LEGAL UPDATE EMPLOYMENT LAW

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The (offside) line between being classed as an employee and being classed as self-employed

Marius Rohmann, L.L.M. (Stockholm)

The Federal Labour Court (Bundesarbeitsgericht, BAG) does not view assistant referees in the 3. Liga (3. Fußball-Liga, the third division of the national professional football league in Germany) (BAG, decision dated 03/12/2025 – 9 AZB 18/25) as employees. This decision provides an opportunity to take an in-depth look at the circumstances under which staff used are classified as employees or as self-employed, in particular from the perspective of associations, organisations and other employers in sport.

In the sports industry, in particular, the question arises about the actual manner in which staff are used. They are either employees or they are engaged as self-employed staff for example on the basis of a service contract or a contract for mixed works and services. The commercial advantages make it attractive to use contractors instead of employees: flexibility, cost savings, no dismissal protection, no annual leave entitlement, no sick pay and no employer contributions to pensions. And this is precisely where the danger lies. Because the differentiation between employee and self-employment represents a very commercially relevant question in labour law and social insurance law. From the employer's perspective it important to maintain a clear distinction between actual and false self-employment to avoid committing a crime (under section 266a of the German Criminal Code (Strafgesetzbuch, StGB)) among others) and any subsequent issues (such as the applicability of the Federal Annual Leave Act (Bundesurlaubsgesetz, BUrlG) and the German Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG) to sham employees). For example, if after multiple years of (undetected) false self-employment it emerges that a contractor held the status of an employee (cf. section 25 (1) of the German Social Code, Volume IV (SGB IV)), the social insurance contributions for a minimum of four years must then be paid for the employee, where, for the most part, the employer will also have to pay the majority of the employee contributions (cf. section 28g SGB IV). It is therefore essential for employers in sport to ensure that the way they use staff is legally checked in advance and legally secure.

The distinction between dependent employment and self-employed work

Degree of personal dependency – obligation to follow instructions & integration into the work organisation

In accordance with the case law of the BAG, the member of staff's degree of personal dependency is decisive when considering whether they are classed as an employee or as self-employed. An employee is someone who is obligated under a private law contract in the service of another person to perform work which is (1) subject to instructions, (2) determined by

others, and (3) which is personally dependent, cf. section 611a (1) sentence 1 of the German Civil Code (BGB). Conversely, this means that if the work is not subject to any instructions at all then this person cannot be classed as an employee. The criteria of work being determined by others is reflected in integration into the work organisation of the employer. Integration into the operational process usually exists where a person is permanently included in operational processes and therefore must operate hand in hand with the (other) employees of the company. According to the BAG, this personal dependency is determined by the extent to which the promised work is performed under obligation to follow instructions and thus is determined by others.

All circumstances must be taken into account when determining whether an employment contract exists between the parties as per section 611a (1) sentence 5 BGB. The employer cannot guard against this by drafting a service contract with a self-employed contractor in such a manner that is in favour of a service contract and against that of an employment contract. In fact, it primarily comes down to the actual implementation of the contractual relationship, cf. section 611a (1) sentence 6 BGB.

Specific indicators in favour of viewing the staff member as an employee and against viewing them as self-employed include the following:

- Being bound by the company's working hours.
- Not just receiving instructions regarding tasks, but rather also receiving personal instructions about the time, location and method of performing the work and thus not allowing the staff member to freely decide how to perform the work.
- Using the employer's equipment (including an email account and non-separate premises) and social facilities.

Are assistant referees employees of DFB Schiri GmbH?

As previously mentioned, the BAG dealt with the question of whether an assistant referee in the 3. Liga should be classified as an employee of DFB Schiri GmbH or were they self-employed (BAG, decision dated 03/12/2025 – 9 AZB 18/25). DFB Schiri GmbH is responsible for providing the games in the professional leagues run by the Deutsche Fußball-Liga and the 3. Liga run by the German Football Association (DFB) with suitable referees and maintains lists of referees.

The court proceedings started with a claim from a referee from the West Regional League who filed a claim against DFB Schiri GmbH regarding his supposed discriminatory non-hiring. The claimant was not awarded a DFB referee coaching place by the Western German Football Association for the 2024/2025 season and therefore was not offered a framework agreement as assistant referee in the 3. Liga by DFB Schiri GmbH.

The claimant asserted that if he had been selected by DFB Schiri GmbH, he would have acquired employee status as an assistant referee in the 3. Liga and fourth official. He stated, in particular, that his rejection of game playing times or deviations from the prescribed times had a negative effect on the decision of DFB Schiri GmbH regarding his future selection and that his performance when refereeing games had been assessed by the GmbH. In addition, joint training sessions and exercise sessions would have indicated his integration into the working structure of the GmbH.

Rejection by the BAG, at least for the 3. Liga

The BAG rejected the assertion that the claimant should be viewed as an employee. It held that assistant referees in the 3. Liga could not be unilaterally instructed to take part in particular games. Games were posted on the DFBnet by DFB Schiri GmbH. The assistant referees enter the dates on which they cannot officiate beforehand, sometimes even over a month in advance, which are recorded in the system as "leave of absence". Following that, DFB Schiri GmbH assigns games to specific assistant referees. The assistant referees may then still refuse these games. This is a consensual, operational system where officiating games are first assigned through a separate contract between DFB Schiri GmbH and the respective assistant referee. The court held that joint training sessions and exercise sessions are required for successful collaboration and are not instructions. Understanding of the rules and physical fitness are requirements to successfully officiate the game. The court also ruled that the assistant referees were not bound to instructions while the game was being officiated, as the assistant referees were able to correct themselves if need be. As the 3. Liga does not yet use a Video Assistant Referee (VAR), unlike the 1. and 2. Bundesliga, the BAG left the question open of whether its use might suggest that assistant referees were under obligation to follow instructions.

In addition, the fact that assistant referees might no longer be considered following incorrect decisions on their part is typical of service contracts, given that subsequent contracts are generally only awarded if previous work had been performed satisfactorily. There was also no economic dependency as, contrary to in the 1. and 2. Bundesliga, there was no ongoing basic remuneration independent of performance, but only purely contract related remuneration.

For those interested in sport and sports employment law it will be very exciting to see whether and/or rather when in the future the BAG will have to deal with the question of whether assistant referees in the 1. and 2. Bundesliga are classed as employees. Such a case could be decided differently to this case due to the existence of basic remuneration independent of performance and the use of VAR. In any case the BAG left itself options with this decision. If the BAG had already confirmed the employee status of assistant referees in this case, there would probably have been little room left to rule differently regarding the assistant referees in the 1. and 2. Bundesliga. In general, the development of the occupation of assistant referees will have to be observed in the context of the ongoing professionalisation of the Women's Bundesliga.

Implications of this case in practice & conclusion

Employers should not cross the false self-employment offside line

The BAG's decision in this case is of direct relevance to the football industry. The differentiation issue between being an employee and being self-employed also arises in other areas of sport. Whenever staff are used in associations, organisations and elsewhere, employers should always make sure that they are not crossing the offside line into false self-employment territory when it comes to contractors so as to avoid the risk of committing a criminal offence and subsequent labour law issues. In short: each staff member used should be individually and carefully reviewed, be subject to a written contract and above all, implemented accordingly.

If you require further information on this topic please contact us and we will be happy to help.

Please note:
This overview is solely provided for information purposes and should not replace professional legal advice. In case of any queries, please get in touch with your designated GÖRG contact person or the author Marius Rohmann, L.L.M. (Stockholm) at +49 40 500360 766 or mrohmann@goerg.de. Information about the author is available on our website www.goerg.de.

Our locations

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN
Kantstr. 164, 10623 Berlin
Tel. +49 30 884503-0
Fax +49 30 882715-0

HAMBURG
Alter Wall 20 - 22, 20457 Hamburg
Tel. +49 40 500360-0
Fax +49 40 500360-99

FRANKFURT AM MAIN
Ulmenstr. 30, 60325 Frankfurt am Main
Tel. +49 69 170000-17
Fax +49 69 170000-27

COLOGNE
Kennedyplatz 2, 50679 Cologne
Tel. +49 221 33660-0
Fax +49 221 33660-80

MUNICH
Prinzregentenstr. 22, 80538 Munich
Tel. +49 89 3090667-0
Fax +49 89 3090667-90