

Menu

Introduction

- Argentina
- Australia
- Belgium
- Brazil
- Canada
- Chile
- China
- Colombia
- Czech Republic
- Denmark
- France
- Germany
- Hong Kong
- Hungary
- India
- Italy
- Mexico
- The Netherlands
- Norway
- Poland
- Portugal
- Romania
- Serbia
- Singapore
- South Africa
- Spain
- Sweden
- Switzerland
- 1. Overview
- 2. Legal Framework Differentiating Employees From Independent Contractors
- 3. Re-Characterisation of Independent Contractors as Employees
- 4. How to Structure an Independent Contractor Relationship
- 5. Trends and Specific Cases
- 6. Conclusion
- 7. Contact
- United Kingdom
- United States of America

You are here: [Home](#) / [Switzerland](#) / Legal Framework Differentiating Employees From Independent Contractors

Legal Framework Differentiating Employees From Independent Contractors

a. Factors that Determine Who is an Employee and Who is an Independent Contractor

Generally speaking, the main factor which distinguishes an independent contractor from an employee under Swiss law is subordination. Whether a subordinate relationship can be accepted or not is decided by a holistic assessment of each individual case. It is necessary to check whether the person obliged to perform the work corresponds more to an employee or to a self-employed person. For this purpose, certain principles have been developed in doctrine and practice, so that there a number of factors which are taken into account in order for determining the existence of one or other contract. Material characteristics indicating an employment relationship are:

- high degree of directionality;
- subordinate to other persons serving the principal/employer;
- acting in the principal's/employer's name and for the principal's/employer's account;
- fixed working hours, working time checks, duty to regularly appear in the office;
- obligation to provide the entire workforce as well as the intensive use by the principal/employer;
- allocation of a work place;
- provision of work equipment or material by the principal/employer;
- agreement of a probationary period;
- granting of holiday by the principal/employer;
- conducting a personal file by the principal/employer;
- periodic remuneration;
- principal's/employer's business risk;
- agreement on non-competition; and
- expressly declaring the intention to establish an employment relationship.

Formal criteria that have only secondary importance are:

- payment of social security contributions by the principal/employer; and
- tax or social insurance deductions as if it was income from dependent employment.

Factors that indicate against the existence of an employment contract are:

- lack of subordination;
- possibility to terminate the legal relationship at any time;
- limitation of the workload to a specific work-related work and, consequently, to a shorter period; and
- provision of materials and tools and insurance of the risks by the principal/employer.

b. General Differences in Tax Treatment

The differentiation between an employee and an independent contractor has consequences with regard to social security law and tax treatment.

Social security law

Swiss social security is split into three 'pillars', each with its own characteristics and goals that help retired people continue to finance their way of life after retirement. Employers participate in the funding of most types of insurance with the exception of health insurance, which is financed by each insured person who pays premiums based on their age and where they live. The three pillars of the Swiss social security system are: Old Age and Survivors /Disability Insurance, an occupational pension plan, and private investment options.

First pillar

The first is a state pension plan that consists of various insurance schemes such as the Old Age and Survivors Insurance (OASI), Disability Insurance, and Unemployment Insurance. OASI and Disability Insurance are mandatory for all Swiss residents, be they employed or self-employed.

Second pillar

The second pillar is based on occupational pension plans and accident insurance. Employees who earn more than CHF 21,150 a year are automatically insured by a second pillar pension fund. When combined with the first pillar benefits, a person could expect to earn about 60% of their final salary after retirement to help maintain their standard of living. Self-employed persons may optionally contribute to second-pillar schemes but are not required to do so.

Third pillar

The third pillar is a private, individual option that workers can use to help make up the remainder of their income not covered by the first two pillars. Such schemes are also protected by law and often offer tax advantages. These typically take the form of a retirement savings account (with tax breaks) or a flexible savings account (few if any tax breaks).

Tax law

Both employees and independent contractors have to declare their income and pay income tax. Self-employed persons can deduct their professional expenses from income completely, while such deductions are not available to employees.

The services of an independent contractor are generally subject to VAT, provided that the annual turnover exceeds CHF 100,000.

c. Differences in Benefit Entitlement

By virtue of Swiss statute law, an employee is entitled to certain benefits, whereas an independent contractor is not. Benefits, which employers are entitled to are listed below:

Paid holiday leave

Unlike self-employed persons, employees are entitled to at least 20 days' paid holiday leave per year (based on full-time salaried employment).

Wage continuation

Where the employee is unable to work due to personal circumstances beyond his control, such as illness, accident, legal obligations or public duties, the employer must pay him his salary for a limited time, including fair compensation for lost benefits in kind, provided the employment relationship has lasted or was lasted longer than three months. Subject to longer periods being fixed by individual agreement, the employer must pay three weeks' salary during the first year of service and thereafter the salary for appropriately longer periods depending on the duration of the employment relationship and the particular circumstances. The employer has the same obligation in the event that an employee becomes pregnant. A written agreement, standard employment contract or collective employment contract may derogate from the above if it provides the employee with at least an equivalent benefit. In fact, many companies provide more advantageous benefits by written agreement, such as insurance providing a benefit of at least 80% of salary for up to 720 or 730 days' sickness absence. If employers chose to enter into such an insurance contract, they have to bear at least 50% of the insurance premiums.

Independent contractors do not benefit from this statutory protection. They may, however, enter into a private insurance contract providing continuation of salary in case of sickness for up to 720 or 730 days. They have to bear the full costs for such insurance coverage themselves.

Accident insurance

Employees have to be insured by law against accidents by their employer, whereas independent contractors have to take out their own accident insurance.

Unemployment insurance

All employees in Switzerland who have not yet reached retirement age are insured against loss of employment. Contributions are split between the employer and the employee. To receive payments, the following conditions must be met. The individual must:

- have been employed for at least 12 months within the two years prior to requesting benefits;
- have Swiss residency and a work permit;
- be registered with the regional unemployment office; and
- be actively looking for a job.

Unemployment benefits typically amount to about 70% of the average wage over the last six months to a year. Average wages are capped at CHF 12,350 a month. Insured persons with children may receive 80% of their average salary.

There is no unemployment insurance for self-employed workers.

d. Differences in Protection from Termination

There are substantial differences in the legal protection given on termination of an independent contractor's contract and that of an employee's employment. However, as it is a principle of Swiss employment law that either party can terminate an employment contract without any specific reason, the difference may not be as extensive as in other jurisdictions. In a nutshell, termination of an employment relationship is always subject to the agreed notice period, apart from when an employment relationship is terminated for a valid reason with immediate effect. If an independent contractor relationship qualifies as a mandate within the meaning of the Swiss Code of Obligations, a notice period does not apply even if agreed between the parties. There are, however, certain statutory restrictions regarding the termination at an inopportune juncture.

Notwithstanding that an employer may terminate an employment contract without specific grounds, the Swiss "Code of Obligations" lists a number of reasons which render termination unfair. Under the Code, a dismissal is deemed abusive if issued:

- due to a quality inherent in the personality of the other party (such as relating to gender or race), unless such quality relates to the employment relationship or significantly impairs cooperation within the enterprise;
- because the other party exercises a constitutional right, unless the exercise of such right violates a duty of the employment relationship or significantly impairs cooperation within the enterprise;
- to prevent the other party from asserting contractual claims arising out of the employment relationship (such as rights under a contractually agreed settlement);
- because the other party asserts in good faith claims arising out of the employment relationship; and
- because the other party performs compulsory Swiss military service, civil defence service, military women's service, or Red Cross service, or a legal duty not voluntarily assumed.

The notice of termination of an employment relationship by the employer will also be considered abusive, if it is given:

- because the employee belongs or does not belong to an employee association, or because he lawfully exercises a union activity;
- during the period the employee is an elected employee representative in a company institution or in an enterprise affiliated thereto, and, if the employer cannot prove that he had a justified motive for the termination; and
- in connection with a mass dismissal without prior consultation with the employees' representative body or, if there is none, the employees (Art. 335f).

In cases of unfair dismissal, an indemnity payment equivalent to six months' wages is required. This allows for additional claims for damages based on other legal grounds to be made.

Moreover, the employer cannot terminate an employment contract at an improper time. Upon expiration of a probation period, the employer must not terminate the employment relationship:

- during the other party's performance of compulsory Swiss military service, civil defence service, military women's service or Red Cross service and, where such service lasts more than twelve days, during the four weeks prior to and after the service;
- during any period of protected sick leave (where the employee is prevented from performing his work fully or partially through no fault of his own due to illness or accident):30 days in the first year of service, 90 days from the second year of service until and the fifth year of service, and 180 days from the sixth year of service;
- during pregnancy and during the 16 weeks following birth; and
- during the employee's participation with the agreement of the employer at a foreign.

A notice of termination rendered at an improper time has no effect: the notice is null and void.

e. Local Limitations on Use of Independent Contractors

There are no limitations on the use of independent contractors in Switzerland.

f. Other Ramifications of Classification

Other ramifications of the distinction between employees and independent contractors mainly relate to their scope of protection during the contractual relationship. For example, safety regulations provided by the Federal Labour Act and by the Federal Law on Accident Insurance are only applicable to employees. Also, employers must abide by working time regulations for their employees, which do not apply to independent contractors.

g. Leased or Seconded Employees

The leasing of employees is a very common way for Swiss companies in need of temporary staff to avoid any discussions relating to the complex differentiation between employees and independent contractors. Swiss labour leasing law applies to all placements and second temporary and permanent, of personnel in Switzerland and imposes several key rules:

- a foreign labour-leasing company (e.g. agency, consultancy) may not place personnel at the premises of a Swiss end-user client;
- a Swiss labour-leasing company may only place personnel at the premises of a Swiss end-user client if in possession of a valid Swiss labour leasing licence; and
- a Swiss company may not use a foreign labour-leasing company to provide personnel.

These rules are strict and unambiguous and mean that foreign agencies wishing to do business in Switzerland are left with only two options: open a local office and obtain a la-bour-leasing licence, or make use of a local partner. While the former option seems preferable, there is considerable cost involved: other than the initial investment in opening a new office, the process of obtaining the labour-leasing licence itself is far from cheap and the recent strength of the Swiss franc means running costs are higher. A critical mass of business must be reached in order to make it a viable option. The latter option, on the other hand, requires a high level of trust, as the local partner will often be a recruitment agency itself. In addition there is a 'Catch 22' associated with an agreement with a local partner because, as a Swiss company, it may fall foul of the ban on recruiting via a foreign labour-leasing company.

It is important to ensure that the supplier of the workforce is in possession of a valid permit. Companies in breach of Swiss labour-leasing law could be fined: the Swiss authorities will pursue Swiss companies first (typically the end-user client) and then any foreign companies found to be in breach. The contractor or employee will not usually be held liable for breaches unless they are deemed to be a principal of a company involved (director or owner of a foreign limited company working in Switzerland on contract, for example) and/or unless they are not complying with local tax and social security regulations.

h. Regulations of the Different Categories of Contracts

In Switzerland, employment relationships are governed by specific protective regulations, which are stipulated both in private and public law. The contract with an independent contractor normally qualifies as either a "mandate" (Auftrag) or as a "service contract" (Werkvertrag). Both of these categories are solely based on private law regulations that do not provide special protective measures for the independent contractor.