

Legal News



Distinction between the employment contract and mandate - a constant issue

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Dear Clients and Business Friends

The theoretically clear distinction between an employment contract and a mandate causes frequent difficulties and unpleasant surprises in practice. This is because the qualification of an employment contract/mandate or that of gainful employment and self-employed activity may differ in civil law and for social insurance law purposes. A business relationship which is designated by the parties as a mandate (e.g. a consultancy mandate) placed with a self-employed person and treated as such may - e.g. on the occasion of a AHV (Pension and Survivors Insurance) audit - be requalified as a gainful employment activity. Such requalification, which may even be retroactive, can under certain circumstances generate substantial costs (of a contractual nature and/or in social insurance law) for the principal or for the employer. This article deals with the issue of delimitation referred to above and shows the criteria which must be respected to avoid the accompanying risks.

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1. General

The employment contract cannot be equated with gainful employment, neither can a mandate be regarded as identical with a self-employed activity; this is because the distinction in civil law and social insurance law is based on *different criteria*. The distinction between the employment contract and mandate in civil law is governed by the wording of the contract and the intention of the parties; for social insurance law purposes, on the other hand, the economic circumstances in each particular case are the only relevant factor underlying the distinction between gainful employment and self-employment.

2. Distinction in civil law

The *individual employment contract* is characterized by the following four features:

- 1) Performance of work
- 2) Incorporation into a third party employment organization
- 3) Long-term relationship in private law
- 4) Remuneration for work performed

On the basis of these features, a distinction must be made between the employment contract and other contracts in private law which also relate to the performance of work.

On the other hand, according to a *mandate agreement*, the agent is committed by contract to perform a particular transaction or a service in the interest and according to the intent of the principal, the agent be-

ing free to allocate his own time at his own discretion.

The *key feature* of the distinction between the employment contract and the mandate is the extent of the dependence or the *relationship of subordination* in law. This means legal subordination from the personal, time-related and organizational angles. However, not every right to give instructions and exercise control establishes an employment contract. In fact, it must extend beyond the limited right to give instructions and the obligation of accountability under the law on mandates. One pointer to an employment contract may be an extended contract term, but not on the other hand the amount of the remuneration, which does, however, enable conclusions to be reached as to the concordant intent of the parties. Other pointers to the existence of an employment contract are the absence of any *economic risk* on the part of the employee and his *economic dependence*, the provision of materials for use by him and the payment of expenses by the employer, as well as an agreed period of notice. In practice, if in doubt, the courts give precedence to the employment contract.

3. Distinction in social insurance law

3.1 Economic circumstances

The question as to whether gainful or self-employed activities exist in a particular case is not resolved primarily on the basis of the legal nature of the contractual relationship between the parties. On the contrary, the *economic circumstances* are the determin-

ing factor. Relationships in civil law may at best give some points of reference for the qualification in social insurance law without, however, being the decisive factor. In general, a person who is dependent upon an employer in the managerial sense or for the purpose of the organization of work and who does not bear *any specific entrepreneurial risk* must be regarded as being in gainful employment.

However, these principles alone do not yet lead on to the definition of any uniform and broadly applicable solutions. The diversity of the situations encountered in economic life is such that an individual assessment of the position of a person in employment must be made for social contribution law purposes in the light of all the *circumstances of the particular case*.

3.2 Criteria for the distinction

Pointers to *self-employed* activity are:

- Own business
- Own business premises
- Own or hired resources (office infrastructure, tools, machinery)
- Materials procured for own account
- Billing in own name
- Debt collection risk
- Employment of personnel
- Authority to take decisions (no reporting obligation)
- Activity for several principals
- Own investments
- Own procurement of mandates

Pointers to *gainful employment* activity are:

- A relationship of subordination (dependence on instructions from the personal, time-related and organizational angles)
- Incorporation into a third party's work organization
- Acting in the name and for the account of third parties
- Working materials provided by the employer
- Obligation of presence, fixed working hours
- Activity for only one employer/principal
- Entitlement to paid holidays
- Entitlement to continued salary payments during absence
- Regular salary payments

4. Relevance of the correct distinction

If, for example, a *dispute occurs in civil law* and a court qualifies as an employment relationship a contractual situation which the parties regarded or "experienced" as a mandate and not as an employment relationship, the employer will be required to compensate the employee in civil law for *additional hours/overtime and holidays* and e.g. in the event of unfair dismissal. From *the angle of social insurance law*, a principal or an employer may be confronted with substantial claims for subsequent payments if, e.g. on the occasion of an AHV or UVG (accident insurance) audit, the activity of an agent is deemed to be in gainful employment instead. Such a requalification cannot be ruled out even if the supposed agent had been treated for a number of years as self-employed for social insurance purposes. The "principal" who is requalified as an employer may, depending on the circumstance, have to settle after the event, both the *employer's and the employee's contributions* to AHV, IV etc., together with accident insurance and occupational benefits, in respect of the fees which may have been paid for several years. In principle, the employer can require the employee to repay the employee's contributions. But the employer bears the debt collection risk. Because the obligation to qualify the contractual relationship rests in principle with the principal or with the employer, the possibility cannot be ruled out that a court may also require such persons to pay the employee's contributions.

It is therefore advisable, especially for social insurance law purposes, to compare the features defining self-employment and gainful employment set out in section 3.2 above. Depending on which features prevail, the activity will have to be reported to the appropriate authorities as either an employment relationship or as self-employment.

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