



# Worker Misclassification: An Innangard Report on Employee Status and Consequences of Worker Misclassification in Key Jurisdictions

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If you have any questions in relation to worker misclassification, or any other employment law questions, **ASK INNANGARD:**

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# EXECUTIVE SUMMARY

## Worker Misclassification in Key Jurisdictions

**Australia:** In Australia, a person performing paid work will be either an employee or an independent contractor. An employee is someone who serves their employer within the employer's business, whereas an independent contractor carries on a business of their own. Misclassification of an employee as an independent contractor may amount to "sham contracting", which is prohibited under Australian employment law, and may also lead to other contraventions. Employers who engage in sham contracting can be subject to heavy fines and forced to compensate the employee for any unpaid employment entitlements.

**China:** In China, workers are classified either under employment law or civil law. An employee under employment law refers to those who have established an employment relationship with an employer according to the employment law and labour contract law of the PRC. An employee under civil law refers to those who concluded the contract with the employer in accordance with contract law or other related civil law. The rights and obligations of employees shall comply with contracts concluded with employers, where the employment law will not be applicable.

Misclassification may cause some consequences to the employer, such as overtime pay, economic compensation for termination of contract, and double monthly pay for failing to conclude a written contract. The misclassification may give rise to administrative or criminal penalties.

**England:** Generally in England an individual will fall into one of three main categories: employee, worker and independent contractor. Although there are definitions of an employee and a worker in English legislation, there is no such definition for an independent contractor and much of the law in this area has developed through case law.

Employees have a full suite of statutory right and protections, including the right not to be unfairly dismissed and the right to maternity leave and pay; workers have fewer rights than employees, as against their employer; and genuinely self-employed independent contractors have almost no statutory employment rights against the people to whom they provide services. Misclassification as an independent contractor as opposed to a worker or employee can lead to an employer being liable for, amongst other things, the national minimum wage, holiday pay, the worker's torts and any unpaid tax and employee and employer national insurance contributions.

**France:** Hiring independent contractors is particularly appealing in France where the classical employee status comes with significant constraints and risks. However, in a context where employees' rights are fiercely protected, there is a strong resistance against the current on-demand economy trend and companies should carefully double-check whether the independent contractor criteria are met i.e. that there is no subordination link: the independent contractor should be free to organise his work, use his own tools, bring skills that are distinct from the company's core business, and be able to provide services to other clients. The outcome of the current litigation launched against Uber will provide useful guidance as to the definition of independent contractors.

**Germany:** The legal consequences in cases of worker misclassification in Germany are severe and a very recent reform will further restrict the use of temporary agency workers and increase the sanctions in cases of bogus self-employment and illegal temporary agency work. In cases of bogus self-employment or illegal temporary agency work, employment law and social security law are fully applicable, leading to the duty to repay all outstanding social security contributions plus surcharges. Other major risks include the personal liability as well as criminal liability of directors and board members and a loss of the entitlement to deduct input tax.

In order to reduce the risk of employee misclassification, it is highly advisable to introduce or review corporate guidelines on the deployment of external staff, conduct spot-checks regarding the current deployment of external staff, and raise the awareness for bogus self-employment and illegal temporary agency work as compliance risks.

**Ireland:** While some legal commentators have questioned whether Ireland's employment categories are out of date, suggesting that the new 'gig' economy requires Ireland to create a category of 'worker' it seems the Irish Courts have already made provisions for such an employment relationship and a 'gig' worker in Ireland is more than likely to be deemed an employee as opposed to self-employed.

**Italy:** Workers in Italy can be either subordinate employees or autonomous workers depending on the activities they carry out and on the manner of performing them. Whilst an employee is a person who works within a hierarchical structure, under the employer's organisational and disciplinary powers and strictly follows the employer's orders (in terms of working hours, place of work, assigned duties, manner of performing the working activities, etc.), the autonomous worker is a person who carries out his / her activity by autonomously establishing the timing, the place and the modalities of work.

Misclassification of workers is forbidden in Italy and the consequences are heavy: in fact, misclassification leads to a declaration of a subordinate relationship between the parties with all the relevant consequences in terms of salary, social contributions and sanctions (and in some cases also in terms of compensation for damages).

**Netherlands:** Dutch legislation covers numerous categories of workers. Most of them can be classified as employees. If the relationship of authority is missing, the worker will be qualified as a contractor. Employers who misclassify their workers can face serious consequences. It is important to keep in mind that the way in which an agreement is executed takes precedence over the wording of the agreement.

**Portugal:** The key distinction to be made when considering paid workers is between an employee and an independent contractor. It can be seen as advantageous to hire independent contractors since the legal framework applicable to the employee is much more protective and restrictive. Still, if a self-employment arrangement is deemed to be false, the contractual relationship with the misclassified self-employed contractor will be reclassified as an employment contract. This brings severe consequences for the employer: contractual termination will amount to an unlawful dismissal resulting in the compulsory reinstatement of the worker or compensation, repayment of outstanding social security contributions and in the application of an administrative misdemeanour fine. The best advice is always to enter into a written contract with a self-employed contractor.

**Spain:** In Spain, labor authorities particularly tend to control the misclassification of employees given that classification as a self-employed worker is often abused. Consequences of misclassification are severe. Therefore, it is advisable to apply the correct employment regime to an individual. In order to distinguish between employee and self-employed worker it is important to look at the following criteria:

- i) the payment of a periodic remuneration;
- ii) the provision of tools and materials by the employer; and
- iii) the subordination and dependence to the employer's working organisation, among other factors.

In Spain, there is also a current concern regarding the legal articulation of new forms of relationships between digital platforms (Uber, etc.) and service users or suppliers as usually they represent false self-employed workers.

**Switzerland:** Under Swiss law persons who carry out paid work for someone else are either classified as employees or self-employed persons. An employee is integrated into the employer's work organization, serves under its directives and does not bear a significant economic risk whereas a self-employed person is free to determine how to perform its services, works with its own equipment and organization, bears its own economic risk and is often paid with a fixed fee for a project or even a specific success. Misclassification bears a high risk for employers since they may retroactively be obliged to pay all the social security contributions and employment protection benefits.

# AUSTRALIA

## Determining Classification in Australia

Where an individual performs paid work for another person or entity, he or she will be either an employee or an independent contractor. An employee is generally defined as someone who serves the employer within the employer’s business, whereas an independent contractor is someone who carries on a business of their own.

The status of a worker must be determined by considering a number of factors / indicators. For example, the following factors would indicate that a worker is an independent contractor:

- the worker controls the way they perform the work;
- the worker supplies and maintains their own tools or equipment;
- the worker is paid according to task completion, rather than wages or salary;
- the worker is able to subcontract or delegate any aspect of the work to another person;
- the worker is free to work for others at the same time.

No single factor is determinative, and the purpose of the exercise is to assess the overall relationship between the two parties.

## Employment protections for worker misclassification in Australia

Employers are specifically prohibited from engaging in “sham contracting” (i.e. where an employment relationship is represented as being an independent contractor relationship). If an employer is found to have engaged in sham contracting, a court may impose a fine on the employer as well as any individuals who were “involved” in the contravention, such as managers and HR practitioners. The maximum fine is currently AUD \$54,000 (£30,447.41 and US \$40,101.54) for corporations and AUD \$10,800 (£6,089.75 and US \$8,020.28) for individuals.

## Tax consequences of worker misclassification in Australia

Employers are required to pay and withhold tax in respect of employees’ salary payments, as well as make mandatory contributions to employees’ superannuation funds. Where an employee has been misclassified as an independent contractor, the employer may have failed to comply with these obligations with respect to that employee, in which case the employer may be liable to pay fines and address any payment shortfalls.

## Other consequences of misclassification in Australia

Employees enjoy a range of statutory entitlements, including minimum wages, leave entitlements, penalty rates and limitations on hours of work. Where an employee has been misclassified as an independent contractor and does not receive these entitlements, a court may:

- require the employer to compensate the employee for unpaid entitlements;
- impose a fine on the employer as well as any individuals who were “involved” in the contravention.

The maximum fine is currently AUD \$54,000 [£30,447.41 and US \$40,101.54] for corporations and AUD \$10,800 [£6,089.75 and US \$8,020.28] for individuals.

## Interesting developments or cases to report in Australia

In July 2016, Australian media reported that certain employee organisations are considering legal action against “on demand” food delivery businesses, Foodora and Deliveroo, in relation to their engagement of delivery riders as independent contractors. It has been reported that, on average, delivery riders engaged as independent contractors earn significantly less than the minimum wage payable to employees performing the same work.

### TOP TIPS:

1. Prior to engaging a worker as an independent contractor, carefully consider the risk of sham contracting and seek legal advice if necessary.
2. Ensure that workers who are engaged as independent contractors:
  - provide their own equipment and resources;
  - are able to control how they perform the work;
  - are paid for work performed rather than on a salary basis;
  - are able to advertise their services and perform work for other clients; and
  - are able to delegate or subcontract work to others.
3. Ensure that workers who are engaged as independent contractors enter into a written agreement (prepared by your employment lawyers) to clarify, among other things, the intention of the parties as to the status of the worker.

# CHINA

## Determining Classification in China

Employees/workers are classified either under employment law or civil law in China.

In principle, employees/workers under employment law are those who have established an employment relationship with an employer in China and thus qualify as an “employee” according to employment law of the PRC. The rights and obligations of employees must comply with employment law. Based on different criteria, employees under employment law can be classified into different types, such as full-time and part-time employees, dispatched and common employees, etc.

The rights and obligations of employees under civil law shall comply with contracts concluded with employers and special protection available to employees under employment law shall not be applicable.

When distinguishing between employees under employment law and civil law, the court will carry out multi-factorial tests, and consider all relevant situation and elements in the actual execution of the contract.

## Employment protections for worker misclassification in China

If two parties conclude a civil contract, but the contract contains the essential elements of an employment relationship, then the court would confirm the existence of an employment relationship and apply relevant regulations for protection of labor rights. Therefore, the misclassification of workers could bring the following consequence to the employer:

- (1) The employment law is fully applied, including but not limited to: overtime pay, economic compensation for termination of contract, and double monthly pay for failing to conclude a written contract.
- (2) The employer must make up the deficit of social insurance premiums, including employment injury compensations.

## Tax consequences of worker misclassification in China

Where an individual is an employee under civil law or employment law, he/she will be obliged to pay individual income tax based on his/her income. The nature of social insurance contributions in China is premium rather than tax. However, misclassification of workers may lead to a supplementary payment of the employer for the clerk’s social insurance fee.

## Other consequences of misclassification in China

Misclassification causes administrative and criminal penalties. If employers do not pay remuneration or abide by the statutory laws regarding working hours, rests and leaves, insurance and welfare, then they will be subject to administrative penalties including but not limited to compensation for damages of employees, fines, restricted access etc. In some serious cases, criminal sanctions will be applied.

Social announcement of major labour security illegal behaviour: if employers conducted major labour security illegal behaviour, the Human Resource and Social Security Administrative Department will make public the employer’s relevant information and misconduct.

## Interesting developments or cases to report in China

New employment modes arise with an unprecedented speed in China in the context of the on-demand economy. Employees in the new mode contain features both under employment law and civil law, or in some cases even overstep both fields, which have caused conflict and confusion in legal practice. For example, with diversified contract arrangements and different extent of actual execution of contracts, no consensus is concluded on whether Didi drivers and other gig workers are employees under employment law or not. The new employment mode brought by internet needs clarification through further legislation and judicial practice.

**TOP TIPS:**

- (1) Sign the written labour contract with the employee and make clear the relationship between employers and employees.
- (2) Pay the social insurance and house fund for the employee according to the laws and regulations.
- (3) Apply for the verification of work-related injury timely when the employees get hurt during the work time to avoid any unnecessary loss borne by the employers.
- (4) Terminate or resign the contract as soon as when the employee reaches his/her retirement age to make the relationship clear between both parties since that time.

# ENGLAND

## Determining Classification in England

### Employees

For much of UK employment law, an employee is defined as “an individual who has entered into or works under...a contract of employment” (section 230 of the Employment Rights Act 1996 (ERA 1996)). There has been much case law on this issue and an Employment Tribunal in England would usually consider the following when assessing if someone was an employee:

- whether there was an agreement for the person to provide the service personally in return for a wage or remuneration;
- whether there is mutuality of obligation, that is the obligation on the employer to provide work and on the putative employee to accept and perform the work;
- whether there is control of the person by the employer; and
- whether the other terms are consistent with a contract of service (for example, if the person provides and maintains the tools or equipment used in their work, whether the person hires their own help, the degree of financial risk adopted, the degree of investment in and management of the business, whether the person has the opportunity to profit from their own good performance, whether the person is paid a fixed wage or salary and whether the person is paid when absent due to holiday or sickness).

### Workers

A worker is a category of individual between an employee and someone who is genuinely self-employed.

Generally, a worker works under a contract to personally perform work or services and is not in business on their own account (most definitions of a “worker” also includes someone who is an “employee”). If the individual has a limited ability to offer a substitute to do the work, the tribunal will find it useful to assess whether the obligation of personal performance remains the dominant feature of the contract in order to confirm the worker status<sup>1</sup>. It will be important to look at whether the worker actively markets his service to the world in general (which might infer independent contractor status), or whether he has been recruited by a "principal" to work as an integral part of the principal's operations (tending to infer worker status)<sup>2</sup>. Further, the degree of control exercised by the putative employer over the individual performing services will be helpful to distinguish workers from independent contractors<sup>3</sup>. Other relevant factors could include: the exclusivity of the arrangement; its typical duration; the method of payment; which party supplied the equipment used; and the level of risk undertaken by the worker. The mutuality of obligation is now also pertinent for the tribunal to consider when assessing if someone is a worker<sup>4</sup>.

There are three key definitions of a worker in English legislation.

- Worker status for general rights: this worker definition applies for the purposes of the national minimum wage, part-time workers rights, the right to paid annual leave and rest breaks, the right to a maximum working week and protection from unauthorised deduction of wages. The

<sup>1</sup> *Pimlico Plumbers Ltd and Mullins v Smith* [2018] UKSC 29 sanctioning the “dominant feature test” from *James v Redcats (Brands) Ltd* [2007] ICR 1006.

<sup>2</sup> Known as the “integration test”, see *Cotswold Developments Construction Ltd v Williams* UKEAT/0457/05.

<sup>3</sup> *Jivraj v Hashwani* [2011] IRLR 827 endorsed by *Pimlico Plumbers*.

<sup>4</sup> *Windle v Secretary of State for Justice* [2016] EWCA Civ 459.

definition under article 230(3) ERA 1996 is: an individual who has entered into or works under a contract of employment or any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract. However, they are not a worker if they are carrying on a business undertaking or profession and the other person is a client or customer<sup>5</sup>. It is worth mentioning though that this has been recently challenged in the Employment Tribunals in cases such as *Uber*, *Pimlico Plumbers* and *Citysprint*, which are discussed below.

- Worker status for whistleblowing rights under section 43K ERA 1996: in addition to the above definition, this includes a person who is not a worker under the general definition above but who works in circumstances in which the person is introduced or supplied to do that work by a third person and where the terms on which they are engaged to do the work is in practice substantially determined not by that person but by the person for whom they work, by the third person or by both of them. This would generally cover a situation where a worker has been placed with an end user client by an employment agency. This extended definition of worker in connection to whistleblowing protections also embraces some of the following: student nurses and student midwives, homeworkers and non-employees undertaking training or work experience otherwise than at an educational establishment.
- Worker Status for discrimination law under section 83(2) Equality Act 2010: it is generally accepted that this definition is intended to be roughly equivalent to, if not wider than, the ERA definition of “worker”<sup>6</sup>, however this definition may also cover individuals who are technically self-employed but who are under an obligation to do the work personally (for example, where they are not permitted to sub-contract any part of the work or employ staff to do it for them).

### Independent Contractors

An independent contractor is someone who runs a business on their own account and takes responsibility for its success or failure. Independent contractors in England do not have employment rights and are responsible for their own national insurance and tax contributions.

### Employment protections for worker misclassification in England

If a worker is wrongly classified as self-employed, when they are in fact a worker, they could be entitled to a host of worker rights including: the right to national minimum wage, the right to paid annual leave, rest breaks, a maximum 48 hour working week, protection from unlawful deduction of wages and the benefit of whistleblowing and discrimination legislation.

If the individual is misclassified as self-employed when in fact they are an employee, they will be entitled to the full range of statutory employment law protections which apply to employees in the UK (subject in certain cases to required minimum periods of service), including unfair dismissal, statutory redundancy payment, maternity, paternity, adoption and shared parental leave and pay rights, and pension auto-enrolment rights amongst others.

### Tax consequences of worker misclassification in England

Her Majesty’s Revenue and Customs (“HMRC”) (the English tax authorities) apply employment case law together with their own guidance, to determine an individual's employment status (employee or self-employed). Employee or worker status categorisation for tax purposes does not automatically guarantee the same characterisation under employment legislation and vice versa. This is particularly

<sup>5</sup> Emphasised in *Bacica v Muir* [2006] IRLR 35.

<sup>6</sup> *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, at paragraph 31.

the case given that HMRC are alive to organisations and individuals trying to avoid national insurance contributions (NICs) and tax by trying to characterise their relationship as one of self-employment, and have specific rules aimed at targeting false self-employment.

As an employer is responsible for assessing and deducting income tax and employee NICs from a worker's pay and paying employer national insurance, if the employer wrongly classifies the individual as self-employed and has not been accounting to HMRC for these payments then they would be liable to HMRC for the employer NICs, under-deducted tax and employee NICs together with any penalties and interest.

In order to recover the accrued tax liability from the worker, the employer must have a contractual entitlement to do so. It would be much harder for an employer to recover the accrued NIC liability from the worker in the same way, as this is governed by detailed social security legislation

### Other consequences of misclassification in England

In addition, worker status gives the worker various rights to bring claims against the employer, including claims arising from discrimination, whistleblowing or a breach of working time or minimum wage legislation. Such claims can expose an employer to very high awards of compensation, especially in discrimination or whistle-blowing claims.

Further there has been case law<sup>7</sup> that suggests that an employer may be vicariously liable for the tortious acts of a worker; despite the absence of an employment relationship and arguably even if they incorrectly misclassify them as an independent worker, although much will depend on the facts of any particular case.

Additionally, a worker may have the right to pension contributions from employer under the mandatory auto-enrolment scheme.

### Interesting developments or cases to report in England

#### ***Aslam and others v Uber BV and others ET/2202550/15 ("the Uber case") upheld by the EAT***<sup>8</sup>

The employment tribunal recently held that Uber drivers are workers. Uber had argued that it is simply a technology platform which puts drivers in touch with passengers and that it is in no way a provider of taxi services. The tribunal concluded that in reality Uber is in the business of providing taxi services and engaged the drivers as workers to deliver its business. Further, although Uber had complex contractual documentation that purported to underpin the relationships between it, its drivers and passengers, the tribunal decided that the contractual documentation did not correspond with reality.

#### ***Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC 29***

The Supreme Court upheld previous rulings holding that a plumber of Pimlico Plumbers was a worker and was therefore entitled to the rights afforded to a worker, despite his contract stating that he was self-employed. Even though the plumber had a limited ability to engage a substitute to do his work, the dominant feature of the contract was personal performance. Furthermore, Pimlico exercised tight control over the plumber by requiring him to wear a uniform and subjecting him to onerous restrictive covenants if he were to leave his employment, to name just a few.

This case is similar to ***Dewhurst v Citysprint UK Ltd ET/220512/2016***, where the employment tribunal decided that, even though couriers were engaged as independent contractors and could have limited ability to use a substitute, they were in reality workers as they lacked autonomy by having to wear

<sup>7</sup> *Cox v Ministry of Justice* [2016] UKSC 10, paragraph 31.

<sup>8</sup> *Uber BV and others v Aslam and others* UKEAT/0056/17.

uniforms and being directed via mobile phones and radios by controllers. By contrast, in ***Independent Workers' Union of Great Britain (IWGB) and RooFoods Limited T/A Deliveroo***<sup>9</sup>, the Central Arbitration Committee decided that Deliveroo riders were self-employed and not workers because of their genuine wide and unrestricted right of substitution which meant that there could not be any obligation of personal service on their part.

Other cases considering the status of cycle couriers looked at the exercise of control as well as other factors, such as the bearing of financial risk by the individual, his capacity to negotiate terms<sup>10</sup> and whether the written agreement reflected the genuine relationship between the parties<sup>11</sup>.

### TOP TIPS:

- Employers should consider carefully what type of worker they need and avoid deliberate misclassification of workers or employees as self-employed contractors. Employers should draft their contracts carefully, having regard to the type of worker they need, and the legal responsibilities which they will have to that worker and the worker will have to them.
- A Tribunal or Court will look at the reality of the relationship, not just the contractual provisions. The English courts are alive to the risk of certain employers trying to avoid classification of employees or workers by inserting a provision into the contract expressly denying a particular facet required for that status, for example providing a right for the employee to provide a substitute to defeat the criterion of personal service. Employers should consider the facts of the particular situation and the likelihood that a Court or Tribunal would re-classify the person as a worker or employee.
- If seeking to have someone classified as a self-employed contractor, the employer should pay particular attention to whether there is a mutual obligation to provide and accept work, the degree of autonomy they give to that person, including allowing them to send a substitute to perform the work, allowing that person to control how and when they do the work, and avoiding full integration of that person into the business such as would be seen in an employee/employer relationship.
- Be aware that employment status will normally afford the employer the best protection in terms of protection of confidential information, duty of loyalty and fidelity, and ownership of IP rights created by the individual during the course of the engagement.

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<sup>9</sup> *Independent Workers' Union of Great Britain (IWGB) and RooFoods Limited T/A Deliveroo*, CAC TUR1/985(2016) 14 November 2017.

<sup>10</sup> *Boxer v Excel Group Services Ltd ET/3200365/2016*.

<sup>11</sup> *Addison Lee Ltd v Gascoigne UKEAT/0289/17*.

# FRANCE

## Determining Classification in France

### Employee

A person performing services for and under the direction of another person in return for which remuneration is paid. The employer has management powers over the employee concerning job description, performance, time and place of work.

#### Test:

- The key element is the subordination relationship. The Courts carry out an overall assessment of the working relation regarding autonomy, working hours, remuneration to determine if this criterion is met.
- The execution of the contract prevails over the intent of the parties and the wording of the contract.

**Intermediate classification: employees under an umbrella company (*portage salarial*):** a tripartite contractual relationship in which the employee, who is tied to an employer by a contract, performs services for the business clients of the employer. One service contract is entered into between the client and the employer and one employment contract is entered between the employer and the employee. A company that provides such services to its clients must make a prior declaration of their activity.

### Self-employed worker

This type of worker is not tied to an employer by an employment contract therefore there is no subordination relationship, nor economic dependency. They have great autonomy over their work and their deliverables.

Under French law, a person is presumed to be a self-employed worker in the following situations:

- they are incorporated and as such their activity is recorded on an official register (Companies Register for example) or affiliated with an insurance institution;
- their area of expertise is distinct from the company's core business; e.g. an IT consultant for a wholesale company;
- they are a business manager;
- they can determine their own working conditions unless these are defined by a contract with the ordering customer.

## Employment protections for worker misclassification in France

The main consequence is that a self-employed worker is recognised as an employee under an indefinite duration contract.

The employee will be entitled to benefit from all applicable legal and conventional dispositions concerning remuneration (minimum wage), working time, paid leave and following the termination of the employment contract (damages for redundancy without actual and serious basis, compensation in lieu of notice). **Tax consequences of worker misclassification in France**

The employer will be forced to pay social security contributions with surcharges and penalties to the Payroll Taxes Collecting Entity (URSSAF).

The employer could also be forced to pay these contributions for the three previous years.

There is a risk for the employee of a tax adjustment.

### Other consequences of misclassification in France

This infraction of undeclared work (article L. 8221-1, 3<sup>o</sup>, of the Labor Code) brings criminal and administrative charges:

#### Criminal charges:

- Private persons: three years in prison and a €45 000 fine.
- Legal persons: a €225,000 fine.
- Dissolution of the company where its purpose was to commit these offences.
- Prohibition from exercising directly or indirectly a particular business or social activity permanently or for five years.
- Placement under judicial supervision for five years or more.

However, the intention to commit these offences must be proven otherwise no criminal charges can be brought against the employer.

#### Administrative charges:

- Temporary or definitive closure of the establishment where the offences were committed.
- Temporary or definitive exclusion from the award of public contracts.
- Prohibition of any State aid for five years.

Any person convicted for using the services of a company that employs undeclared workers is held to be jointly liable to pay security and social contributions with surcharges and penalties and taxes.

### Interesting developments or cases to report in France

The Payroll Taxes Collecting Entity (URSSAF) is suing Uber in order to consider the drivers as employees before the Social Security Court (le Tribunal des Affaires de Sécurité Sociale).

The URSSAF is arguing that:

- Uber hires and trains the drivers;
- the drivers' fee is capped;
- Uber receives the entire price paid by the customer and gives a percentage back to the drivers;
- the drivers lack autonomy.

#### TOP TIPS:

##### Legal measures:

- Implement checklists to ascertain that the execution of the contract does not appear as a subordination relationship: favour a flat-rate remuneration and not in consideration of working hours.
- Implement procedures to ensure that workers are affiliated, that they have discharged their obligations with regard to taxation and social insurance.

##### Practical measures:

- Workers should use their own working equipment (laptop for example).

- They should have their own email address and business cards.
- They should not appear as belonging to the organisation.

They should have other clients or at least the possibility to develop their own.

# GERMANY

## Determining Classification in Germany

Employee / worker: An employee is a person performing services for and under the direction of another person in return for which remuneration is paid. The employer's directions may concern the content, performance, time and place of work (subordination relationship).

- Multi-factorial test: the Courts carry out an overall assessment of the situation, taking all relevant factors of the individual case into consideration.
- The actual execution of the contract takes precedence over the wording of the contract.

Executive staff: Employees with significant managerial powers, in particular with the power to employ and dismiss employees.

Some legislative Acts use a broader notion of employee. For example, the Federal Data Protection Act or the General Act on Equal Treatment also covers trainees or civil servants who do not fall under the scope of most of the employment law.

Managing Directors and members of the Board of Directors in general are not considered employees under labor law.

## Employment protections for worker misclassification in Germany

The contractual relationship with the misclassified worker (or any other form of external staff) is reclassified as an employment contract. As such, the following may apply:

- employment law and social security law are fully applicable;
- non-wage labor costs: repayment of outstanding social security contributions plus surcharges (for up to four years of employment; in case of intent, even up to 30 years).

## Tax consequences of worker misclassification in Germany

Loss of the entitlement to deduct input tax, repayment of outstanding income taxes, with high risk that remuneration paid to freelancer will be regarded as intended net payment. Thus, taxes and social security contributions will be calculated on projected gross income.

## Other consequences of misclassification in Germany

Other legal consequences / possible sanctions include:

- Fines: personal liability of directors and board members and fines for the company; up to €1 million per infringement; skimming off of profits gained from offences;
- Criminal liability of directors and board members pursuant to Section 266a of the German Criminal Code (non-payment and misuse of wages and salaries) and Section 370 of the Fiscal Code (tax evasion), imprisonment not exceeding five years or a fine;
- Exclusion from public procurement and private tendering procedures.

In addition, there may be severe damage to the company's reputation, arising from dawn raids, media coverage and pressure from the works council.

## Interesting developments or cases to report in Germany

After some major reforms on the liberalisation of the employment law (“Agenda 2010” / so-called agenda reforms of the Schröder administration), there have been several reforms that restricted the use of external staff. Currently, there is another reform on its way that will further restrict the use of temporary agency workers and increase the sanctions in cases of bogus self-employment and illegal temporary agency work.

### TOP TIPS:

Measures we have taken for several clients typically include:

- Introduction or enhancement of corporate guidelines on the deployment of external staff; introduction of checklists in the procurement process as a tool for assessing the risk of bogus self-employment and illegal temporary agency work;
- Spot-checks regarding the current deployment of external staff (optimisation of standard contracts, interviews & reports);
- Communications strategy and raising the awareness for bogus self-employment and illegal temporary agency work as compliance risks (including through training sessions for board members or executive staff).

# IRELAND

## Determining Classification in Ireland

There is no general definition of an employee but there are certain definitions specific to relevant pieces of legislation, e.g. “a person who has entered into or works under a contract of employment”.

Similarly, there is no set definition of “independent contractor”. In practice, there has been considerable jurisprudence on how best to determine employee / contractor status. Historically, the governing test was whether the individual is “in business in his or her own account”. The Courts’ current view is that no fundamental test had been established, and that each case must be considered in light of its particular facts. While a contract will be persuasive, the actual relationship will determine status.

Agency workers are assigned by their agency employer to work for third parties and also have a specific statutory status.

Industrial relations and whistleblowing legislation define “Worker”, the former as “any person who is or was employed”, the latter specifically including employees, contractors, agency workers and trainees.

## Employment protections for worker misclassification in Ireland

When a contract of employment is identified, the common law rights of an employee are activated, together with a series of statutory rights, principally the protection against unfair dismissal as well as entitlements to minimum wage, rest breaks and rest periods, leave, consultation and immunity from civil suit when engaged in industrial action. It is also a mandatory requirement to reduce an employee’s work arrangement in writing.

Equality rights arguably apply even when employee status has not been achieved.

## Tax consequences of worker misclassification in Ireland

The employer pays tax, social insurance contributions and pension contributions for and on behalf of the employee, whereas an independent contractor makes his or her own arrangements. In circumstances where the revenue authorities determine that an independent contractor is in fact an employee, the employer will be liable for unpaid taxes, interest and penalties. Tax non-compliance could also impact upon an employer’s eligibility to employ individuals subject to employment permits.

## Other consequences of misclassification in Ireland

A specialised and enlarged duty of care applies not to cause injury to employees due to negligence.

Insurance against injury at work is usually provided by employers where independent contractors will be obliged to make their own arrangements.

Damages caused by an employee may be attributed to an employer through implied, command or vicarious liability so damage caused by an individual who is deemed an employee may become the responsibility of the employer.

When an employer becomes insolvent, independent contractors will hold no special ranking whereas employees can avail of the protections contained in the Employers Insolvency Act 1984.

## Interesting developments or cases to report in Ireland

The most high-profile on-demand company, Uber, has been unable to take a foothold due to stringent transport regulations limiting services to licenced taxi drivers. However, it is clear from the growth of app-based services that the legal concept of an employee increasingly involves short-term flexible work rather than traditional employment. The definitions contained in most employment legislation (excepting the most recent 2014 whistleblower legislation, which defines a broad concept of “worker”) have become outdated. As such, close attention is being paid to cases in other jurisdictions (including Uber disputes in the US, UK and France) as to how Uber’s services are classified but, as of yet, no specific cases have arisen here.

The UK Employment Appeal Tribunal (“UK EAT”) decided in November 2017 that the two Uber test claimant drivers were in fact ‘workers’, and upheld the findings of the UK Employment Tribunal stating that:

*‘The issue at the heart of the appeal can be simply put: when the drivers are working, who are they working for?’*

The UK EAT’s decision has been regarded as a further blow to operators in the gig economy. This status has far-reaching implications not only for Uber drivers who are now party to a number of protections including national minimum wage and paid annual leave, but it calls into question the viability of the business models of a number of companies in the so-called “gig economy”.

Recently, in ***King v The Sash Window Workshop C-214/16***, the UK Court of Appeal interpreted the Working Time Directive 2003/88/EC so as to preclude an employer from denying a worker the right to take paid leave. The UK Court of Appeal held that the right to paid leave carries over until the worker has had the opportunity to exercise it and, upon termination of employment, the worker has the right to payment in lieu of any leave which remains outstanding and unpaid. This case is of significant importance for all employers across the EU as it creates the potential for those workers wrongly classified as being self-employed contractors to claim back pay in respect of unpaid annual leave going back many years once their ‘employee’ status is established. Employers take note that the failure to adhere to ensure that their workers are readily identifiable as being self-employed may have far reaching financial consequences. This case may be referenced by the Irish Courts in finding employers financially liable without restriction for any accrued but untaken annual leave whether in respect of an employee and/or in respect of a person by who the employer thought was self-employed but was in fact an employee.

Zero-hour contract workers fall into the mix of precarious employment, they are paid by the hour but have no set minimum of hours per week. Unlike gig workers, they are entitled to certain statutory benefits such as holiday pay and minimum wage. The recently introduced Employment (Miscellaneous Provisions) Bill 2017 proposes to ban zero-hour contracts and create new banded-hour contracts which will entitle such employees to a minimum number of hours each week.

We understand the Department and Revenue Commissioners have also set up a working group to further consider the rapidly changing employment status landscape. The Revenue Commissioners have also provided a Code of Practice for Determining Employment or Self-Employment Status of Individuals.

The Competition (Amendment) Act 2017 introduced new two further classifications of workers, “false self-employed worker” and “fully dependant self-employed worker”. This Act addresses collective bargaining rights for certain categories of self-employed individuals previously categorised as undertakings pursuant to competition law (voiceover actors, session musicians and free-lance journalists). Although the ambit of the new classification has been limited in respect of its application,

it remains to be seen whether workers and trade unions may adopt the terms in the Act when challenging their own self-employed status.

Under Irish law, the “worker” category does not exist. The individual is either an employee or self-employed. At this moment in time, should a test case arise the Irish Courts are likely to determine a worker who is working for a ‘gig’ company, an employee as opposed to self-employed however, as always, each case must turn upon its own facts.

### **TOP TIPS:**

For the time being, pending any changes to law or governance, we ordinarily advise:

- Carefully consider whether an independent contractor arrangement really is appropriate in the circumstances, bearing in mind the risks involved if it proves incorrect.
- Consider engaging the contractor through an incorporated entity, in order to create a further contractual layer between the parties.
- Ensure contractual documentation is in order and not suggestive of an employment relationship, including anticipated control levels, manner of payment, ability to sub-contract, insurance obligations, indemnities in terms of any future tax liabilities, etc.
- Monitor the relationship, on an ongoing basis, to ensure that it does not evolve into an employment relationship in terms of levels of control over the contractor, degree of integration within the organisation (including email address, business card, inclusion at team meetings, representation at events, control of rate of pay/fees, insurance, etc.

Be prepared for change and the implications this could have.

# ITALY

## Determining Classification in Italy

**Employee:** A person who works within a hierarchical structure, under the employer’s organisational and disciplinary powers and strictly follows the employer’s orders (e.g. working hours, place of work, duties to be carried out, methods of performing the working activities, etc.). There are 4 categories of employee (in the following hierarchical order): blue-collar, white-collar, “Quadri” and managers.

**Autonomous worker:** A person who carries out his / her activity without any kind of subordination by autonomously establishing the timing, the place and the methods of work. There are different types of autonomous workers:

- Consultant: is an autonomous worker who undertakes the obligation to perform a specific activity or supply a service (the consultant can be a professional enrolled in a professional register - e.g. doctors, notaries public, lawyers, architects, etc. – or not);
- Coordinated and continuous collaborator: an autonomous worker who carries out activity in coordination with the company’s organisation;
- Agent: a person in charge of procuring business on behalf of the company and promoting the conclusion of commercial contracts.

**Board Member:** Normally an autonomous worker (with a specific compensation for the assignment or not), and can also have, in addition to the assignment, an employment relationship (normally as an executive) with the Company. In such cases, the salary as an employee may or may not include the compensation for Board assignment.

**Temporary workers:** A person hired (for a definite or an indefinite period of time) by a Temporary Work Agency (which must meet specific financial and legal requirements and be registered with the Labour Agency Register) and engaged to work at another Company’s premises (the “User”) under a specific commercial contract between the latter and the Temporary Work Agency. The Temporary Worker must follow the User’s orders and directives but is paid by the Agency and remains subjected to the latter’s disciplinary power.

## Employment protections for worker misclassification in Italy

In cases of recognised misclassification of workers, the consequences are the followings:

- the Judge will declare a subordinate relationship between the parties;
- the employer would be sentenced to pay the difference between what has been paid to the autonomous worker and what should have been paid to the employee;
- moreover, the employer would be sentenced to pay social security contributions (which are higher in the subordinate relationship case) and, sometimes, compensation for damages.

## Tax consequences of worker misclassification in Italy

If misclassification is declared, taxes on the amount corresponding to the difference between what has been paid to the autonomous worker and what should have been paid to the employee are due.

## Other consequences of misclassification in Italy

The Labour Office is a public authority that has a considerable power in checking and investigating the compliance of the Labour legislation.

In cases of ascertained violations, the legal consequences will be:

- fines for unpaid social contributions;
- administrative and / or criminal sanctions in some particular cases provided for by law.

### **Interesting developments or cases to report in Italy**

On-demand economy and new technologies often require new types of working modalities.

In Italy a national agreement on teleworking is currently in force and is signed by all the main national trade unions and entrepreneurial associations. However, teleworking is not frequently used in Italy due to some legislative restrictions and to its cultural heritage.

The Italian Parliament is currently discussing a Bill about “smart working and work life balance” with particular attention to: working hours, remote surveillance by employers, compliance with health and safety legislation and the “right of disconnection” (that is the employee’s right to turn off the working technological devices at the end of the working hours).

### **TOP TIPS:**

Daverio & Florio’s philosophy is “prevention is better than cure”. As a consequence, in order to reduce the risk of employees’ misclassification, we normally advise our clients to:

- choose the contract which is most suitable for the client’s needs always bearing compliance with the Italian legislation in mind;
- always draft contracts complying with the formal requirements set forth by the Italian legislation;
- read very carefully our legal opinions and guidelines on the concrete modalities in which the different contracts must be performed and on how the different types of workers (autonomous or subordinate) must be treated;
- pay attention to our periodical newsletters in order to be kept informed about the recent developments of the legislation and the case-law;
- always contact us in case of doubt.

# NETHERLANDS

## Determining Classification in the Netherlands

Dutch legislation covers numerous categories of workers.

Most workers can be classified as employees. There are three requirements to qualify an agreement as an employment agreement:

- there has to be a **relationship of authority** whereby the employer can give instructions to the employee;
- the employee is obliged to **personally** carry out the employment agreed upon; and
- the employee receives **salary**.

The actual execution of the agreement takes precedence over the wording of the agreement.

If the relationship of authority is missing, the worker will be classified as a contractor. For contractors a contract for professional services is used.

Companies who need a temporary workforce can hire agency workers from a temporary employment agency. These workers have an employment contract with the temporary employment agency. This is a specific type of employment agreement.

Other kinds of workers are for example civil servants, managing directors and trainees. For these workers specific rules apply and different agreements are used.

## Employment protections for worker misclassification in the Netherlands

Employers who misclassify their workers can face serious consequences. The employer may be faced with the fact that he (still) has to apply all applicable laws and regulations related to employees. For instance, in cases of an employment agreement as meant by law, the employer has to observe a notice period, pay wages during illness and holidays, minimum wages apply, there are stricter rules regarding the non-competition clauses, and in cases of termination by mutual consent a reconsideration period of fourteen days on behalf of the employee applies, there are stricter rules regarding termination of the employment agreement (i.e. in most dismissal cases prior permission to terminate is required), etc.

## Tax consequences of worker misclassification in the Netherlands

The misclassification of an agreement can mean that the employer is held liable for social security insurance contributions and income tax.

## Other consequences of misclassification in the Netherlands

To ensure employers comply with all aspects of health and safety laws, the health and safety inspector can check and investigate various business premises. This may result in fines as well as negative publicity.

## Interesting developments or cases to report in the Netherlands

The fairly strict rules of Dutch employment law will often clash with values and needs of employers to recruit flexible employees. The legislator and social partners keep trying to find the right balance

between flexibility of employment and protecting employees. The “Wet flexibel werken” (Flexible Work Act) provides regulations for a better work-life balance for employees.

Another example is the “Wet deregulerend beoordelen arbeidsrelaties” (Deregulation on the Assessment of Employment Relationships Act). This law entails a stricter regime and has been in force since 1 May 2016. It requires clients and their contractors to pay much more attention to their contractual arrangements in order to avoid tax liabilities. Tax authorities publish model agreements that guarantee a sufficient degree of independency of the contractor. If the agreement used by the parties is not an agreement approved by tax authorities, the authorities may rule that the relationship qualifies as an employment agreement and hold the client liable for (amongst others) wage taxes. Unfortunately, there has been a lot of discussion about this law and the model agreements due to the fact that the guidelines are open to several interpretations. Hopefully better guidelines will follow soon.

#### **TOP TIPS:**

- Keep in mind that you should choose an agreement that is most suitable for the situation. Ask yourself if you want the agreement to qualify as an employment agreement or a contract for professional services.
- Remember that the actual execution of the agreement takes precedence over the wording of the agreement.
- Avoid the situation that workers (who are not employees) are performing substantially the same work as regular employees (otherwise these workers might be classified as employees).

# PORTUGAL

## Determining Classification in Portugal

### Classifications:

One of the most relevant distinctions, which is frequently the origin of employment lawsuits, is the one between services contract (independent contractor) and employment contract (subordinated employee), since the legal regime applicable to the latter is much more protective of the employee.

An employment relationship generally exists when the employer is entitled to control not only the result of the services rendered, but also the means by which that result is achieved. The employee renders his services for and under the direction of the employer. The employer's directions may concern the content, performance, time and place of work.

An independent contractor relationship is generally created when an individual (self-employed) is given a task to do but is free to use her/his own judgment when performing that task, works without supervision, typically using her/his own tools and materials on the job and is being paid by commission or lump sum based on the job or project rather than by the hour.

Employment law does not include any specific classification for workers, although explicit provisions or protections are applicable to:

- Workers employed on fixed-term contracts;
- Part-time workers;
- Juvenile workers; and
- Working students.

Categories of worker based on the different duties and responsibilities are usually set by collective agreements.

### Key Tests:

Under Portuguese employment law, there is a general presumption of an employment contract when some of the following situations occur:

- the activity is carried out in a place which belongs to the hiring entity or determined by the latter;
- the equipment and work tools belong to the hiring entity;
- the activity's provider complies with a work schedule determined by the hiring entity;
- a certain amount is paid with regularity to the activity's provider, as compensation for this activity;
- the activity's provider performs management or leadership functions in the organic structure of the company.

Please note that these assumptions must be understood and examined in a case-by-case context. Typically, and beyond the general assumptions listed above, Portuguese Courts will assess if the contractual relationship in question implies any kind of subordination (or at least minimal self-government) on the behalf of the self-employed contractor, which is widely regarded as characteristic of an employment relationship.

## Employment protections for worker misclassification in Portugal

The contractual relationship with the misclassified self-employed contractor (or any other form of external staff) will be reclassified as an employment contract.

As such, the following contingencies may apply:

- (i) Termination of the relevant contract by the company may be deemed as an unlawful dismissal. In such an event the risk exists of compulsory reinstatement of the relevant worker (including potential accrued rights) or, alternatively, the payment of a seniority compensation (corresponding to an amount between 15 and 45 days of salary plus seniority allowance times the respective years of seniority). Payment of all salaries due between the dismissal and the final Court decision would also be due;
- (ii) Payment of salary differences, at least in relation to vacation and Christmas allowances.

## Tax consequences of worker misclassification in Portugal

Concerning tax liability, independent contractors are responsible for paying their own income tax and social security contributions, thus the hiring party may at least avoid the latter (since they are self-employed).

In the event of misclassification, the company will have to repay the outstanding social security contributions at least for the last 5 years: 23.75% of the amounts effectively paid to the self-employed contractor, and of payable supplementary amounts.

In this regard, please be informed that tax and social security authorities are generally very responsive towards apparent false self-employment arrangements.

## Other consequences of misclassification in Portugal

So, called “false self-employment” also constitutes a very serious administrative misdemeanour, punishable with fines between EUR 2,040.00 and EUR 61,200.00 per self-employed contractor, depending on the company’s turnover and degree of fault.

Recent improvements and amendments to the applicable legislation came into force which aims to control misclassification type situations, namely enabling a specific legal entity (Authority for the Labour Conditions) to trigger administrative infraction proceedings every time there is evidence that an apparently self-employment situation is in fact a situation of employment. This also enables said authority to trigger specific proceedings against the employers for the acknowledgment and regularisation of these situations.

## Interesting developments or cases to report in Portugal

In September 2016, a new law aimed at the prevention of modern forms of hard labour (Law 28/2016) entered into force and extended the liability for the payment of all agency workers’ credits to the Company, as a way to operate a stricter control over potential violations of workers’ rights. This means that, from now on, the Company will also be liable for the payment of all credits due to the workers by the Agency, by virtue of any misclassification, alongside with any misdemeanour due.

### TOP TIPS:

The first advice in this regard would be to enter into a written services contract with the self-employed contractor. Despite such written nature not being mandatory under Portuguese legislation, it might confer enhanced safety to the hiring entity, especially regarding the nature of said arrangement.

In said written contract, it would also be advisable:

- (i) to include a clause which specifies that both parties acknowledge and agree that their relationship does not have an employment nature;
- (ii) not to stipulate payment on a time spent basis or any time schedule or exclusivity (in rendering of services' agreements, what really matters is the delivery of the product / result and not how that product / result was made / achieved); and
- (iii) to underline the autonomy of the self-employed contractor to the maximum extent, namely excluding reference to terms like subordination and hierarchy (or any other similar wording).

During the execution of the contract, the company must pay special attention to avoid integrating the self-employed contractor in the latter's organisational structure, since she / he should not be subject to any kind of hierarchy or actual relationship that may be deemed comparable.

# SPAIN

## Determining Classification in Spain

1. **Employee:** The Workers Statute, hereinafter also referred to as “WS”, defines “employee” as a person who voluntarily renders his/her services within the scope of the organization and management of another person, physical or legal (employer) and receives compensation (salary) in exchange.

Top management executives are also employees, but their relationship is governed by a specific regulation (Royal Decree 1382/1985).

Employees (ordinary or top management executives) are included in the General Social Security Regimen.

2. **Self-employed contractors:** those who habitually, personally and directly render their services on their own account, this is, outside the scope of organization and management of another.

Self-employed contractors are included in the Special Social Security System for Self-Employed Contractors, commonly known as “RETA”.

3. **Trade:** within self-employed contractors, Spanish law separately regulates the concept of an "*economically dependent autonomous employee*", commonly known as a “TRADE”. The main characteristics of a TRADE are as follows:

- Those who carry out an economic or professional activity on a lucrative basis;
- Said activity is carried out in a habitual, personal and direct manner and predominantly for one physical or legal person, known as the client;
- The self-employed contractor depends on this client to receive at least 75% of his/her work income. TRADE self-employed contractors are included in the RETA’s system.

4. **Board Member:** They will be classified in one or other regime depending on the tasks performed and the remuneration received:

- Social Security Law states that *“board members who exercise managerial functions that entail the performance of director or administrator tasks or provide services for a capital company on a personal, direct, regular and lucrative basis, having effective control -directly or indirectly- of such, will be framed under the Special System for Self-Employed Contractors”* commonly known as “RETA”.

It will be understood that the board member has effective control of the company when he/she possesses at least half of the capital equity of the company, through stocks or participations. Also, when the board member exercises managerial functions and has at least a 25% of the equity.

- When the board members do not have effective control of the Company in terms of equity and receive remuneration for their services, they will be framed under the General Social Security Regime. Nevertheless, it should be taken into consideration that board members do not receive unemployment benefits or protection from the Salary Guarantee Fund (FOGASA).

Therefore, Board Members are included in the General Social Security Regimen, as assimilated, or in RETA's system, depending if they control the Company's capital equity.

5. **Temporary Agency workers:** Companies whose fundamental activity consists at making available to another "user company", on a temporary basis, employees hired by it. The hiring of employees to temporarily assign them to another company can only be done through these agency's when they meet specific financial and legal requirements such as obtaining the correspondent administrative authorization.

Therefore, the user company and the agency must be previously bound by a commercial contract. Generally, the user company will act as the "employer" as it will give the employee the specific orders and instructions for his/her provision of services. Nevertheless, the employee is subject to the agency's disciplinary power. Also, the agency is responsible for paying the employee's salary.

The agency worker is included in the General Social Security Regimen.

## Employment protections for worker misclassification in Spain

When the employee's misclassification is recognized by the relevant authority, the Company is subject to:

- **Administrative responsibility:** The company could be penalized in accordance with Article 22.2 of the LISOS Law, which considers as a serious offence that of not registering the employee under the correct framework in due time. The penalty corresponding to this serious offense could range between €626 up to €6,250 per person.
- **Minutes of the Labour Inspectorate:** By which they oblige the company to register in the General Scheme of Social Security (or the correspondent applicable regime) and pay the corresponding Social Security contributions for the last four years, with a surcharge of 20%. In other words, Social Security shortfall for the salary differences of the last 4 years (including a 20% of surcharge) plus a penalty for the contribution shortfall that that could rise from a 100% to a 150% of the contributions not paid.
- Additionally, and when applicable, the **salary differences** between the retribution the self-employed contractors receive, and the salary stated in the applicable Collective Bargaining Agreements or the remuneration that a comparable employee would receive for the same position within the company. Other employment conditions (such as paid holiday period, social benefits, etc.) can be claimed in case of employee misclassification.

- Also, the company would be subject to **corporate responsibility for future benefits**, amongst others, pensions.

### Tax consequences of worker misclassification in Spain

If salary differences were to apply, the employee would be subject to tax retentions on said differences. Additionally, Tax Law states that *“the non-taxation of all or part of the tax debt that should result from the correct annual self-declaration it is a tax violation”*. For such violation, certain penalties apply.

### Interesting developments or cases to report in Spain

The traditional Spanish way of understanding labor relations does not fit the new phenomenon of economy on demand. With the fragmentation of production through digital platforms, services can be provided on a global scale, with an on-demand workforce, at a lower cost and 24x7. Questions regarding the framework of the people who deliver such services are increasingly being raised: *are they employees? Who is the employer? Who controls the employee?*

With the increase of digital platforms that require human interactions (either on-site or to deliver the specific services) such as Uber, Amazon Mechanical Turk, Deliveroo, Gobo, Joyners, Take it easy etc, *how do we classify the people who provide these services?* In Spain, there is a trend towards their classification as self-employed contractors or TRADE. Nowadays, experts are trying to define the best legal option to classify these kinds of relationships. Below, we refer to the most recent cases that bring some light to this matter:

Supreme Court Ruling of 16<sup>th</sup> of November of 2017 states that there is an employment relationship -and not commercial- with people who provide their services as translators or language interpreters *on demand*. The Supreme Court determined the existence of an employment relationship on the following basis:

- Despite not having fixed working hours, the employee’s schedule is imposed by the needs of the Company (the Company sets the day, time and place for the provision of services, therefore, *“services on demand”*);
- Although it seems that the employees enjoy great freedom in choosing whether or not to accept assignments, it is certain that given the relationship established between the parties, if the employee doesn’t accept the assignment, he/she takes the risk of losing future referrals.
- Translation or language interpreters do not require a business structure. Therefore, people who provide these types of services integrate in the business structure of the Company who has requested such.
- Despite the Company not providing the employee with working tools, the employment relationship still exists as the provision of services rests fundamentally on a personal element (the knowledge of language).

Therefore, the Supreme Court considers that when the provision of services rests on the personal element, the delivery or not of working tools is irrelevant when determining the existence of a labor relationship, especially when professionals do not have the freedom of choosing whether to accept or not the assignments.

Nevertheless, Amazon Mechanical Turk Services, amongst others, frame those who provides personal services such as translation, graphic design, illustrations, language interpreters etcetera as self-employed contractors and not employees.

On the 18<sup>th</sup> of May of 2018 the Supreme Court ruled the existence of an employment relationship in the following case: the provision of transportation services by a person who is a member of an associated work cooperative lacking infrastructure and only permitted to hold the company's card. In this case, the employee signed a lease contract with the transportation company, who owns the trucks. To this effect, the company rented the trucks to the work cooperative whose owner is the employee, placed the trucks at the employee's disposal, discounting the rental price through the monthly invoicing of the services which are fully organized and run by the transportation company.

The Supreme Court determined the existence of an employment relationship because:

- The transportation company had a solid infrastructure.
- Drivers would provide their services through rented trucks.
- All instructions were provided by the transportation company.
- The transportation company delivered monthly installments where payment of expenses were included.

Similarly, we must highlight that the European Court of Justice (case C-320/16) determined Uber as a provider of services "*in the field of transport*", who acts as an intermediate putting in contact, though an application for smartphones, non-professional drivers *who use their own vehicles* with people who require transportation, in exchange for remuneration. We can determine that the main difference with the ruling stated above is that the drivers own their vehicles. *Is that sufficient to rule out the existence of an employment relationship?*<sup>12</sup> Doesn't Uber tell its drivers where to go "on demand" (i.e. organize the services) and "*punish*" those drivers who decline rides (as it affects their account status and their ability to take advantage of certain promotions). Therefore, do the drivers have actual freedom to accept and decline the rides?

Social Court number 6 of Valencia stated in its recent ruling 244/2018 of June 1<sup>st</sup> that Deliveroo riders are employees and not self-employed contractors. The Social Court took into consideration the following signs of employment relationship for Deliveroo riders:

- The riders are dependent to Deliveroo as they are obliged to use a Deliveroo app.
- Through this app Deliveroo tells their riders what zone they are allowed to work in.
- Deliveroo chooses the riders' work schedule.
- Deliveroo requires their riders to follow certain norms on how to carry out the delivery (timings, how to present the package etc.).
- Deliveroo controls their riders by GPS, controlling their delivery timings.
- The digital app the riders use is to be considered as a means for production.

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<sup>12</sup> Please see court ruling 244/2018 mentioned below.

- Riders have no freedom in accepting or declining their assignments. The relationship between the rider and the Company is ended after a few declines on the part of a rider.
- If the riders wish to resign, they must notify Deliveroo with 2 weeks of prior notice.
- The vehicle, despite being the riders property, is a means of transportation which must be considered as a working tool. The property of such working tool is not the main source of the job; therefore, its property is irrelevant.
- Deliveroo is the proprietor of the brand, stating that their riders are the “face of the brand”. Riders have no control or use over such brand.
- Deliveroo fixes the prices per ride. Riders have no say in the matter.

For the reasons above-mentioned, the Social Court ruled that riders are dependent to the Company and they provide their services within the scope of organization and management of the Company. Therefore, the provision of services is on behalf of the Company, and not on their own account as self-employed contractors.

Labour Inspectorate has also imposed several sanctions to Deliveroo (and other “on demand or gig economy” Companies) for lack of Social Security contributions arising from employee’s misclassification.

Employment Courts and Labour Inspectorate in Spain are using as key elements to qualify relationships as employment ones in the context of “gig and on demand economy” the fact that the control Companies may hold through their digital platforms (i.e. Deliveroo and Uber apps) is much higher than the control mechanisms a day to day Company can hold with their employees.

In conclusion, when determining the existence of an employment relationship in this new era, the Employment Court and Labour Inspectorate might take into consideration the following elements:

- Degree of control exercised on behalf of the Company.
- If the provision of services is personal.
- If the person provides services in the scope of organization and management of another person.
- If the people who provide their services can continue rendering their services without the digital apps.
- If the Company gives specific orders on how to provide the services and if such orders are unilateral.
- Who organizes the workforce beyond a website or app.
- Who rewards or penalizes the employee.

As stated before, experts are trying to define the best legal option to articulate these kinds of relationships. Whereas start-ups and digital platforms are testing the legal terrain through the subscription of commercial contracts or self-employed contractors, recent resolutions from Employment Court and Labour Inspectorate in Spain are considering that we are facing real employment relationships. In practice, the business model itself of some start-ups and digital platforms is being questioned.

We consider urgent that a review of current employment regulation or a new employment regulation for this way of rendering services through apps is put in place in an agreed manner, with the involvement of all the relevant stakeholders.

### **TOP TIPS:**

In order to reduce the risk of employee misclassification, we suggest following these main rules:

- Pay attention both to the duties performed by the individual as well as the form in which he/she will perform those duties;
- Choose the contract which is most suitable to the company's needs but always bearing the compliance of Spanish legislation in mind, specially taking into consideration the above-mentioned Case Law; and
- Always draft contracts complying with the formal requirements set forth by Spanish legislation.

# SWITZERLAND

## Determining Classification in Switzerland

Under Swiss law persons who carry out paid work for someone else are either classified as employees or self-employed persons. The most relevant criteria to distinguish between the two is whether the person carrying out the services is in a subordinate position, integrated into the working environment of an employer or not. In order to classify the relationship, typically the following questions have to be asked:

- Is the person strictly bound by directives of the company or person it provides services for?
- Is the person organizationally, temporally and/or personally integrated into the work organisation of the employer?
- Does the person e.g. have an e-mail address of the company, participate in regular team meetings and/or have a fixed working place within the offices of the company?
- Is the person bound by the company's usual working hours?
- Does the person get paid holidays?
- Does the person waive its participation in the economic success of its personal work? Is it bound by a contractual and/or post contractual non-compete obligation?
- Is the person paid by a fixed amount for the hour, week or month instead of being remunerated for the success of a specific project?
- Can the company instruct the person to do any work or is the person's activity limited to a specific project?

In case these questions are affirmed, the relationship will be qualified as employment relationship. It is, however, not necessary that all criteria are met. Rather, a judge would examine each case taking into account the overall personal, organizational and temporal subordination of the person.

## Employment protections for worker misclassification in Switzerland

The most important Swiss employment protections that will apply in case a person is qualified as employee instead of self-employed person are the following:

- Overtime pay
- At least 4 weeks of vacation per year
- Protection against abusive and/or unjustified immediate dismissal, both including a net indemnity of up to six month's salaries
- Protection against dismissal in case of sickness, accident or pregnancy (so called "blocking periods" of 30, 90, 180 days or even longer during which a termination is null and void)

- Mandatory salary payments during sickness and accident for a certain time period.

### **Tax consequences of worker misclassification in Switzerland**

Apart from the above described employment protection provisions, one of the significant risks for a company in case of a misclassification are the social security contributions that will have to be paid retroactively on all salary payments made for up to five years. The company will have to pay the employer's as well as the employee's share of contributions. The company can then try to obtain the employee's share from the employee which will be difficult if the employee is not solvent.

It is important to note that the threshold to be qualified as "employee" from a social security point of view is even lower than where we look at the mere contractual situation. As a consequence, we have cases in Switzerland where a person is an independent contractor from a contractual but an employee from a social security point of view. The main criteria here is the economic risk that a self-employed person must bear.

In order to minimize the risk of social security contributions and of employment protection rules, it of course helps if a person incorporates its company and provides services as an employee of this company.

Another significant risk for the employer are possible tax consequences: if an employee is taxed at source (e.g. foreigners not having a permanent C-permit) and the employer does not fulfil his obligation to make these deductions and pay the taxes to the authorities, the employer will be liable for these taxes and can even be fined for not complying with his obligations.

### **Other consequences of misclassification in Switzerland**

In case of a misclassification, a court will usually not impose any fines on the employer unless it either wilfully violated the Swiss provisions on work time regulations and/or health protection or if the employer has not deducted taxes at source. However, a court will oblige the employer to retroactively provide the employee with all its employment protection entitlements (as described above: overtime pay, vacation, indemnity for abusive dismissal or unjustified dismissal with immediate effect). Also, if the company terminated the contract during sickness, a pregnancy or 16 weeks thereafter or after an accident, such termination – in case of a misclassification – would be null and void and would have to be repeated after the lapse of the applicable blocking period of 30, 90, 180 days or even longer. Also, in case a termination was issued before such blocking period, the notice period will be suspended during the time of the blocking period.

### **Interesting developments or cases to report in Switzerland**

As mentioned, a person may incorporate its own company and provide services to a third party as employee of its own company. This minimizes the risk of such third party that it will be qualified as an employer from a social security law and contractual point of view.

However, the Swiss Federal Court held otherwise in its decision of 26 January 2012 (9C\_459/2011). A person had an advisory function for a foundation and was employed by its own company who was remunerated based on a mandate agreement. However, the court disregarded the set up with the person's own company as employer and held that the fees paid to such company were to be qualified as salary since:

- The person was clearly integrated into the work organisation of the foundation;
- It received instructions directly from the foundation;
- The person's own company did not have an actual independent identity and did not have any control or autonomy with regard to the mandate agreement.

Another interesting decision concerning the "Uber" car transportation service was issued by an important Swiss accident insurance company (SUVA). It held that Uber drivers are – from a social security point of view - not self-employed persons, mainly based on the following grounds:

- Drivers with or without a vehicle who are connected to a head office are generally considered as employed and do not bear much risk. Also, they are organizationally dependent on the head quarter;
- The drivers are bound by Uber's instructions and do not employ own staff or have their own offices;
- The drivers do not make significant investments and do not act on their own behalf but are contacted through the Uber app.

### TOP TIPS:

Most importantly the parties should consider what type of contract suits the relationship most. It is better to set up a correct employment contract and budget all the additional costs than to have a misclassification case that runs over years. In these cases, the employer has a very high financial risk to become retroactively liable for all employee protection claims as well as all social security contributions (employer's and employee's share).

It is important to seek legal advice and to set up a contract with a self-employed person (in the form of e.g. a mandate or a contract for work and services) in a professional way ensuring particularly that:

- payments (if possible) are made based on progress of a project instead of a regular hourly/monthly payment;
- self-employed persons have the right to subcontract or to work with its own employees on a project;
- self-employed persons provide their own resources and equipment;
- self-employed persons are not strictly bound by directives of the company or person it provides services for and or not integrated in the companies working organization;
- invoices to clients are issued in the self-employed person's name;
- self-employed persons are in charge of how they perform the services;
- the self-employed person provides the company with a confirmation of its status issued by the competent social security authority.

It is important to note that the authorities and courts will consider the way the contractual relationship is actually exercised and not decide solely based on what is written in the contract.



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