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(English machine translation provided as courtesy)

The freelancer – a fairy tale

Dear Ladies and Gentlemen

In our accounting and auditing mandates, we occasionally come across situations in which a company pays someone for their work but does not settle any social contributions. In reply to our enquiries, we are always told that this is just fine because the person is a freelancer. Unfortunately, the supposedly advantageous freelancer hides considerable legal and financial risks. We have therefore compiled the most important facts below.

What is a freelancer?
What is commonly known as freelancer is a free agent, who, as a formally self-employed person, works for his or her own account in a company and effectively assumes the role of an employee. Instead of a salary, he or she receives a fee. The supposed advantages include, on the one hand, a high degree of flexibility, since labour law, including protection against dismissal and the obligation for sick pay, does not apply, and, on the other hand, the employing company saves on social security contributions, since the freelancer takes care of this himself - or should take care of it. This is the fairytale of the freelancer. But the reality is quite different.

How are freelancers regulated?
In a legal sense, freelancers do not exist. There is only a distinction between being an employee or self-employed.

Being employed means working within the framework of an employment relationship, i.e. in a company and under the authority and responsibility of the employer. In exchange, the employer pays a salary, takes care of all social and employee insurances contributions and issues a salary statement.

A self-employed, on the other hand, runs their own company, bears all business risk and takes care of their own social insurances. A financial statement replaces the salary statement and determines the taxable profit.

Where is the boundary between self-employed and dependent?
Legislation covering Old Age and Survivors' Insurance (AHV, social security) provides the distinction between those two categories and is supervised by the social security authorities. Self-employed persons appear on the market under their own name, can freely choose the organisation structure of their company, work with their own resources and for a large number of customers. Often, they also employ staff themselves. Anyone not fulfilling the criteria of being self-employed is by definition dependent, i.e. employed.

In many cases, these criteria are so obviously met that further clarification is unnecessary. This is the case, for example, for the purchase of a table at a fixed price that a carpenter has manufactured in his own workshop with his own tools and his employees. These criteria are also fulfilled if a gardening company maintains my garden twice a year, even if this is done on my property and will be charged by hourly basis.
The distinction becomes much more difficult in cases where individual activities are performed at customer's premises over a long period, which do not require specific operating resources, or which need to be performed using the customer's infrastructure. Thus, we enter the field of computer science, professional services in all variations and sales services on commission basis – all industries in which one frequently encounters freelancers.

In such situations, the social security authorities examine each case individually according to the actual facts and use primarily the number of client relationships as a basis. The principle applied here is "the more the better", with a minimum of three clients required, and where less than half the turnover is made with the largest client. Otherwise, there is too much dependency on one particular client, and some form of employment is assumed. If someone officially becomes self-employed while de facto being in employment, it is treated as a case of "disguised employment".

In an – even de facto - employment relationship, the employee is considered as the weaker party and therefore enjoys special legal protection. This means the employer bears the risk for any violations of labour or social insurance regulations. Passing on, via contractual agreement, the obligation to take care of social insurance contributions to the freelancer is therefore not possible.

Where are the risks?
On the occasion of regular employer audits by social security, we notice that the authorities are specifically looking for such constellations and you risk that the missing AHV contributions (both employer's and employee's share) are subsequently collected up to 5 years back. Consequently, the accident insurance contributions must also be paid in arrears for that period, and the employee must be signed up to a pension fund insurance. As private pension funds normally do not allow this retrospectively, only the expensive option of the Contingency Pension Fund (Stiftung Auffangeinrichtung BVG) remains.

If the freelancer has at least paid social security contributions himself, it could be argued that social security has been paid and that only the difference between the lower contributions for self-employed and the regular contributions should be paid in retrospect. Should a freelancer neither be registered to social security nor have paid any contributions, you could find yourself accused of illegal employment and face heavy penalties. It gets even worse: should a freelancer become disabled after an accident

that should have been covered by your accident insurance, then your business will be directly liable.

Staff leasing as an additional complication
Particularly in the IT sector staff is frequently employed to work for a client for a longer period of time and to be fully integrated into the organisation of the customer's company. This so-called labour-hire is subject to a government license, and for this licence, the staff-leasing companies must provide a deposit of at least CHF 50'000. This also applies if only the company's own regular employees are hired out.

In principle, self-employment and staff leasing are mutually exclusive. Where freelancers are employed and then seconded elsewhere, not only do you face the above-mentioned risks but also those of breaches of the regulations covering labour-hire. These risks go from revocation of your staff leasing license to fines (even against your client) for employing seconded staff. So here too, there is no getting around "legitimate" employment.

How can I protect myself?
In view of the legal and financial risks above-mentioned, it is essential to avoid employing bogus self-employed persons. It is best to systematically check whether you have problematic constellations in your company and clarify the recognition as self-employed in each individual case.

For this purpose, the competent social security authorities issue certificates of self-employment, which you should definitely request from your contractor before starting work. An entry into the commercial register or your own VAT number are good indications of valuable self-employment, but cannot replace the effective self-employment confirmation from social security.

Attention: The confirmation from social security only proves that the person is basically self-employed and pays the contributions himself/herself. Nevertheless, the employment with you can still be dependent if the scope, duration or organisational integration into your company creates too great a dependency. In such cases, we recommend that you submit the specific individual case to the competent authorities at the social security office to obtain a binding ruling.

This newsletter can only provide a general overview of the complex world of social insurance, but cannot replace a detailed analysis of any individual case. Should you perceive the need for action in your company, or have any further questions regarding this matter, our specialists will be pleased to help you.

Kind regards

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