

Employed or self-employed? Request an advance ruling!

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Contract of service or contract for services

New act

Comment

Determining whether an individual is an employee or self-employed can be risky for both the contractor and engager. Often, no one knows exactly how to qualify an individual until the national insurer claims arrears in social security payments in the wake of an audit. The parties involved hardly ever have legal certainty in advance. The Social Security Determination Act aims to change that.

Contract of service or contract for services

Whether someone works as an employee under a contract of service or as an independent contractor under a contract for services is not determined by what the parties consider their relationship to be or how they word the underlying contract. Instead, as with other legal relationships, this determination is based on how the contractual relationship plays out in reality.

Even then, in the absence of a concise legal definition of 'employment' and 'self-employment', the factors and tests developed by the courts over the years hardly provide reliable guidance.

Similar to other jurisdictions across Europe, some factors are typical indicators of employment under a contract of service, including where:

- the engager dictates where, when and how to perform work;
- the engager decides whether the individual will be paid hourly, weekly or monthly; and
- the worker becomes 'part and parcel' of the engager's organisation.

Other factors are strong indicators for self-employment under a contract of service, including where the individual:

- has a right to substitution;
- can engage helpers;
- uses his or her own equipment and materials;
- performs work for several engagers; and
- is not an integral part of the organisation.

However, the test applied by the courts does not simply count up the various factors pointing towards employment versus self-employment and compare them, as this approach has been rejected because different factors may have different weights under the circumstances of each case. Instead, once the facts and factors have been established, the court will consider the whole picture. This test leaves much leeway for judicial assessment and legal uncertainty.

New act

Under the new Social Security Determination Act, which entered into force on July 1 2017, self-

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employed individuals must fill out a questionnaire when registering for insurance or if seeking to obtain a trade permit for certain trades that commonly conceal employment under a contract of service (eg, certain manual unskilled work, types of cleaning service, unskilled assembly, courier and office services, excavation work and shelf stacking).

The questionnaire asks about typical factors pointing towards employment (eg, use of the worker's own equipment, flexible working time, engagement of helpers, training by the engager, place of work, personal services and business liability insurance).

If the involved social security providers jointly conclude that the person can be considered self-employed, this legal status will be confirmed in an advance ruling that has a binding legal effect for subsequent audits, unless the statements in the questionnaire were wrong or where the reality of the relationship deviates from the factors according to the questionnaire. The same applies where the two social security providers involved jointly conclude that the questionnaire points towards employment. Should the social security providers fail to reach a common understanding, the person will be considered an employee, which decision can then be appealed by the worker.

Not only are the allegedly self-employed requested to fill out a questionnaire and have their status tested, engagers or potential employers can also request an advance ruling on a worker's employment status.

Provided that the reality of their relationship corresponds with the information provided in the questionnaire or, where employers request an advance ruling, is in line with the information given to the competent insurer, both workers and their engagers now have a legal tool to verify employment status. In particular, engagers/employers that are uncertain of whether their contractors' employment status is accurate can now plan their labour costs with more certainty.

Employers that are seeking to engage self-employed contractors should therefore request that they present the advance ruling as proof of their status before they engage them.

Comment

The new advance ruling on employment status is a reliable legal tool, provided that:

- all information presented to the insurers either in the questionnaire or by engagers is accurate; and
- the reality of the contractual relationship does not deviate from this information and is not modified at a later stage.

It remains to be seen whether tax and social security auditors will accept the legally binding effect of the advance ruling in cases of only minor changes to the contractual reality.

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