



Distinction between freelancers and employees under German law

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I. Summary

German legal practice has developed various criteria to determine whether a contractual relationship should be regarded as a freelancer arrangement or as an employment relationship. None of the criteria is exclusively decisive to legal status but all of them will be considered jointly when assessing the status.

Accordingly, a freelance agreement must be carefully drafted and handled in such a way that it fulfills the criteria that are indicative of a freelance relationship (*freies Mitarbeiter-verhältnis*) and avoids the characteristics of a dependent employment relationship (*Arbeitnehmerverhältnis*). However, when assessing the status of a person, the determining factor is the actual handling of the relationship and not only the written terms of the contract.

Should it turn out that a purported freelancer is in fact an employee, the employer will be confronted with a number of risks with regard to protection against dismissal, social security and tax issues.

II. Requirements for freelance activity

1 Distinction between freelancers and employees

Under German law, freelancers (also referred to as “consultants”, “contractors” or “self-employed persons”) are persons who render work on the basis of a private law contract and who have, in particular, the freedom to determine the content of their work and the details regarding the rendering of their services. In contrast, employees are integrated into the employer’s work organisation and render the work subject to the employer’s instructions and control.

A person working at a company would only be considered a freelancer if the circumstances in the individual case speak in favour of a freelance relationship. The reason is that German courts determine the status of the person according to the actual activity rather than according to the contractual content. Thus, it is not sufficient to conclude an agreement where the wording of the contract suggests that it is a freelance agreement but the execution of the contract suggests that the relationship is actually one of dependent employment (e.g. because the person is integrated into the company’s work organisation and works subject to company instructions). Consequently, the actual handling of the relationship will prevail over the written terms of the contract concluded. Nonetheless, the contractual regulations are still highly relevant in practice, as, for example, in the case of an audit (e.g. tax audit), the auditor will usually only see the contract but will, as a rule, not be in a position to gain knowledge about the actual handling of the contract. Thus, an auditor will usually make an assessment of the status of a freelancer based on the content of the contract.

2 Criteria for a freelance activity

German legal practice has established certain criteria which need to be considered in order to assess whether someone’s activities qualify for freelance status or should be deemed a dependent employment relationship. Please find attached to this overview a detailed (albeit not exhaustive) checklist with regard to the relevant criteria.

Please note that none of the criteria are exclusively decisive to legal status. Only after consideration of all the criteria for the individual person, can a conclusion be drawn. Because of the large number of criteria, there is a great range of discretion for social security authorities, tax authorities and courts. However, the more criteria that speak in favour of freelance status are met, the more likely authorities will consider the person a freelancer.

There are two core characteristics of a freelance relationship:

- Firstly, the company may not give instructions with regard to the time, place and the way of rendering the services; the freelancer must be in a position to determine these aspects themselves
- Secondly, the freelancer may not be integrated into the work organisation of the company

If one of these criteria is not met, this would constitute a strong argument in favour of dependent employment.

Accordingly, all contracts governing purported freelance arrangements should reflect the described criteria and should avoid any indications of a dependent employment relationship. However, as mentioned before, substance prevails over form and the company must ensure that the contractual provisions are reflected by the reality of the relationship.

III. Risks of false qualification of an employee as a freelancer

1 Protection against unfair dismissal and employee benefits

The freelancer could claim protection rights which accompany employee status, in particular protection against unfair dismissal, if applicable in the operation. Accordingly, valid grounds (either operational, behavioural or personal) would be required for termination of the contract. In addition, the freelancer would be entitled to employment-related benefits (e.g. vacation, compensation for untaken vacation and continued salary payments during sickness).

2 Liability for wage tax and social security contributions; Criminal Offences

A freelancer is generally responsible for handling their own taxes and social security arrangements. A company which has concluded a contract with a freelancer does not withhold income taxes or make social security contributions on behalf of the freelancer. In contrast, such withholding obligations do exist in the case of dependent employees. If a contractual relationship with a freelancer is subsequently qualified as an employment relationship, the company will be liable for income tax and social security contributions.

Therefore, the company could be required to reimburse outstanding social security contributions to the social security authorities retrospectively (for up to four years if the non-payment was unintended and even longer if intention can be shown) and to

reimburse income taxes to tax authorities. Therefore, the financial risk of a freelancer being qualified as an employee is substantial.

In addition to the financial implications, the non-payment of social security contributions could qualify as an administrative offence and even as a criminal offence according to sec. 266a of the German Criminal Code (*Strafgesetzbuch* – “StGB”). The risk of criminal liability usually affects the management as well as the employees of the company who employs the freelancer. According to recent court rulings, the withholding of social security contributions in excess of EUR 1,000,000 may result in imprisonment without probation.

To avoid the risk with regard to social security issues, companies can apply for an official statement on the correct social security treatment by the competent authorities prior to or at the beginning of the freelance relationship. The German Pension Insurance Association offers a so-called status determination procedure (*Statusfeststellungsverfahren*) in accordance with sec. 7a Social Security Code IV (*Sozialgesetzbuch IV* – „SGB IV”) which can be triggered by the company or the freelancer. However, filing for the procedure should be considered carefully as it comes with the risk that all freelancers whom the company has an agreement with may trigger it.



IV. Recent EU legislative developments on platform work

As there have been misclassification issues more frequently when it came to so-called platform workers, the EU saw the need of taking measures in order to regulate the classification and other aspects of platform work.

Platform work is a form of employment in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems, or to provide specific services in exchange for payment. Common examples are taxi drivers and food delivery services.

In 2024, after long lasting discussions, the EU institutions and the Member States have agreed on an EU Platform Work Directive. According to this, the relationship between a digital labour platform and a person performing platform work shall be legally presumed to be an employment relationship when facts indicating control and direction are found. However, it will be up to the Member States to set out the modalities of such a legal presumption in their national law. Further developments in this area should be observed closely, especially with a view to national implementation to which the Member States are obliged to until December 2026.

ANNEX

Checklist for freelance status

Please note that none of the criteria are exclusively decisive to legal status. Only after consideration of all criteria for the individual person a conclusion can be drawn.

Specific content of the services to be provided, specified in detail beforehand

- The agreement with the freelancer includes a work description defining the freelancer's project in sufficient detail so that the latter is able to start project work on the basis of such description, e.g. describing the tasks of a developer or IT engineer
- The freelancer does not take over additional or alternative tasks during the project which are not covered by the service content described in the individual freelance agreement

Independent work organisation

- The freelancer is free to choose their working hours (workdays, working hours, breaks)
- The freelancer works at a place of their own choosing outside the customer premises
- In cases where the freelancer performs work on customer premises, their work area is clearly separate from the customer staff's work areas
- The freelancer uses their own resources for working on the project. Customer resources (such as hardware or software) are used only in areas where, and only to the extent that, it is required for technical, privacy or copyright reasons (e.g. licences)
- The freelancer is not obliged to perform their services in person but may engage third parties, subcontract and assign the services
- The freelancer does not have to work exclusively for one company but is also allowed to work for other companies. It is, however, permitted to impose a non-compete restriction on the freelancer regarding other companies in the same industry
- The freelancer participates only in certain project coordination meetings in which they inform the customer about the current work status

- The freelancer's vacation is not required to be requested or approved by way of normal company procedures, e.g. HR management systems
- Certain regulations are only applicable to employees and not to freelancers, e.g. maternity protection regulations and minimum wage requirements.

No right to give instructions may be exercised vis-à-vis the freelancer

- No instructions may be given as to where the obligations are fulfilled unless this is necessary due to the type of services that shall be rendered. No instructions may be issued as to how the services are rendered. This is relevant in particular for individual orders directed to a specific person and for process-related instructions. More general result-oriented or project-related instructions are acceptable. So, the contracting party with whom a framework agreement exists may receive instructions regarding the content of the services to be provided beforehand. The company should, however, be careful not to instruct the freelancers directly. Accordingly, it should rather make use of scheduled meetings with the contractor to issue limited project-related instructions where necessary
- The company may, of course, give orders as to when and how the results of the freelancer's work are to be presented, as agreed e.g. in the defined service provisions beforehand

The freelancer is not integrated into the work organisation of the company/Inequality between freelancer and company's employees

- The freelancer does not perform the same work as employees employed by the company
- The position of the freelancer has not been occupied by a dependent employee in the past
- The freelancer has no office at, and no permanent access to (own keys, code cards etc.), the company premises
- The freelancer has no access to the company's internal networks to the same extent as regular employees

- The freelancer has no entitlement to continued remuneration in case of illness and no entitlement to paid holidays
- The freelancer is not obliged to submit a sick note unless they are prevented from participating in an appropriate scheduled meeting or similar
- The freelancer has no e-mail account with the company domain
- The freelancer has no business card of the company
- The freelancer is not mentioned in the internal phone directory of the company and has no company phone number
- The freelancer is not mentioned in organisational charts of the company
- The freelancer does not participate in any electronic or other time recording system
- The freelancer does not take part in Christmas parties or other social events organised by the company for company staff

Market presence as a freelancer

- The freelancer assumes entrepreneurial risk and shows entrepreneurial appearance in the market
- The freelancer also works for other customers
- The freelancer has own resources and an own office space

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