

### Additional ways to detect bogus self-employment

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On 20 May 2021, the German Bundestag approved the Accessibility Reinforcement Act (Barrierefreiheitsstärkungsgesetz) and, somewhat covertly, also adopted an amendment to section 7a of the German Social Code Book IV (Sozialgesetzbuch IV, SGB IV) on employment status determination assessments, which is due to come into force on 1 April 2022.

#### I. New provision in section 7a SGB IV

The inquiry process bindingly determines whether a person is a dependent employee liable to insurance contributions or is self-employed in order to achieve legal certainty regarding their obligation to pay social insurance at an early stage. Incorrect status assessments can result in a significant financial burden, as the employer bears the contribution risk for the last four years and, in the event of intent, even up to 30 years plus surcharges for the delay (12% per year) if it is later determined that the self-employment is bogus.

The new regulation primarily makes changes to procedural law, which should give contractual parties more legal certainty and more certainty for planning purposes.

##### ▪ Determining employment status

In future, employment status (employee/self-employed) will be an express element of deciding on a potential obligation to pay social insurance and not just regarding the obligation to pay social insurance in the individual social insurance branches (due to dependent employment).

##### ▪ Status determination also in triangular relationships

In future, the German pension insurance organisation (Deutsche Rentenversicherung, DRV) may also determine the existence of direct employment in the event of the deployment of staff that involves a third party (such as hiring out of workers). Until now, two separate employment status determination assessments would have to be carried out. The third party now has their own right to request an inquiry, even if this would have only come into question if they were the person obligated to

pay the entire social insurance contributions, i.e., if there were indications that the contractor was integrated into their work organisation and was subject to their instructions.

##### ▪ Predictive decision

It is especially welcome that, in future, participants will be able to have their employment status determined before accepting a job. The written agreements must be presented and the circumstances of the job anticipated. However, the DRV may revoke their decision within one month of their predictive decision if the contractual relationship that actually takes place deviates from the circumstances previously presented.

##### ▪ Group determination

The newly introduced process of group determination will make it possible to obtain an expert opinion for multiple workers if these are based on uniform agreements.

##### ▪ Oral hearing

The newly introduced oral hearing aims to clarify the significant legal circumstances and facilitate a decision tailored to the individual in order to increase acceptance among all participants.

#### II. Practical consequences

The significantly expanded ways to obtain legal certainty for frequently asked difficult questions regarding the deployment of staff that involves a third party are very welcome. Determining that someone is an "employee" does not necessarily result in an obligation to pay social insurance and an obligation to make contributions in all branches of social insurance. If clarification is still required of the precise liability to insurance contributions, employers still have to obtain a decision from the responsible collection office (section 28h (2) SGB IV).

With regard to the status determination for triangular relationships, the new regulation does not address whether and how the third party is to be involved in the process and to what participation rights they are entitled. If the third party makes the application themselves, they

run the risk of incriminating themselves, as they must provide information about the integration of the contractor and the contractor's requirement to observe instructions. With a predictive decision, there is only legal certainty if the contractual relationship that later comes into being does not deviate from the agreement presented/these deviations are reported without delay. The DRV's decision may also be revised.

The DRV and other insurance companies are not formally bound to the newly introduced group determination process, as it is not a (binding) administrative measure but merely an expert opinion.

### III. Outlook

It must be assumed that the new employment status determination assessment instruments will result in more legal certainty and will be accepted by the participants. Nevertheless, the new regulation is initially only valid temporarily until 30 June 2027, and the DRV is required to submit a report to the responsible Ministry (Federal Ministry of Labour and Social Affairs, BMAS) by 31 December 2025.

### Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Burkhard Fabritius unter +49 40 500360-750 oder BFabritius@GOERG.de. For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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