

Independent Contractor Compliance – New Developments in Germany

Today, I am happy to share some thoughts on compliance and legal considerations in an external workforce program together with my peer Christian Hübscher, Partner at PEER GROUP ALLIANCE.

An on-going hot topic when thinking about contingent workforce compliance is the delimitation of independent contractors and employees. It is a highly disputed question in a lot of countries. Due to the flexibilisation of employment relationships, which particularly increased during the pandemic, it is becoming more difficult to distinguish an independent contractor from an employee.

1. How is the status checked?

In contrast to employees, independent contractors are **not personally dependent** in their work. In order to define the characteristics of the personal dependence, numerous individual criteria have to be taken into account, in particular the following:

- Probably the most important criterion is the **personal dependence on directives** regarding place, time and specifics of the work performed.
- **Integration into the operation** of the client.
- **Obligation to perform the work personally.**
- **Entrepreneurial behaviour and risk.**

2. What are the consequences of misclassification?

If the contractual relationship is implemented wrongly, not as a true independent contractor relationship, but as an employment relationship, it is called **pseudo-independence** (Scheinselbstständigkeit). The legal consequences concern:

- **Employment law** (full employee protection).
- **Social security law** (Payment of full social insurance contributions retroactively for the current as well as for the last four years. In case intent is given, social insurance contributions have to be paid for the last 30 years).
- **Tax law** (withholding taxes and wrongfully deducted VAT concerning the last four years).



- **Criminal law** (imprisonment of up to five years or with pecuniary penalty as far as the employer withholds as an employer an employee's contribution to social security; tax fraud).

3. New developments in Germany

In recent years, employee's **working conditions** have become **increasingly flexible**, e.g. due to implementation of part-time work, mini jobs, fixed-term contracts, trust time work (Vertrauensarbeitszeit), etc.

It was an **important criterion** for an independent contractor status if the worker had **several clients**. However, courts argue that also employees can have several employers when working in several part-time jobs and that, therefore, **having several clients should not be a valid criterion for an independent contractor status**.

In the past, employees regularly worked in the employer's office. **Working from home was an exception**. When an independent contractor worked from home or remote, this was a good criterion for an independent contractor status since integration into the client's operation was not given. During the pandemic, an **increasing number of employees are working from home or remote**. Therefore, German authorities now argue that employees also work from home and that independent contractors participate in meetings via internet.

There is a **risk** that increasing flexibility of working conditions and the resulting harmonisation of employment relationships and independent contractor relationships will **lead authorities and courts to consider independent contractor relationships more and more as employment relationships**.

Interested in more details? Please **contact** us.



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