Contingent Worker Misclassification Risk Map & Comparison Tool - Germany

Contingent worker misclassification risk information

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# Is there any specific legislation that determines that contingent workers should be treated as employees for (a) employment, (b) tax/social security or (c) pension purposes?

(a) No
(b) No
(c) No

# Is there a safe harbor for contingent workers for (a) employment, (b) tax/social security or (c) pension purposes? Safe harbor means being expressly excluded from the legislation or a particular category/classification under the legislation if certain conditions are met.

(a) No
(b) No
(c) No

# How clear is the law on classifying contingent workers from an employment perspective, based on a rating of 1-5, with 1 being clear and 5 being unclear?

4

# How clear is the law on classifying contingent workers from a tax / social security perspective, based on a rating of 1-5, with 1 being clear and 5 being unclear?

4

# Are there any new developments coming up in relation to contingent workers? If so, please briefly describe along with the timing.

In 2021, the Federal Labour Court decided a gig worker to be an employee of a crowdworking platform. This decision is considered to have a high impact on current business models.

On 12 June 2023, the Council of the European Union (EU) agreed on the proposal for a directive that aims to better protect platform workers. This opens the door to negotiations between the Council and the European Parliament on the final directive. The directive aims to ensure that platform workers have or can obtain the appropriate employment status through the introduction of a legal presumption. In addition, the directive provides for rules regarding the transparency of the use of algorithms within the platform economy.  For more information, please see our client alert [here](https://insightplus.bakermckenzie.com/bm/employment-compensation/europe-the-european-platform-deal).

Further, the member states of the European Union (EU) have developed a new framework agreement in the field of social security to address the reality of regular cross-border remote working. The framework agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border remote working aims to promote the free movement of people within the EU while preserving their right to social security. The framework agreement came into effect on 1 July 2023. Please see our client alerts [here](https://insightplus.bakermckenzie.com/bm/employment-compensation/netherlands-the-signing-of-a-new-framework-agreement-regarding-the-social-security-rules-within-the-european-union) and [here](https://insightplus.bakermckenzie.com/bm/employment-compensation/luxembourg-remote-working-a-more-flexible-social-security-regime) for more details.

# Outline the maximum penalties from an employment perspective.

If there is no direct contractual relationship between the worker and customer/employer (e.g., through an agency), this contractual setup can be considered as unlawful labor lease. Unlawful labor lease might result in fines of up to EUR 15,000 per breach being imposed by the local authority. The authority can also seize the profit resulting from the use of workers as freelancers instead of employees.

# Outline the maximum penalties from a tax perspective.

Up to EUR 10 million in case of intentional tax evasion

# Outline the maximum penalties from a social security perspective.

Social security contributions for up to 30 years plus punitive interest of 12% per year.

# Outline the maximum penalties from a pensions perspective.

Social security contributions for up to 30 years plus punitive interest of 12% per year.

# Are there any wider tax compliance risks, e.g., senior accounting officer or corporate criminal offense of facilitating tax evasion?

Yes, the company can be charged with penalties if employees are seen to be facilitating the tax evasion of contingent workers. Furthermore, representatives of the company can be held personally liable for underpaid wage tax.

# What is the risk of criminal sanctions applying?

Non-payment of social security contributions and wage taxes and wrongful deduction of input VAT is a criminal offense in Germany, if the non-payment is based on intentional misclassification. The risk is quite high in Germany, if the employer has not taken necessary measures to avoid misclassification, such as implementing a robust compliance system or the use of so-called assessment procedures (*Statusfeststellungsverfahren*) for each freelancer.

# What are the main employment law risks that may arise for contingent workers?

The main employment law risk is misclassification. In case of misclassification, the worker is considered an employee and entitled to equal pay and holiday pay. If the worker has been employed with the company for more than six months (which also applies if the worker is only engaged on an irregular basis), there is a risk that the Termination Protection Act applies and that the worker cannot be terminated without a valid justification. Furthermore, employee protection rights such as minimum wage and working time restrictions must be observed.

# What are the main tax risks that may arise for contingent workers?

The de-facto employer can be held liable for underpaid wage tax from payments made to the misclassified freelancer. The de-facto employer can, however, take recourse against the freelancer (this is not possible in case of social security contributions). If the de-facto employer does not take recourse against the misclassified freelancer, but assumes the wage tax liability, this will be treated as additional taxable benefit in kind subject to wage tax and social security contributions.

The de-facto employer is also obliged to repay erroneously deducted input VAT (Vorsteuerabzug).

# What are the main social security risks that may arise for contingent workers?

The de-facto employer is liable for all social security contributions that have not been deducted from the remuneration with retroactive effect up to four years at least (approx. 40% of the monthly remuneration amount), with a maximum of 30 years. The employer has to pay default interest amounting to 1% per month in addition to the social security contributions that have erroneously not been paid (the employer has to pay both the employee's and employer's part of the contribution, and can only seek for reimbursement for the employee's contributions for the last three months).

If workers are misclassified and social security becomes due, companies would need to consider the EU's new social security rules for cross-border employees (effective on 1 July 2023), if the individuals are EU-based and work in more than one EU jurisdiction. Please see our client alerts [here](https://insightplus.bakermckenzie.com/bm/employment-compensation/netherlands-the-signing-of-a-new-framework-agreement-regarding-the-social-security-rules-within-the-european-union) and [here](https://insightplus.bakermckenzie.com/bm/employment-compensation/luxembourg-remote-working-a-more-flexible-social-security-regime) for more information.

# What are the main risks from a pensions (or other regulator) perspective?

The de-facto employer is liable for all social security contributions that have not been deducted from the remuneration with retroactive effect up to four years at least (approx. 40% of the monthly remuneration amount), with a maximum of 30 years. The employer has to pay default interest amounting to 1% per month in addition to the social security contributions that have erroneously not been paid (the employer has to pay both the employee's and employer's part of the contribution and can only seek for reimbursement for the employee's contributions for the last three months).

# Risk commentary - Employment

8

The main employment law risk is misclassification. In case of misclassification, the worker is considered an employee and entitled to equal pay and holiday pay. If the worker has been employed with the company for more than six months (which also applies if the worker is only engaged on an irregular basis), there is a risk that the Termination Protection Act applies and that the worker cannot be terminated without a valid justification. Furthermore, employee protection rights such as minimum wage and working time restrictions must be observed.

# Risk commentary - Pension

8

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# Risk commentary - Social Security

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# Risk commentary - Tax

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