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NEWSLETTER

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The freelancer – a fairy tale

Dear Ladies and Gentlemen,

During our audit work we sometimes encounter situations in which a businessman has paid someone for having done certain work, but has not paid any social contributions. In reply to our enquiries, we are often told that "everything is just fine as it involves a freelancer". Unfortunately, behind the seemingly advantageous usage of a freelancer are hidden many legal and financial risks. For that reason we have compiled the most important facts here.

What is a freelancer?
What is commonly known as freelancer is a free agent, who, being officially self-employed at his or her own account, works in a company and is, de facto, taking on the role of an employee. This free agent receives a fee instead of a salary. One of the alleged advantages is a high level of flexibility; employment laws regarding protection from unfair dismissal and sick pay are not applicable, another is savings on social contributions, as these become the freelancer's business. This is the fairytale of the freelancer. But reality shows a different picture.

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

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

Someone who is self-employed, on the other hand, has his or her own company, bears all business risks and personally deals with social contributions. A financial statement replaces the salary statement and determines any profit.

Where is the boundary between self-employed and employed?
Legislation covering Old Age and Survivors' Insurance (OASI) supplies the distinction between those two categories and is supervised by the OASI authorities. Self-employed enter the market under their own name, can freely choose the organisational structure of their company, work with their own resources, and for multiple clients. Often, they

have employees of their own. Anyone not fulfilling the criteria of being self-employed is by definition employed.

In many cases the criteria are met in such an evident way that further clarification is unnecessary; for example, in the case of the purchase, at a fixed-price, of a table manufactured by a carpenter in his own workshop, with his own tools and with his own employees. These criteria are also met, for example, when a gardening company does my garden twice a year, even if that is on my own premises and pay is on an hourly basis.
The distinction is not so easy in cases where individual activities are performed at a customer's company over a long period, which do not require specific operating resources, or which require the work being 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 OASI authorities examine each case individually, according to the actual facts and use the number of customer 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. When someone officially becomes self-employed while de facto being in employment, it is treated as a case of "disguised employment".

Whilst in employment – even de facto – an employee is regarded as the weaker party, and thus enjoys particular legal protection. This means the employer bears the risk for any infringements against work regulations or social insurance regulations. Passing on, via contractual agreement, special obligations to clarify mandatory social insurance contributions is just not possible.

Where do the risks lie hidden?
On the occasion of employer audits OASI we have noticed that the authorities are specifically looking for such arrangements, and you as entrepreneur are at risk of having to pay the missing OASI contributions (both employer's and employee's contributions) as far as five years back. As a consequence, all accident insurance premiums also need to be paid for that period, and the employee integrated into a pension scheme. As private pension funds do not allow this retrospectively, only the expensive option of the Contingency Pension Fund remains.

In cases where the freelancer has made his or her own OASI contributions, it could be argued that some OASI regulations have been followed and that only the difference between the lower premiums for someone self-employed and the regular contributions needs to be paid in retrospect. Should a freelancer neither be registered under OASI 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.

Labour-hire as additional complication
In particular, the computer science industry frequently uses staff to be seconded to customers on a long-term basis, and to be integrated into the administration of the customer's company. This so-called labour-hire is subject to a licence, and for this

licence, staff-leasing companies are required to provide a deposit of at least CHF 50’000 (this also applies in cases when the staff leasing companies are only seconding their own regular employees).

In principle, self-employment and staff leasing rule each other out. 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 withdrawal of authorisation to fines (for your client) for employing seconded staff. The only legal solution: the freelancer forms his own limited company, becomes the sole employee and applies for a labour-hire licence. The mandatory deposit seldom makes this feasible, and there is no getting around “legitimate” employment.

How can I safeguard against risks?
In face of the legal and financial risks mentioned above, it is vitally important to avoid employing anyone in “disguised employment”. The best you can do is to systematically check any problematic situations in your company, and examine each potential case of self-employment individually.

For this purpose, the relevant OASI authorities have forms available for certification of self-employment; it is absolutely necessary to ask your contractor to provide this form before starting the contract. An entry into the commercial register or VAT registration, are valuable hints of proper self-employment is no substitute for certification by OASI.

Attention: confirmation by OASI only shows that the person mentioned is self-employed and personally deals with OASI matters. Yet a specific job could still be regarded as employment as, depending on amount, duration or administrative integration into your company, too much dependency might be created. In such situations we recommend presenting the specific case to the relevant OASI compensation office and asking for a binding judgement.

This newsletter is only able to supply a general overview of the complex world of social insurances and 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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