).	
	Whosoever, as a temporary employment agency, does not have the proper permit (pursuant to Section 1 of the Act on Temporary Employment Businesses) and places third-country nationals without residence title or work permit with a third party, shall be imprisoned for up to three years or pay a fine (Section 15 subs. 1 of the Act on Temporary Employment Businesses). If the temporary employment agent has committed repeated acts or acts out of gross self-interest, it shall constitute a serious offence punishable by imprisonment for six months to five years (Section 15 subs. 2 of the Act on Temporary Employment Businesses).	
	The temporary hiring business shall be guilty of a regulatory offence in these instances (see above) unless guilty of a crime by a) hiring more than five third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same, or b) persistently employing third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same. These offences are punishable by imprisonment of up to one year (or fine), or up to three years or fine when acting out of gross self-interest (Section 15a subs. 2 of the Act on Temporary Employment Businesses).	

Sanctions	Irregular residence/ illegal employment of third-country nationals	Regular residence/ illegal employment of third-country nationals
<b>Imprisonment of employer (II)</b>	Any temporary hiring business employing third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same as temporary employees under working conditions that are noticeably disproportionate to the working conditions of German temporary employees performing the same or a similar activity may be imprisoned for up to three years or pay a fine, or, in aggravated cases, be imprisoned for six months to five years (Section 15a subs. 1 of the Act on Temporary Employment Businesses).	
<b>Confiscation of financial gains (e.g., share of profit or revenue of the employer)</b>	German law does not provide for the confiscation of financial gains as a form of punishment. However, any assets that have been illegally obtained by an employer can be seized in the form of asset recovery should criminal proceedings be initiated against the employer (Bundesrechnungshof 2008: 20). The legal basis for this is Section 111b of the Code of Criminal Procedure.	
<b>Ineligibility for public contracts</b>	Building industry employers sentenced to imprisonment for more than three months, or to a fine of more than 90 daily rates of pay, or to pay a penalty of at least €2,500 for illegally employing third-country nationals <sup>1)</sup> may be excluded from public contracts for up to three years (Section 21 subs. 1 of the Act to Combat Clandestine Employment).	
	The reform of the Act to Combat Clandestine Employment extends this ineligibility to public supply and service contracts. In order to be granted public contracts, employers tendering offers must confirm that they have not been convicted or fined for offences relating to the illegal employment of third-country nationals (ibid.).	
	Section 98c of the Residence Act also establishes that exclusions from competing for public supply, construction, or service contracts may last up to a period of five years “until there is proof of the restoration of reliability”, depending on the severity of the offence (Section 98c subs. 1 of the Residence Act).	
<b>Temporary or definitive closure of company or worksite</b>	There is no legal norm in Germany for temporarily or permanently closing a company or worksite. The severity of sanctions, however, can indirectly result in the insolvency of a company.	
<b>Confiscation of equipment/ property</b>	German law does not provide for the confiscation of an employer’s equipment or property as punishment for illegally employing third-country nationals.	
<b>Suspension of activity</b>	There is no legal norm for (temporarily or permanently) closing a company due to illegal employment of third-country nationals. However, a company may be partially or completely banned from a trade pursuant to Section 35 subs. 1 of the Trade Regulation Code (prohibition of trade activity due to unreliability) (Huber 2012: 480).	
<b>Revocation of trading licence/ disbarment from activity</b>	There is no legal norm that explicitly states that employers who illegally hire third-country nationals shall face revocation of licences and permits, however, they can be partially or completely banned from the trade as described above.	
	The temporary employment agency permit under the Act on Temporary Employment Businesses is an exception. “Any temporary employment agent convicted of an offence pursuant to Section 15 shall be deemed unreliable as defined in Section 3 subs. 1 no. 1 of the Act on Temporary Employment Businesses resulting in the invalidation of their permit (Rolfs et al. 2016: Section 15 of the Act on Temporary Employment Businesses, margin no. 26).	
<b>Withdrawal of residence permit if the employer is a third-country national</b>	A residence permit is null and void if its holder is expelled (Section 51 subs. 1 no. 5 of the Residence Act). If an employer who illegally employs third-country nationals is him/herself a third-country national, the sentence shall determine whether expulsion is considered: there is generally a particularly serious public interest in expulsion if third-country nationals are incontestably sentenced to more than two years’ imprisonment (Section 54 subs. 1 no. 1 of the Residence Act). Public interest in expulsion is considered serious if the offender “has been incontestably sentenced to a prison term of at least one year for one or more intentionally committed offences” (Section 54 subs. 2 no. 1 of the Residence Act). Public interest in expulsion is balanced against the offender’s individual interest in remaining (Section 53 subs. 1 of the Residence Act).	
	The employer may also face expulsion if the illegal employment is considered a regulatory offence pursuant to Section 404 subs. 2 no. 3 of the Third Book of the Social Code: “An isolated offence meets the criteria for expulsion if it is not minor, and minor offences meet the criteria for expulsion if they are not isolated” (55.2.2.2. of the General Administrative Regulation to the Residence Act). Since regulatory offences with fines exceeding €1,000 are typically no longer considered to be minor (55.2.2.3.4 of the General Administrative Regulation to the Residence Act), expulsion may occur in cases where illegal employment is punished in the form of a regulatory offence, should the established fines exceed €1,000 and the interest in remaining does not outweigh the public interest in expulsion.	
<b>Other sanctions</b>	<b>Exclusion from subsidies</b> Employers incontestably sentenced to a regulatory fine of at least €2,500 pursuant to Section 404 subs. 2 no. 3 of the Third Book of the Social Code, or to imprisonment for more than three months or to a penalty of more than 90 daily rates of pay pursuant to Sections 10, 10a or 11 of the Act to Combat Clandestine Employment can be excluded from public subsidies by the proper authorities for a period of five years (Section 98b of the Residence Act).	
	<b>Liability for deportation or expulsion</b> If an employer has illegally employed third-country nationals, or if an employer, as a (general) contractor, contracts other companies to perform work and the employer is aware or should have known that the employees were illegally employed third-country nationals, that employer shall be liable for the costs of deportation or expulsion (Section 66 subs. 4 of the Residence Act).	

1) That is, in violation of Section 8 subs. 1 no. 1 or Section 9-11 of the Act to Combat Clandestine Employment, Section 404 subs. 1 or 2 no. 3 of the Third Book of the Social Code, or Sections 15, 15a, 16 subs. 1 no. 1, 1b or 2 of the Act on Temporary Employment Businesses.

### 4.3 Subsequent social security claims

In addition to criminal and regulatory sanctions, if a case of illegal employment is uncovered, social security providers claim the unpaid social security contributions from the employer *ex post*. The various statutes of limitations are as follows: Claims to contributions are invalidated four years after the end of the calendar year due (Section 25 subs. 1 first sentence of the Fourth Book of the Social Code). Claims to intentionally withheld contributions are invalidated 30 years after the end of the calendar year due (Section 25 subs. 1 second sentence of the Fourth Book of the Social Code). This typically applies to illegal employment (interview with the German Pension Fund). Pension insurance provider inspection services are responsible for determining both the duration of employment and the amount of remuneration the employee (should have) received. If remuneration cannot be determined by an official assessment, the Social Code allows for a prudent estimation to be made (Section 28f of the Fourth Book of the Social Code). In the event of illegal employment, net pay received by the employee is rounded up to gross pay for assessing contributions (Section 14 subs. 2 second sentence of the Fourth Book of the Social Code). Furthermore, penalties on late payment pursuant to the stipulations of Section 24 of the Fourth Book of the Social Code apply.

The loss assessed by the German Pension Fund is the basis for the determination carried out by the Financial Investigation Office for Clandestine Employment of a fine and for the public prosecutor's determination of punishment during criminal proceedings pursuant to Section 266a of the Criminal Code. The pension insurance provider also issues a demand for payment against the employer to be collected by a health insurance company (interview with the German Pension Fund).

In the event of accident leading to the uncovering of illegal employment, additional claims against the employer can also be made by the proper accident insurance provider in addition to *ex post* contribution and regulatory fine claims and criminal sanctions:

If employees are injured during their activity to such an extent that the treatment by a medical doctor becomes necessary or even longer-lasting damages remain, the compulsory accident insurance initially takes on the costs of the accident in order for the employee to be treated and compensated immediately. However, in these cases the accident insurance carriers have the possibility to charge back the expenditures for workplace accidents from the employers (Section 110 subs. 1a of the Seventh Book of the Social Code). This encompasses e.g. the costs of rehabilitation measures and possible pension payments for the injured leading to possibly very high claims for recourse.

Furthermore the employer is also required to pay the illegally employed third-country nationals "the agreed remuneration. For the purpose of remuneration, it shall be assumed that the foreigner has been employed by the employer for three months" (Section 98a of the Residence Act; also Section 7 subs. 4 of the Fourth Book of the Social Code; cf. Section 5).

### 4.4 Unintentional illegal employment of third-country nationals

The unintentional employment of third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same would require that an employee presented the employer a forged residence and work permit, and these were not recognized as such in the course of the official reporting of the employment to the social security carriers and the subsequent data check. This occurs rarely in practice.

The General Administrative Regulation to the Residence Act makes it clear that the employer's inspection duties pursuant to Section 4 subs. 3 of the Residence Act cannot be completed by simply looking at the documents:

"A reckless failure to recognise the lack of authorisation is also sanctioned. Recklessness is a higher degree of negligence, which corresponds to gross negligence under civil law. It is when the most simple and most self-evident of observations are not made and what is obvious under the circumstances goes unnoticed. Objectively, a level of violation of diligence considerably exceeding the ordinary degree of negligence, and subjectively, personal fault is required. The offender's personal skills and abilities must be taken into consideration during judgement" (98.2a.2 and 98.2a.2.1 of the General Administrative Regulation to the Residence Act).

The employer must have exercised "due diligence to [have made] certain that the foreigner may be employed" (66.4.2 of the General Administrative Regulation to the Residence Act). Relying solely on the claims of the prospective employee, or the submission of an income tax card or social security card is insufficient (*ibid.*).

Should it turn out that an employment relationship is illegal despite the employer having carefully fulfilled his requirements to inspect and retain a copy of the documents furnished by the employee, as well as to report the employment, the employer shall not be liable for the costs of the deportation or removal of the individual in question (Section 66 subs. 4a of the Residence Act).



## 4.5 Criminal sanctions pursuant to article 9.1 of Directive 2009/52/EC

To reduce irregular immigration, the Member States of the European Union in June 2009 agreed on steps to sanction employers who hire irregular third-country nationals. Concurrently, the rights of illegally employed third-country nationals to file for their outstanding pay from their employer were strengthened. The Employer Sanctions

Directive<sup>32</sup> was implemented in German law by the “Act for the Implementation of EU Directives Relating to the Right of Residence and the Adaptation of National Legislation to the EU Visa Code dated 22 November 2011” and affected in particular the Residence Act and the Act to Combat Clandestine Employment (BGBl 2011b: 2258 et seq.). Table 8 lists the individual criminal sanctions under the Sanctions Directive and cites their implementation in national law.

<sup>32</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2008 providing for minimum standards for sanctions and measures against employers of illegally staying third-country nationals.

**Table 8: Criminal sanctions pursuant to Article 9 paragraph 1 of the Employer Sanctions Directive (2009/52/EC)**

Criminal sanctions for employers pursuant to Article 9 paragraph 1 of the Directive 2009/52/EC	Description
<p><b>Article 9 paragraph 1 letter a: the infringement continues or is persistently repeated</b></p>	<p>Employers who persistently employ third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same shall be imprisoned for up to one year or pay a fine (Section 11 subs. 2a of the Act to Combat Clandestine Employment). ‘Persistent’ refers to employers who have already violated the prohibition once and continuously violate it out of disregard or indifference (Erbs/Kohlhaas 2016: Section 11 of the Act to Combat Clandestine Employment, margin no. 12).</p> <p>Employers acting out of ‘gross self-interest’ shall be imprisoned for three years. According to current legal commentary, this is when the employer “allows himself to be guided by his drive for his own benefit to a particularly objectionable degree”, such as failing to make social security contributions in order to enrich him/herself (Erbs/Kohlhaas 2016: Section 11 of the Act to Combat Clandestine Employment, margin no. 17).</p>
<p><b>Article 9 paragraph 1 letter b: the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals</b></p>	<p>If more than five third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same are employed or engaged to provide works or services, the employer shall be imprisoned for up to one year or pay a fine (Section 11 subs. 1 no. 1 of the Act to Combat Clandestine Employment). As with cases of persistently repeated violation, the sentence for an offence committed out of gross self-interest is extended to three years (Section 11 subs. 2 of the Act to Combat Clandestine Employment).</p>
<p><b>Article 9 paragraph 1 letter c: the infringement is accompanied by particularly exploitative working conditions</b></p>	<p>An employer who employs third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same under conditions that are noticeably disproportionate to the working conditions of German employees performing the same or similar activity shall be imprisoned for up to three years or pay a fine (Section 10 subs. 1 of the Act to Combat Clandestine Employment). The law provides for imprisonment of six months to five years for cases in which the employer commits repeated acts or acts out of gross self-interest (Section 10 subs. 2 of the Act to Combat Clandestine Employment).</p>
<p><b>Article 9 paragraph 1 letter d: the infringement is committed by an employer who, while not having been charged with or convicted of an offence established pursuant to Framework Decision 2002/629/JHA, uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings</b></p>	<p>An employer who exploits the predicament of third-country nationals who are victims of forced prostitution (Section 232a of the Criminal Code) or forced labour (Section 232b of the Criminal Code) shall be imprisoned for up to three years or pay a fine (Section 10a of the Act to Combat Clandestine Employment), regardless of whether the exploitation of the third-country nationals was originally for sexual exploitation or exploitation of labour. It is irrelevant who put the third-country nationals in this situation— only the employer’s conscious exploitation of the situation matters (Erbs/Kohlhaas 2016: Section 10a of the Act to Combat Clandestine Employment, margin no. 60–61a).</p>
<p><b>Article 9 paragraph 1 letter e: the infringement relates to the illegal employment of a minor</b></p>	<p>In the event an employer hiring minor third-country nationals without an appropriate residence title authorising economic activity, a permit authorising the same, or otherwise without authorisation for the same, Section 11 subs. 1 no. 3 of the Act to Combat Clandestine Employment prescribes imprisonment of up to one year or a fine. The provision does not require that the minor was employed under less favourable conditions than comparable German employees, or was the victim of human trafficking. If the offence was committed out of gross self-interest, punishment can be extended to up to three years or a fine (Section 11 subs. 2 of the Act to Combat Clandestine Employment).</p>

## 4.6 Legal amendments since July 2014

Since July 2014, there have been two major amendments regarding the sanctioning of employers who illegally hire third-country nationals: in October 2016, sections of the Criminal Code were amended to include human trafficking and the exploitation of labour. The reform provided a clearer distinction between human trafficking and exploitation of labour (cf. Section 1.4). Section 10a of the Act to Combat Clandestine Employment was subsequently amended: In citing Section 232a subs. 1-5 and Section 232b of the Criminal Code, it is not only punishable to exploit the predicament of third-country nationals who are victims of human trafficking for sexual exploitation or exploitation of labour, but also the exploitation of their predicament when they were brought into the country in order to beg is also punishable (Section 232b no. 3 of the Criminal Code) by imprisonment for up to three years or a fine (Section 10a of the Act to Combat Clandestine Employment).

The reform of the Act to Combat Clandestine Employment (cf. Section 1.2.6) annuls some provisions for fines (Section 8 subs. 1 no. 1a-1c of the Act to Combat Clandestine Employment). These regulatory offences required intent, conflating them “almost without exception with criminal liability for fraud pursuant to Section 263 of the Criminal Code. The application of the regulatory offences pursuant to Section 8 subs. 1 no. 1 letter a–c [was] therefore regularly ruled out pursuant to Section 21 of the Regulatory Offences Act. In legal practice, the offences [were] virtually meaningless” (Deutscher Bundestag 2016c: 17). In regard to employer sanctions, Section 8 subs. 1 no. 1c of the Act to Combat Clandestine Employment, set forth that employers who had individuals eligible for benefits under the Act on Benefits for Asylum Applicants perform works or services to a substantial degree and compelled them not to report it could be punished by a fine of up to €300,000.

## 4.7 Strengths and weaknesses in sanctioning employers

There are no studies on the effectiveness of sanctioning employers who illegally hire third-country nationals. Nevertheless, the Financial Investigation Office for Clandestine Employment emphasises that the combination of sanctions and active public work with respect to illegal employment and clandestine work in general has proven to be a deterrent. The occasionally substantial *ex post* claims by social security providers and sanctions threatened in criminal proceedings have been central (interview with the Central Customs Authority).

# 5 Outcomes for third-country nationals found to be working illegally

An illegal employment can yield administrative and penal consequences as well as consequences in terms of residence. However, one has to discern between the outcomes for irregularly staying third-country nationals (Section 5.1), third-country nationals with a valid residence title (Section 5.2), and third-country nationals with a limited or unlimited residence permit of another EU-Member State (Section 5.3), as well as third-country nationals that have become victims of human trafficking or exploitation of labour (Section 5.4). Furthermore, the possibilities of the employees to receive a retroactive remuneration, to introduce a claim and to eventually enforce a judgment against the employer are described (Section 5.5 and 5.6).

## 5.1 Outcomes for irregularly-staying and illegally working third-country nationals

Third-country nationals that are detected as working illegally and whose irregular residential status is discovered in the process, primarily bear consequences with regards to their (right to) residence. Additionally, criminal and/or regulatory offence proceedings are opened.

### 5.1.1 Regulatory fines

As the economic activity of third-country nationals without permission to reside is generally an illegal employment, the illegal employment (Section 404 subs. 2 no. 4 of the Third Book of the Social Code in conjunction with Section 4 subs. 3 first sentence of the Residence Act) or the illegal self-employment (Section 98 subs. 3 no. 1 in conjunction with Section 4 subs. 3 first sentence of the Residence Act) is categorized as a criminal offence in conjunction with a regulatory offence and can be fined with up to €5,000 (Section 404 subs. 3 of the Third Book of the Social Code). In the case of an unlawful stay the act is also seen as wilful and not as negligent (for the difference in the amount of the fine cf. Section 5.2.1).

In practice, these administrative fine proceedings are often closed, as the person concerned generally has to leave the country or is issued with an expulsion and deported. Nonetheless, the proceedings are set in motion.

### 5.1.2 Obligation to leave the federal territory, voluntary departure, deportation

For the consequences regarding the right of residence of irregularly-staying third-country nationals it is less decisive that the employment was illegal than that authorities became aware of their unauthorised stay. By virtue of the unauthorised stay, the person concerned generally is enforceably obliged to leave the federal territory (Section 58 subs. 2 of the Residence Act). The departure can come into effect voluntarily or by means of coercive measures, such as deportation.

#### Period for voluntary departure

If there are no reasons for the prohibition of the deportation (Section 60 of the Residence Act) or obstacles to deportation that would justify the temporary suspension of deportation (Section 60a of the Residence Act) the foreigners authority may refrain from granting a period of voluntary return, that otherwise is to be given by the authority (Section 59 subs. 1 of the Residence Act). As the prior unauthorised stay and illegal employment can establish the suspicion that the person concerned may try to evade deportation, a shorter period for departure than the commonly set seven to 30 days or no period at all can be given (Section 59 subs. 1 no. 1 of the Residence Act).

### 5.1.3 Detention and ban on re-entry

The enforcement of the deportation can be ensured by detention, which requires a judicial order. If ordered for the first time, a period of detention up to six months can be set (Section 62 subs. 3 no. 1 of the Residence Act). The order of detention is regularly justified with the argument



that due to the prior unauthorised stay it has to be assumed that the person concerned would be at risk of absconding, if permitted to depart autonomously.

Notwithstanding the conditions applicable to custody to secure deportation under Section 62 subs. 3 of the Residence Act, a third-country national “may be placed in custody for no more than four days by judicial order for the purpose of ensuring that the deportation can be carried out” if the person concerned “has displayed behaviour which leads to expect that he or she will make the deportation more difficult or impossible” (Section 62b of the Residence Act). “The custody to secure departure shall be enforced in the transit area of an airport or in accommodation from which the foreigner’s subsequent departure is possible” (Section 62b subs. 2 of the Residence Act).

#### Ban on re-entry

Third-country nationals that have been expelled, removed or deported shall be permitted neither to re-enter nor to stay in the federal territory. The foreigners authority discretionarily takes a decision regarding the length of the time limit. “It may exceed five years only if the foreigner was expelled on the ground of a criminal conviction or if he or she presents a serious threat to public safety and law and order” (Section 11 of the Residence Act). In the latter cases this period should not exceed ten years.

### 5.1.4 Issuing of a work permit and/or a residence title

#### Issuing of a work permit

The issuing of a work permit for an economic activity that has been carried out illegally by irregularly-staying third-country nationals before would have to involve the legalisation of their stay. The issuing of a work permit without a valid residence title or a legal prior stay is not possible.

#### Issuing of a residence title

The legalisation of an unauthorised stay is generally not foreseen in Germany. The issuing of a residence permit after the unauthorised stay and illegal employment have been detected may therefore only be considered on humanitarian grounds, for example, if the illegal employment was accompanied by exploitative conditions. In Section 25 subs. 4b of the Residence Act grounds for issuing residence permits for victims of criminal offences pursuant to the Act to Combat Clandestine Employment and the Act on Temporary Employment Businesses are listed:

“A foreigner who has been the victim of a criminal offence pursuant to Sections 10 (1)<sup>33</sup> or 11 (1)<sup>34</sup> no. 3 of the Act to Combat Clandestine Employment or pursuant to Section 15a<sup>35</sup> of the Act on Temporary Employment Businesses may also be granted a temporary residence permit for a temporary stay, even if he or she is enforceably required to leave the federal territory. The temporary residence permit may only be issued if

1. the public prosecutor’s office or the criminal court considers the temporary presence of the foreigner in the federal territory to be appropriate in connection with criminal proceedings relating to the said criminal offence, because it would be more difficult to investigate the facts of the case without his or her information and
2. the foreigner has declared his or her willingness to testify as a witness in the criminal proceedings relating to the offence.

The temporary residence permit may be extended if the remuneration owed to the foreigner by the employer has not yet been paid in full, and it would represent particular hardship for the foreigner to pursue his or her entitlement from abroad” (Section 25 subs. 4b of the Residence Act).

If for the issuing of the residence permit no grounds with explicit reference to the illegal employment are

33 “Whosoever wilfully commits an act described in Section 404 subs. 2 no. 3 of the Third Book of the Social Code and employs a foreigner in working conditions that are noticeably disproportionate to the working conditions of German employees that carry out the same or a comparable activity, shall be punishable with up to three years imprisonment or a fine” (Section 10 subs. 1 of the Act to Combat Clandestine Employment).

34 “Whosoever counter Section 4 subs. 3 sentence 2 of the Residence Act employs a person under the age of 18 shall be punishable with up to one year of imprisonment or a fine” (Section 11 subs. 1 no. 3 of the Act to Combat Clandestine Employment).

35 “(1) Who as a temporary hiring business arranges for a foreigner borrowed to him, who does not possess the required residence title [...], to take up work in conditions of the temporary employment relationship that are noticeably disproportionate to the working conditions of German temporary employees that carry out the same or a comparable activity, shall be punishable with up to three years of imprisonment or a fine. In particularly serious cases the penalty is imprisonment of six months to five years; [...](2) Who as a temporary hiring business 1. simultaneously arranges for more than five foreigners, who do not possess the required residence title [...], to take up work or 2. persistently repeats an infringement described in Section 16 subs. 1 no. 2 shall be punishable with up to one year of imprisonment or a fine. If the offender acts out of gross self-interest, the penalty is imprisonment up to three years or a fine” (Section 15a of the Act on Temporary Employment Businesses).

considered, other humanitarian grounds can be brought to the fore that can lead to a prohibition of the deportation (Section 60 of the Residence Act), to a temporary suspension of deportation ('Duldung'; Section 60a of the Residence Act) or to a granting of residence in cases of hardship (Section 23a of the Residence Act). According to enforcement and foreigners authorities what happens in practice when a third-country national staying without authorisation is detected is that he or she applies for asylum, which can lead to a residence permit on the basis of the recognition of a ground for protection. The application for asylum can thereby be rejected as manifestly unfounded, if e.g. one has to assume that the person concerned filed an asylum application in order to avert an imminent termination of residence although he or she had had sufficient opportunity to file an asylum application earlier (Section 30 subs. 3 no. 4 of the Asylum Act). For victims of human trafficking or labour exploitation further-going regulations apply (cf. Section 5.4).

## 5.2 Outcomes for regularly-staying and illegally working third-country nationals

Also in the case of regularly-staying but illegally working third-country nationals, the detection of illegal employment yields sanctions ranging from regulatory fines and imprisonment to expulsion and deportation.

### 5.2.1 Regulatory fines

Third-country nationals commit a regulatory offence when they pursue an economic activity (Section 404 subs. 2 no. 4 of the Third Book of the Social Code in conjunction with Section 4 subs. 3 first sentence of the Residence Act) or work self-employed (Section 98 subs. 3 no. 1 in conjunction with Section 4 subs. 3 first sentence of the Residence Act) without the proper work permit. A violation can be fined with up to €5,000 (Section 404 subs. 3 of the Third Book of the Social Code). When assessing the fine it is to be taken into consideration whether the offence was committed wilfully or negligently, as the maximum sanction for a negligent action shall not exceed half of the maximum fine imposable (Section 17 of the Act on Regulatory Offences). If the infringement is repeated persistently, the person concerned can face imprisonment or a fine (cf. Section 5.2.2).

For third-country nationals that have filed an asylum application the same fine of €5,000 applies if they have negligently disregarded their obligation to notify authorities when taking up an employment or self-employment (Section 13 of the Act on Benefits for Asylum Applicants in

conjunction with Section 8a of the Act on Benefits for Asylum Applicants).

### 5.2.2 Imprisonment

In the case of the persistent repetition of the violation of Section 404 subs. 2 no. 4 of the Third Book of the Social Code (economic activity without the respective work permit) the person concerned may be subject to an imprisonment of up to one year or to a fine (Section 11 subs. 1 no. 2b of the Act to Combat Clandestine Employment). In consequence, the conviction can lead to a change in the balance between the interest in expulsion and the interest in remaining and can justify an interest in expulsion (see below).

Imprisonment can also impend in the case that illegally employed third-country nationals commit fraud against the social security system (German: "Sozialleistungsbetrug"<sup>36</sup>) by, for example, receiving unemployment benefits parallel to working illegally. A criminal proceeding relating to fraud (Section 263 of the Criminal Code) can lead to an imprisonment of up to five years or a fine (Section 263 subs. 1 of the Criminal Code). In particularly serious cases (e.g. if the person concerned acts on a commercial basis or as a member of a gang) the length of imprisonment is six months to ten years (Section 263 subs. 3 of the Criminal Code).

### 5.2.3 Shortening of stay, revocation of the residence permit, expulsion and ban on re-entry

Next to a fine, an illegal employment can also bear consequences on the right to residence for third-country nationals with a valid residence title. The type of consequence depends on the respective residence title and the respective entitlement to pursue an economic activity on the one hand, as well as on the severity of the offence on the other hand.

#### Non-extension or shortening of the residence permit

In less serious cases it is possible that the foreigners authority does not extend the residence permit. If the offences committed are more significant, the foreigners authority can reduce the length of validity of the residence permit *ex post* (Section 7 subs. 2 second sentence of the Residence Act). However, in both cases the decision is discretionary and a balancing of interests as in the case of an expulsion is to be carried out.

<sup>36</sup> E.g. pursuant to Section 8 subs. 1 no. 1a and b of the Act to Combat Clandestine Employment in conjunction with Section 60 subs. 1 first sentence no. 1 and 2 of the First Book of the Social Code.

If the economic activity carried out transgresses the requirements set by the Federal Employment Agency on economic activity (for instance if work is carried out in a different sector than the sector(s) allowed for by the Federal Employment Agency) this can lead to the revocation of its approval of employment as part of the residence title. Provided that the approval of the Federal Employment Agency was a precondition for the issuance of the current residence title, the revocation by the Federal Employment Agency can implicate that the preconditions for the granting of a residence title are no longer met and that the foreigners authority revokes the residence title. In case that the preconditions for the issuance of a different residence title are not given, the person concerned is required to leave the federal territory.

#### Revocation of the residence permit

In certain circumstances a residence permit may be revoked, by which the person concerned becomes required to leave the federal territory. This is the case e.g. with third-country nationals that dispose of a residence permit for the purpose of studying (Section 16 subs. 1 of the Residence Act) and pursues an economic activity without the necessary permit.<sup>37</sup> In this case the residence permit can be revoked by the foreigners authority (Section 52 subs. 3 no. 1 of the Residence Act).

#### Expulsion and deportation

Illegal employment can also give ground for an interest in expulsion (Section 54 of the Residence Act). In the balancing of interests this interest in expulsion has to outweigh the interest in remaining of the foreigner (and his dependants) (Sections 53 subs. 1 in conjunction with 55 of the Residence Act). With the expulsion, the residence permit expires by act of law (Section 51 subs. 1 no. 5 of the Residence Act) and the third-country national is required to leave the federal territory without delay or, if a period has been allowed for departure, by the end of this period (Section 50 subs. 1 and 2 of the Residence Act). The person concerned is notified by the foreigners authority about this period in connection with a deportation warning (Section 59 of the Residence Act). If during this period the departure does not take place, the enforceability of the deportation comes into effect, which under certain

circumstances can also be safeguarded by a judicially ordered custody awaiting deportation (Section 62 of the Residence Act). Generally, the voluntary departure is to be preferred over a forced return. Before the person concerned is taken into custody awaiting deportation, it has to be clarified if not other, less severe means than custody can be considered, e.g. a geographic restriction of residence, a residence restriction or the allocation to a departure facility (Section 61 of the Residence Act).

Also in connection with the Posted Workers Act a requirement to leave federal territory may come into effect for the posted workers, which, even though they possess residence and working permits, arises indirectly from the sanction against the employer:

“The danger of expulsion exists even for migrant workers who are legally entitled to work, but are employed under irregular conditions. For example, if violations regarding the minimum wages in the construction business, as defined by the Act on the Posting of Workers, are ascertained, the general contractor then cancels the contract with the respective subcontractor, whose foreign workers thus lose their residence and work permits and are therefore obliged to leave Germany” (Junkert/Kreienbrink 2008: 43).

#### Ban on re-entry

The regulations on banning re-entry apply in equal measure for third-country nationals that were expelled, that were refused from entering federal territory and that were deported, even if they had been in possession of a residence permit before. Also here, the decision is a discretionary one in which the public interest is individually balanced against the personal interest, whereby the personal interest may possibly predominate in the case of a hitherto legal stay, in comparison to irregularly-staying third-country nationals (cf. Section 5.1.3).

#### 5.2.4 Regularisation of the illegal employment

Regarding the possibility of regularising illegal employment relationships of otherwise regularly staying third-country nationals, the extent of the infringement is of significant importance. Generally, a regularisation is not considered, especially not when the illegal employment sets out a different purpose of residence than the purpose for which the existing residence permit was issued or in the case that the residence title did not permit an economic activity at all. A regularisation can become possible, though, if the infringement is a minor infringement against the provisions on economic activity and the valid residence title generally permits the employment relationship.

<sup>37</sup> “The temporary residence permit shall entitle the holder to take up employment totalling no more than 120 days or 240 half-days per year, and to take up spare-time student employment. This shall not apply in the first year of residence during a stay for the purpose of preparatory measures for a course of study, except during university holidays and in the case of residence pursuant to subsection 1a” (Section 16 subs. 3 of the Residence Act). If the person wishes to work more than this, a permit of the Federal Employment Agency for the pursuance of an economic activity is required.

### 5.2.5 Cooperation of authorities in sanctioning third-country nationals

In case an illegal employment of third-country nationals is detected and the well-founded suspicion exists that an offence has been committed against fineable or punishable provisions of the aliens law, the competent authorities pursuant to Sections 71 et seq. of the Residence Act have to report this accordingly to the law enforcement authorities and those authorities in charge of enforcing regulatory fines. “The foreigners authority notifies the competent public prosecutor’s office about an intended expulsion and deportation, if criminal proceedings have been opened against the foreigner or if public charges were brought against him (Section 72 subs. 4 [of the Residence Act; ...])” (95.3.1 of the General Administrative Regulation to the Residence Act).

As exemplified in Section 5.1.4 on the outcomes for victims of human trafficking, this reciprocal information sharing is also of interest, as “the governmental interest in criminal prosecution [..., may be] opposed to the public interest in measures terminating the stay of the foreigner” (95.3.1 of the General Administrative Regulation to the Residence Act).

### 5.3 Consequences for illegally employed third-country nationals with a residence permit of another EU-Member State

If third-country nationals are in possession of a temporary or permanent residence title of another EU-Member State and if they, during their permitted temporary stay in Germany, pursue an illegal employment, they commit a regulatory offence that (as laid out in the previous section) is punished with a regulatory fine or, in case of persistent repetition, also with imprisonment of up to one year or a fine. Moreover, the persons concerned can be expelled to the respective EU-Member State. The expulsion generally is accompanied by a temporary ban on re-entry (see above).

Whosoever disposes merely of a Schengen visa pursuant to Section 6 subs. 1 no. 1 of the Residence Act and pursues an economic activity without the respective work permit in Germany, is punished with imprisonment of up to one year or a fine (Section 95 subs. 1a of the Residence Act). The infringement can lead to expulsion.

### 5.4 Outcomes for victims of human trafficking, forced prostitution, forced labour or exploitation of labour

Under certain conditions, the Residence Act provides for the possibility of the issuance of a residence permit for third-country nationals that have become victims of human trafficking (Section 232 of the Criminal Code), forced prostitution (Section 232a of the Criminal Code), forced labour (Section 232b of the Criminal Code), exploitation of labour (Section 233 of the Criminal Code) or exploitation using a deprivation of personal freedom (Section 233a of the Criminal Code):

“A foreigner who has been the victim of a criminal offence pursuant to Sections 232 to 233a<sup>38</sup> of the Criminal Code should also be granted a temporary residence permit for a temporary stay, even if he or she is enforceably required to leave the federal territory. The temporary residence permit may only be issued if

1. the public prosecutor’s office or the criminal court considers his or her presence in the federal territory to be appropriate in connection with criminal proceedings relating to the said criminal offence, because it would be more difficult to investigate the facts of the case without his or her information,
2. he or she has broken off contact to the persons accused of having committed the criminal offence and
3. he or she has declared his or her willingness to testify as a witness in the criminal proceedings relating to the offence.

After conclusion of the criminal proceedings, the temporary residence permit should be extended if humanitarian or personal reasons or public interests require the foreigner’s further presence in the federal territory” (Section 25 subs. 4a of the Residence Act).

### 5.5 Back payment of illegal work and right of action

Employers are required to pay illegally employed third-country nationals the agreed wage (Section 98a subs. 1 of the Residence Act), whereby both third-country nationals staying legally and third-country nationals staying

<sup>38</sup> Human trafficking (Section 232 of the Criminal Code), forced prostitution (Section 232a of the Criminal Code), forced labour (Section 232b of the Criminal Code), exploitation of labour (Section 233 of the Criminal Code) or exploitation using a deprivation of personal freedom (Section 233a of the Criminal Code).

unlawfully have a right to back payment (Section 611 of the Civil Code), since taking up economic activity gives the employee the right to sue for the compensation agreed or that is usual and reasonable for the work provided regardless of residence status (Section 98a subs. 6 of the Residence Act).

“The conclusion of a work contract has legal force even if it was verbal, since writing out a work contract is primarily for evidentiary purposes. If the amount of compensation was not agreed or the agreement on compensation cannot be evidenced, the wage that is usual for the sector generally applies (Section 612 of the Civil Code)” (Kössler/Mohr/Habbe 2013: 77).<sup>39</sup>

Employees can file a claim if they do not receive their minimum wage pursuant to the Posted Workers Act, the Act on Temporary Employment Businesses or the Act Regulating a General Minimum Wage:

“If an employer does not provide his employees with the working conditions required under [...] the Posted Workers Act or the Act on Temporary Employment Businesses, working conditions under a collective bargaining agreement, or working conditions under a regulation for the nursing sector, the employee can also assert his claim against his employer under [...] the Posted Workers Act or the Act on Temporary Employment Businesses before a labour court. [...] This right of action is granted not only to German employees. Employees posted to Germany can (also) file suit for collectively bargained working conditions before a German labour court pursuant to the Posted Workers Act [...] against their employer located abroad, but also against the prime contractor. The suit can only be filed with regard to the period of employment in Germany” (Generalzolldirektion 2017i).

If a sectoral minimum wage agreement pursuant to the Posted Workers Act contains a cut-off period of at least six months, it should be noted that “the employee [must] demand payment from his employer in writing before the end of this period, otherwise the employer is no longer required to pay” (Weiser 2007: 20). The legal minimum wage, on the other hand, is not subject to any cut-off periods (Section 3 of the Act Regulating a General Minimum Wage).

Victims of human trafficking (Sections 232 and 233 of the Criminal Code) can, under certain circumstances, sue for

damages or similar claims in addition to back payment of wages (Hofmann 2016: Section 98a of the Residence Act, margin no. 6).

### 5.5.1 Effects of unequal general conditions of individual status groups on their right to sue their employer

Despite this general right of action against an employer regardless of the legality of a residence title, other general conditions for individual status groups differ, which can have an impact on their willingness to exercise that right:

“Nevertheless, it is much more difficult for illegalised workers to assert their right because:

1. their dependence on their employer is objectively higher due to the lack of residence status,
2. the right of residence and the current policy punishes illegal residence with expulsion and deportation,
3. the subjective experience of being a worker without residence papers is one of having no rights whatsoever, which affects all aspects of life.

If workers without residence papers want to sue for their labour rights, it is possible that, during labour court proceedings, the judge will discover the employee has no right of residence or no certificate of suspension of his/her deportation and forward this information to the local foreigners authority. This would also make possible police intervention and immediate deportation. However, it should be noted that this is only a possibility and not an obligation. Under current legal opinion, Section 87 [of the Residence Act] does not constitute a reporting requirement during proceedings” (Diakonie Hamburg 2009: 174).<sup>40</sup>

### 5.5.2 Amount of back payment with no work contract

If third-country nationals sue their employer, the amount of back payment is assessed according to the following criteria:

“If the amount of remuneration was not expressly agreed in the contract, it is based on the remuneration that is usual for the sector. This could be standard wages. The obligation to pay the agreed wage persists regardless of a valid work permit or the residence status of the employee. The lack of residence status, however, is often exploited by employers to agree to

<sup>39</sup> “Unless otherwise stipulated in the work contract or wage agreement, the regular statute of limitations of three years applies to claims for wages (Section 195 of the Civil Code)” (Kössler/Mohr/Habe 2013: 78).

<sup>40</sup> cf. Mitrović 2015 and Junkert/Kreienbrink 2008: 33.



and pay hourly rates well below the standard wage. Individual cases can then proceed against the employer due to ‘unethical wage extortion’. The Federal Labour Court has ruled that this prevails when remuneration is less than 70% of the usual remuneration, constituting ‘noticeable disproportion’. A verbal agreement has legal force.

When employing workers without residence papers, a contract is typically not concluded in writing with the understanding of both parties. This is why a verbal agreement is sufficient. If the employee later wants to sue for the wage he/she is owed, he/she must be able to prove through records or witness testimony how many hours he/she worked for the employer. Whilst a written contract is not necessary for an employment relationship, the employment relationship must be terminated by the employer pursuant to Section 623 of the Civil Code in order to have legal force. Otherwise the employment relationship still formally exists if the employer continues to offer his labour after verbal termination” (Mitrović 2015).

According to Mitrović, it is more difficult in practice for an irregular third-country national to enforce an obligation for back payment due to the “objectively higher dependence on the employer [...]”, since they can expect more far-reaching consequences on their residence than regular third-country nationals caught performing illegal employment (Mitrović 2015).

### 5.5.3 Liability of prime contractors and intermediate contractors for outstanding compensation and taxes

If a company hires another company, the prime contractor is also liable for illegal employment at the intermediate contractor (Section 98a subs. 3 of the Residence Act), “unless the prime contractor or the intermediate contractor were not aware that the employer has employed foreigners who lack the authorisation for employment required pursuant to Section 284 (1) of the Third Book of the Social Code or the authorisation to pursue an economic activity required pursuant to Section 4 (3)” (Section 98a subs. 4 of the Residence Act).

“The liability pursuant to subsections 3 and 4 shall not apply if the contractor provides evidence that he or she was able to assume on the basis of due diligence that the employer has not employed any foreigner who lacks the authorisation for employment required pursuant to Section 284 (1) of the Third Book of the Social Code or the authorisation to pursue an economic activity required pursuant to Section 4 (3)” (Section 98a subs. 5 of the Residence Act).

Also Section 14 of the Posted Workers Act and Section 13 of the Act Regulating a General Minimum Wage also establish similar liability provisions for the prime contractor in regard to paying the minimum wage, whereas the liability in this case is regardless of negligence or fault:

“A contractor employed by another contractor to provide works or services shall be liable for the obligations of this contractor, a subcontractor, or a temporary employment agency hired by the contractor or a subcontractor to pay the minimum wage to an employee or make contributions to an institution jointly stipulated by the parties to the collective bargaining agreement [...]” (Section 14 of the Posted Workers Act).

### 5.5.4 Employer obligation to pay for other expenses

The Employer Sanctions Directive (2009/52/EC) defines the remuneration of third-country nationals residing unlawfully as follows: “The wage or salary and any other consideration, whether in cash or in kind, which a worker receives directly or indirectly in respect of his employment from his employer and which is equivalent to that which would have been enjoyed by comparable workers in a legal employment relationship” (Article 2 letter j of Directive 2009/52/EC).

“This means compensation to which there is a (retroactive) claim refers at minimum to:

- basic pay in the form of a fixed wage or salary (e.g., hourly wage, monthly salary) or a performance-based wage (e.g., piecework wage, premium wage)
- extra pay and supplements (e.g., for overtime, difficult working conditions), as well as allowances (e.g., for food or travel costs), or in-kind benefits (company housing, comped meals)
- continued pay in the event of illness pursuant to the Continued Remuneration Act
- paid legal holidays (see Section 2 of the Continued Remuneration Act)
- paid holiday pursuant to the Federal Holiday Entitlement Act
- continued pay in the event of breakdowns

Moreover, under Article 6 paragraph 1 letter c of the Sanctions Directive, the employer must bear any costs for wiring outstanding amounts to the country to which the foreigner was deported. In certain cases, the employer can also be obliged to bear the costs of the employee’s return to his country of origin” (Kessler 2016: Section 98a of the Residence Act, margin no. 7).



## 5.6 Court costs and third-party representation

Wage entitlements can also be demanded by illegally employed third-country nationals in a court (see above) or through a reminder process. In the first instance, the costs must be borne by the third-country national him/herself. The possibility exists to apply for financial legal aid. Victims can turn to pro bono legal advice or legal counsel from non-governmental organisations, which, however, are not available everywhere (interview with MigrAr).

Third-country nationals can acquire a legal advisor within the frame established by law or they can be represented by third parties. A representation by adult family members or representatives of employee associations or trade unions is permitted. Trade union information centres and consulting offices, for example, offer legal representation and legal services for irregular third-country nationals in many cities in Germany (cf. Section 2.2). Here, illegally employed individuals with no legal residence status can obtain advice on their rights and on the documentation necessary for a potential court case later on.

In practice, as an alternative to often lengthy court proceedings, (trade union) representatives often seek an out-of-court settlement with employers before taking legal action. As reports from trade union consulting offices and studies show, representation of employees by the consulting offices often has a positive effect on an out-of-court settlement between the employer and the worker. Reports from union counselling centres lead to assume that this could be due to the fact that employees are aware of their legal claim and employers prefer an out-of-court settlement for fear of negative public perception and given the knowledge their (former) illegal employees are receiving trade union support (interview with MigrAr, cf. ver.di 2015: 6, Junkert/Kreienbrink 2008: 34).

## 6 Conclusion

Time and again illegal employment figures as a topic within political discourse in Germany. Providing legal and practical arrangements to curtail the phenomenon is of high significance to the Federal Government, as became apparent i.a. through different legislative reforms in the 18<sup>th</sup> legislative period concerning the matter. The central legislative basis to curtail illegal employment is the Act to Combat Clandestine Employment, which regulates the competencies of the Financial Investigation Office for Clandestine Employment as the centrally responsible actor as well as further involved authorities, prescribes the nature and extent of cooperation amongst the different authorities and stipulates the penal and regulative sanctions following violations and infringements. Stipulations concerning (minimal) working conditions provided by the Act on Temporary Employment Businesses, the Posted Workers Act and the Act Regulating a General Minimum Wage are also relevant.

Illegal employment can be uncovered by different inspecting authorities (e.g. the inspectorate of the German Pension Fund or the tax fraud investigation offices). However, the central competence for curbing illegal employment lies with the Financial Investigation Office for Clandestine Employment. During its inspections that are partly carried out together with other authorities (e.g. the local foreigners authorities) the inspectorate is entitled to access workplaces, to check company records and to interview the persons working at the site of inspection extensively. Further, the Financial Investigation Office for Clandestine Employment is the competent authority for regulatory offence proceedings.

The extent of illegal employment of third-country nationals cannot be satisfactorily determined on the basis of the existing data acquisition and analysis methods. Furthermore, until today, conclusive scientific assessments or estimates on the extent of illegal employment of third-country nationals are lacking, making it impossible to determine third-country nationals as a percentage of all illegally employed persons in Germany. Cases of illegal employment of third-country nationals are discovered in the course of the inspections on illegal employment. According to experts and actors involved, this process is entirely sufficient.

Generally, third-country nationals may only pursue an economic activity if the residence title so allows. The entitlement to pursue an economic activity may be

temporally limited or may restrict the employment to certain sectors. Employers may only employ third-country nationals or commission them to perform other paid work or services if they possess such a residence title or if the third-country national is permitted by virtue of an intergovernmental agreement, a law or a statutory instrument to pursue an economic activity without requiring due authorisation via a residence title (Section 4 subs. 3 of the Residence Act). Employers must ascertain whether these conditions apply (Section 4 subs. 3 fourth and fifth sentence of the Residence Act). Illegal employment can therefore be committed by irregularly-staying third-country nationals, but can also be the case, when regularly-staying third-country nationals disregard the requirements set in their residence title. In addition, regularly-staying third-country nationals can be employed illegally very much in the same way German or EU-citizens can, if the employment is not registered in order to circumvent taxes or social insurance contributions.

Both employees working without the respective residence title or without an entitlement to pursue an economic activity and their employers can be subject to regulatory offence proceedings and criminal prosecution. Thereby, administrative fines up to €500,000 can be imposed upon employers that illegally employ third-country nationals. Further, employers may be sanctioned with imprisonment or the ineligibility for public contracts and subsidies. Also, the social security carriers request the unpaid social security contributions.

The outcomes for employees from third countries range from administrative fines, imprisonment, the shortening of the duration of stay and expulsion to deportation. Illegally employed third-country nationals (staying irregularly or regularly) may introduce a claim and eventually enforce a judgment against the employer for any outstanding remuneration. A representation of interest and legal advice is offered in several German cities by trade union consulting centres. Often, settlements out of court are sought in order to avoid long-term court proceedings.

Forced prostitution, forced labour, labour exploitation or exploitation using a deprivation of personal freedom are offences that can resemble illegal employment, but that are prosecuted by other entities on other legal grounds. In the course of inspections on illegal employment, cases of labour exploitation can also be discovered.

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**German Pension Fund** (Deutsche Rentenversicherung Bund, Fachbereich Grundsatz), 11 January 2017.

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**MigrAr (Migration and Work)** (Migration und Arbeit), 06 February 2017.



# Abbreviations

AEntG	Posted Workers Act (Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz))
ASOG Bln	General Act Protecting Public Safety and Order in Berlin (Allgemeines Gesetz zum Schutz der öffentlichen Sicherheit und Ordnung in Berlin)
AufenthG	Residence Act (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz))
AÜG	Act on Temporary Employment Businesses (Gesetz zur Regelung der Arbeitnehmerüberlassung (Arbeitnehmerüberlassungsgesetz))
BAMF	Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge)
BDA	German Employers' Association (Bundesvereinigung der Deutschen Arbeitgeberverbände e.V.)
BGBI	Federal Gazette (Bundesgesetzblatt)
BKA	Federal Criminal Police Office (Bundeskriminalamt)
BMAS	Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales)
BMF	Federal Ministry of Finance (Bundesministerium der Finanzen)
BMFSFJ	Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (Bundesministerium für Familie, Senioren, Frauen und Jugend)
BMI	Federal Ministry of the Interior (Bundesministerium des Innern)
CDU	Christian Democratic Union of Germany (Christlich Demokratische Union)
Cf.	Compare ( <i>confer</i> )
CSU	Christian Social Union in Bavaria (Christlich-Soziale Union)
DAAD	German Academic Exchange Service (Deutscher Akademischer Austauschdienst)
DEHOGA	Federal Hotel and Restaurant Association (Bundesverband der Deutschen Hotel- und Gaststättenverbände e. V.)
DGB	German Trade Union Confederation (Deutscher Gewerkschaftsbund)
EC	European Community
Ed./eds.	Editor/editors
EEA	European Economic Area (Europäischer Wirtschaftsraum)
e.g.	For example ( <i>exempli gratia</i> )
EMN	European Migration Network (Europäisches Migrationsnetzwerk)
Et seq.	And the following ( <i>et sequentes</i> )
EU	European Union (Europäische Union)
FKS	Financial Investigation Office for Clandestine Employment (Finanzkontrolle Schwarzarbeit)
GDP	Gross Domestic Product
GRETA	Group of Experts on Action against Trafficking in Human Beings
i.a.	Among other (things) ( <i>inter alia</i> )
i.e.	that is ( <i>id est</i> )

IG BAU	German Construction, Agricultural and Environmental Trade Union (Industriegewerkschaft Bauen-Agrar-Umwelt)
IOM	International Organization for Migration
KIB	Coordinating Offices to Curtail Illegal Employment in Hessen (Koordinierungsstellen zur Bekämpfung der illegalen Beschäftigung in Hessen)
KOK	German Network and Coordination Office Against Trafficking In Human Beings (Bundesweiter Koordinierungskreis gegen Menschenhandel e.V.)
MigrAr	Migration and Work (Migration und Arbeit; Trade Union Contact Point for Migrants with unsecured right of stay at the Hamburg office of the German Trade Union Confederation)
MiLoG	Act Regulating a General Minimum Wage (Gesetz zur Regelung eines allgemeinen Mindestlohns (Mindestlohngesetz))
MiZi	Memorandum on the Order on Communication in Civil Matters (Anordnung über Mitteilungen in Zivilsachen)
NGG	Union for Food, Consumption and Restaurants (Gewerkschaft Nahrung-Genuss-Gaststätten)
NGO	Non-Governmental-Organization
No.	Number ( <i>numero</i> )
p.	Page
PKS	Police Crime Statistics (Polizeiliche Kriminalstatistik)
REG	Return Expert Group
SchwarzArbG	Act to Combat Clandestine Employment (Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung Schwarzarbeitsbekämpfungsgesetz)
SPD	Social Democratic Party of Germany (Sozialdemokratische Partei Deutschlands)
Subs.	Subsection (of a legal act)
Ver.di	United Services Trade Union (Vereinte Dienstleistungsgewerkschaft)
VO	Ordinance (Verordnung)
ZAV	International Placement Services (Zentrale Auslands- und Fachvermittlung)
ZustVO-OWiG	Ordinance on Competences for Prosecuting and Punishing Regulatory Offences in Berlin (Verordnung über sachliche Zuständigkeiten für die Verfolgung und Ahndung von Ordnungswidrigkeiten in Berlin)

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