

LEGAL UPDATE ARBEITSRECHT

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Federal Social Court updates on social insurance obligations of shareholding directors when contracting with single member companies

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An unpleasant surprise during auditing: The Deutsche Rentenversicherung Bund [umbrella organisation of German pension insurance companies] determined that what was thought to be self-employed work in a contractual relationship was actually dependent employment. This occurs when the 'self-employed person' is integrated into the operations of the client and ultimately acts without any entrepreneurial risk. A case of false self-employment. Sometimes, redress is sought by using a single member company (such as a GmbH (limited liability company) or a UG (limited liability entrepreneurial company) where a contract is no longer awarded directly to a natural person, the 'self-employed person', but rather to a company where the sole shareholding director is the self-employed person. Dependent employment was therefore avoided in the past in this way (cf. [LSG Berlin-Brandenburg Regional Social Court \(Landessozialgericht, LSG\), decision dated 5 November 2021 – L 26 BA 6/20](#)). From a formal point of view there lacks a direct contractual relationship between the client and the self-employed person because the contractual relation-

ship only exists between the client and the company. With this formal point of view the self-employed person is not employed by the client and is not employed in return for the 'payment of earnings', such as is required for the insurance obligation of statutory pension insurance, for example (cf. [section 1 sentence 1 \(1\) SGB VI](#)).

BSG decisions dated 20 July 2023 – B 12 BA 1/23 R, B 12 R 15/21 R, B 12 BA 4/22 R

The BSG ruled as follows in three recent decisions dated 20 July 2023:

The BSG had to decide whether the activities of a natural person, who is the shareholding director of a single person company, represents employment which is subject to social insurance, i.e. whether it imposes an insurance obligation under the statutory pension insurance and the law of employment promotion. Third parties, the clients, concluded contracts for the provision of services with these single person companies, which in one of the cases was a GmbH and in other two cases, a UG. In two of the cases these

services were nursing care services in an in-patient area of a hospital and the third involved consulting services. The contracted services to be provided to the client were in fact only carried out by natural persons, i.e. the shareholding director. The Deutsche Rentenversicherung Bund performed status checks and determined that in all three cases an insurance obligation arose due to employment. The shareholding directors filed claims opposing this. They were unsuccessful.

The BSG confirmed the assessment of the Deutsche Rentenversicherung Bund. An employment relationship of a natural person subject to social insurance contributions will not necessarily be excluded because a contractual relationship only exists between the client and the single person company, where the shareholding director is the sole natural person. To decide whether the activities of the natural person represent dependent employment requires looking at the overall picture. The fundamental division between legal persons and their executive bodies as natural persons that is also to be taken into account in social law does not preclude this. (BSG, decision dated 20 July 2023 – B 12 BA 1/23 R, B 12 R 15/21 R, B 12 BA 4/22 R).

Meaning of the actual circumstances

The BSG has dealt with the distinction between dependent employment and self-employed work multiple times. The relevant principles here are known. A person who is working in return for wages is subject to an obligation to be insured in the statutory pension insurance. The assessment criteria for employment are stated in section 7 (1) SGB IV. This states that employment is not self-employed work, particularly in an employment relationship. Indications for employment are carrying out tasks in accordance with instructions and being integrated into the work

organisation of the issuer of instructions. In accordance with the settled case law of the BSG, dependent employment requires the employee to be personally dependent on the employer. When employed at a third party firm this is the case if the employee is integrated into the firm and is subject to the employer's right to give instructions about the time, duration, location and manner of work carried out. By contrast, self-employed work is primarily characterised by their own entrepreneurial risk, having their own premises, the option of how to dispose of their own labour and fundamentally being free to choose how to carry out their activities and their own working hours. Whether someone works as an employee or is self-employed is determined by the circumstances that make up the overall picture of their work and depends on which characteristics outweigh the others.

Dependent employment despite intermediary single person company

The BSG's decisions dated 20 July 2023 became rather controversial due to the fact that the BSG now also uses the principles laid down to classify an activity as dependent employment or self-employed work in status cases, where the contractual relationship is between two legal persons (such as a GmbH and a UG), however, the contractually owed work is, as intended, carried out by a natural person who is also a shareholding director of one of the legal persons.

Also in these circumstances the actual specific circumstances of the activity are decisive to distinguish between dependent employment and self-employed work after assessing all the factors. The fact that the underlying contracts were only entered into by two legal persons, such as the GmbH of the client and the UG of the self-employed person, does not count against it. Rather, the distinction between the two depends

on the business content of the express agreements of the contractual partners and the practical implementation of the contract, but not on the description chosen by the parties or the intended legal consequence. The lack of a contractual relationship between the client and the shareholding director ultimately was not significant for the BSG when classifying the work of the shareholding director for the client as dependent employment under social insurance law. On the contrary, with more parties in a contractual relationship under social insurance law it is necessary to determine between which legal subjects there is an employment relationship, if necessary, based on the entire circumstances.

The decision surprised few. In past decisions when assessing whether there is dependent employment or self-employed work, the BSG had already attributed the actual relationships, namely the configuration and implementation of the underlying contractual relationships to be of crucial importance (cf. [BSG, decision dated 19 October 2021 – B 12 R 10/20 R](#)).

Secondary effects

The secondary effects of dependent employment being determined are generally unpleasant, in particular for the client, as they bear the liability risk for non-paid social insurance contributions and late payment penalties. These pay-

ments can total a not insignificant amount, certainly where the employment relationship has existed for some time. In addition, there threatens to be fiscal, employment law and possibly even criminal consequences.

Practical relevance and conclusion

The mandatory provisions of social insurance law must be observed. The founding and interposing of a single person company will not necessarily prevent false self-employment and/or social insurance obligations. The shareholding director of a single person company may still be in a dependent employment relationship with the client. This is certainly the case when there are no other employees employed by the company and the shareholding director personally carried out the contractually agreed services for the client. Before concluding contracts/deploying staff it is therefore important to thoroughly investigate whether the work will be classified as dependant employment or self-employed work using the specific actual circumstances of the work. The status under social insurance law can be clarified by an employment status determination assessment. In cases of doubt, compliance aspects themselves render an employment status determination process unavoidable. In addition, it is also useful bearing other forms of staff deployment in mind, such as employment on the basis of a fixed term employment contract or as part of (permitted) contract staffing.

Hinweis

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