National Report

Jens Helbich ▪ Christoph Klang ▪ Julia Lange ▪ Mareike Rudat

Germany

Table of Contents

1. What is the definition in your country of the contract of employment? What are thus the main criteria for assuming a contract of employment in your country? How these criteria are currently interpreted in regulations and in case law? What is the main source of uncertainty in this area?

There is no general definition of the contract of employment in Germany. The judicature reverts to the usual definition of § 611 BGB developed by Alfred Hueck. Therefore by means of a service contract, a person who promises service is obliged to perform the services promised, and the other party is obliged to grant the agreed remuneration. Specifically, an employee is someone, who is hired to provide services bound by instructions in personal dependence based on a private law contract.

1.1. Private law contract

An employee is just someone, who provides services for another person based on a private law contract. A person, who is acting based on another legal position cannot be an employee.

Therefore civil servants, judges and soldiers are not employees, because they are acting based on a public employment which is founded by an administrative act. Their job rights and obligations are regulated by the federal law and federal state law.

Besides, no employees are spouses, children and other relatives, who provide services in household or business of their husband, wife or parents on a Family Law basis.

As well persons, who provide services based on their membership of an association, are not employees. Indeed the admission to the association is a private legal position, but it constitutes simply member rights and obligations. The performance on the job is only based on the articles of association.

1.2. Job performance for value

An employee is someone, who is engaged to perform the services promised and the other party is obliged to grant the agreed remuneration. Services of any type may be the subject matter of service contracts. The contract of employment differs from the contract for services by the sign of the working achievement. The employee owes in contrast to work enterpriser no concrete working success, but only the bare working achievement. That's why the employer has not only a project-related instruction right like the work customer, but rather a managerial right to give instructions. By this right the employer can determine the obligation to provide services concerning working time and working place.

1.3. Personal dependence

The contract of employment is a subset of the contract of service referred to § 611 BGB (Civil Code). The classification, whether there is a contract of employment or a contract of service is the central problem in the assessment of the employee's quality.

In regard to the absence of other legal regulations in German law, the regulation of § 84 HGB (Commercial Code) could be a division line for the employment law in Germany. This regulation differ the independent commercial agent from the hired clerk. Therefore an independent person is someone, who is able to arrange his employment self-dependent and who is able to affect his labour time.

The jurisdiction makes the difference between a contract of employment and a contract of service in the fact, whether someone provides services in personal dependence on its contracting party. Those personal dependence arises out of the converse argument of the regulation of § 84 HGB. Therefore someone provides services in personal dependence, if he is integrated into the employer's organization of work and is bound to instructions concerning all circumstances affecting the work for example the labour time and place. An independent worker is also bound to instructions of his contracting party, but the instructions are confining to several modalities of services. Characteristics of a personal dependence are thus, for example, an obligation to report, continued remuneration in the case of illness, agreed wages, no pressure with cost of materials, provide services only for one person, no commission, income tax and national insurance contributions by the employer and the absence of own assistants.

All together the main source of uncertainty is the absence of a legal definition. The alternative definition of § 611 BGB by Alfred Hueck is very short and imperfect. Indeed the requirements apply to the most cases of contracts of employment, but the definition is also subject to restrictions. Therefore it cannot be spoken of an employee term, but much more of an employee type. So it is better to focus on the type "employee" than on the term "employee". Although the individual characteristics can be interpreted relatively concretely, but it's necessary to decide on a finally account of a whole show of all circumstances, if the person deserve the defense of being an employee.

Therefore it can be possible, for example, that the employer is not able at all to give instructions concerning the kind of the work to be performed in case of especially certified activities done by the head physicians or professional sportsmen. Nevertheless, the independence by technical decisions does not exclude the personal dependence from instructions at all. If the employee is subjected to the managerial right of the employer concerning other modalities of his job performance then he is an employee.

However, for example on the radio- and television area is allowed to occupy the employee (person), who is responsible for the program creation, as a freelance and just not as an employee. The reason is that there is a need for the program variety to be offered.

Nevertheless, a limited employer-employee relationship is to be accepted, if there is a constant official readiness expected and an extensively work is assigned to the employee.

2. What are the main different forms of employment contract in your country? Present these in a table showing the main distinctive characteristics.

You have to distinguish three main types of employment: employee, employee-like and self-employed persons. All of them have different subspecies of employment relationships.

2.1. Employee

The normal German employment contract includes full-time employment.

Furthermore, there are also contracts including part-time employments. Those are defined in § 2 I TzBfG (Part-Time and Employment Act). The part of the act §§ 6 ff. includes all normative rules about part-time employments. Moreover it rules work on alert in § 12 TzBfG and job sharing in § 13 TzBfG. Further, this group includes minor work in § 2 II TzBfG.

Next there are employment contracts for a restricted period of time, the so called temporary employment relationships, § 620 I, III BGB in association with §§ 14 ff. TzBfG. This kind of contract ends at a certain time or with fulfilling an agreed purpose without the requirement of a notice of dismissal.

Also, probationary employment is a possible employment contract. This kind of contract has advantages for both sides of it. You have to distinguish between unlimited and limited employment relationships. The limited one needs to have a functional reason § 14 I S. 2 TzBfG and it ends at a previously agreed time if they do not conclude a new contract. Anyway you have to know that there are a few circumstances when the company does not need to show that there is a functional reason. For example in the four years after a new establishment business § 14 III S. 1 TzBfG and if the potential worker has completed his 52 year. The unlimited employment relationship has a probationary period including a shorter period of notice § 622 IV No. 1 BGB. If a probationary employment relationship is void following § 16 TzBfG the employment contract is automatically seen concluded for an unlimited time.

There are two other groups with an employment contract with the status of an employee.

First you have to mention the agency workers. They are lent to another firm to fill a vacancy in this firm. In such a situation you just have a contract of employment between the hire company and the agency worker. Therefore there are just claims under the law of obligation between the agency worker and the borrower, § 328 II BGB. Agency workers are ruled in AÜG (Act of temporary Employment).

Second there are trainees. They are ruled in the BBiG (Vocational Trainings Act) and they receive a basic training to be prepared for the future and thus receive a kind of introduction.

2.2. Employee-like self-employed

This group has to be distinguished from employees. The main difference is that there is no personal dependence. Employee-likes are defined in § 12 a I TVG (Labour Contract Act). Therefore someone is an employee-like who is economically dependent, has to be protected like an employee due to performing his work personally for one person in a contract for services and without any help of other employees most of the time (reference to question 3).

2.3. Self-employed person

The division line for self-employed persons is mentioned in § 84 I 2 HGB. This type has the following different subspecies and problems:

The so-called pseudo-self-employed persons occur where the contract uses a different description for the situation of the potential employee. In fact he is in an employment relationship even if the contract describes him as a self-employed person.

Employee-like self-employed persons are an exception to self-employed persons because they are covered by a compulsory pension insurance even they are not employees.

The group of solo-self-employed persons presents a further problem in German Law. They are not covered by insurance as long as they do not perform their work for one contractor most of time.

2.4. Special groups

There are a few special employment relationships where it is not entirely clear whether an employment contract occurs or not.

Head physicians and professionals do not receive subject-specific instructions for example due to insufficient knowledge of the hospital group. But finally, they are both in an employment relationship.

Another special case is the one of a franchisee. On the one hand he could be self-employed due to the fact of organizing his work on his own. On the other hand the franchisee is an employee-like if he is economically dependent and in a similar way protectable like an employee.

Last but not least there is the group of executives. They do not receive the same protection as normal employees. The executives have to fulfill three characteristics:

- performing tasks which are important for the development and survival of the company
- for these tasks, it is necessary to have a huge amount of experience

- While performing these tasks, they do not receive instructions. If they receive any, they have significant influence.

3. Which categories can be distinguished of persons who perform work personally, but who do not have a contract of employment in your country? Which legal criteria are used to distinguish these groups? Which numbers on the respective groups are currently available?

In Germany there is a special type of persons who perform work personally, who do not have a contract of employment, but who need legal protection. These people are called the employee-like persons (German: Arbeitnehmerähnliche Personen). They are a subspecies of the self-employed.

For the group of self-employed is used § 84 I s.2 HGB (HGB= Commercial Code). The original scope of § 84 I s.2 HGB is to distinguish between a hired clerk and an independent commercial agent. But due to lack of other legal grounds § 84 I s.2 HGB is used also to distinguish between self-employed persons and employees. So this code delineates a guide for the entire German labour law.

According to that a self-employed person is somebody, who can configure his activities substantially free and decide on his working hours.

The Federal Labour Court has continued to set general demarcation criteria. To distinguish between a contract of employment and free service contracts, it will be focused on whether the one who provides the services of its counterparty is personally dependent. Under which conditions such of personal relationship of dependence results, is based on a reverse inference from § 84 HGB.

The personal dependence, and with it the status of an employee is given if there is no free activity determination and instead…

a) there is the integration into an employer organization of work and further
b) a direction right of the employer in terms of content, organization, working time, duration and location of activities.

The criteria of this special group of the employee-like persons are written in § 12a I TVG (Collective Agreement Act) the features are:

- economic dependence,
- the accomplishment must be provided in person,
- social vulnerability, like an employee
- Primarily due their accomplishment based on a service contract
- for only one person
- Power performance substantially without the help of other employees by providing

3.1. Economic dependence

Unlike the employee the employee-like persons are not personal dependent, because there is no inclusion in an operational organization. In place of personal dependence by subordination here comes the criterion of economic dependence.

Regularly economic dependence is to assume, if the jobholder has to rely on the exploitation of its work force and the income from the activities of the contractor to secure his existence. In addition, a person has to be equal to an employee in their whole social position.

3.2. Social vulnerability, like an employee

There is no Social vulnerability when a jobholder decides about his own approach on the scope and conduct of his work input and also significant opportunities exist for another income that can secure his existence. For the social vulnerability is crucial that the income comes predominant from only one contractor. It does not matter if a number of different contractors are available. According to § 12a I TVG it is essential that more than half of the income comes from one contractor. For meaning and purpose of the concept of the employee-like persons the social vulnerability is not available already, because a person is dependent on completion of the contract for secure his existence. Rather the law underlying vulnerability of the employee-like persons follows the amount of the contractually agreed remuneration.

According to § 12a III TVG self-employed persons, who provide journalistic, literary or artistic achievements are classified as employee-like persons when a third of the complete income comes from one contractor.

The term of the employee-like person is obligatory. A different regulation in a personal contract or a collective agreement is null.

4. Do labour law Acts and/or courts assist workers who have difficulties in proving that they have a contract of employment in asserting their claim? For instance, does the Act provide for legal presumptions that there is a contract of employment? In which situations? Do courts reclassify a civil law contract into a contract of employment? Under what conditions and by using which criteria?

The basis of the judgement whether an employee is to be classified as an employee forms the concrete arrangement of the employment by the parties of a contract. Besides, it is not vital whether the employee is called in the contractual relationship also as an employee. It would not be to be agreed with the basic idea of the labour legislation as an employee protection right if the typically economically stronger employer could exclude the employee from the protection right in that way, that he put a formulation in to the contract.

Therefore is to be put down rather on the real contents of the contract which is to be taken from the expressly agreed arrangements as well as the practical realization of the contract. If the contract is carried out, therefore, deviating from the explicit arrangements, the actual realization is authoritative for the regulation of the employee's quality.

In Germany the access to labour court is not opened by a presumption that one person is an employee. Besides, the single case constellation is vital.

4.1. sic-non- cases

If somebody complains on the statement of an employer-employee relationship or on the fulfilment of a claim which can be supported only on a basis pertaining to labour law, as for example the protection against dismissal, the presumption of the employee’s quality is sufficient. Because in these cases the fact of being an employee does not decide about the opening of the court way, but also about the legitimacy of the complaint.

4.2. et-et-cases and aut-aut-cases

Differently it comes to pass if a claim is asserted which can be supported on a pertaining to labour law one as well as on a civil juridical claim basis or can be supported on a pertaining to both of them. Therefore in these cases a proof of the employee's quality must be necessary for the opening of the labour court way and the presumption that one person is an employee cannot be enough. According to that the labour court would decide about a foreign basis claim, if the employee’s quality was not certain.

5. Are aspects of labour law extended to categories of workers who do not have a contract of employment? If so, which parts and under which conditions? Is such protection also available for self- employed persons without staff? (You need to give brief information on the position of self-employed only)

Labour law provisions are used only to employee-like persons, when the provisions explicitly extend to employees-like persons.

Normally, only employees have access to the labour courts.

But an employee-like person have this possibility, § 5 I s. 2 ArbGG (Labour Court Act) too. The labour courts are responsible for all litigations arising from a contract of service or a manufacturing contract with employee-like persons.

In a number of laws the legislature has equated employees and employees-like persons.

According to § 2 s.2 BUrlG (Federal Holidays Act) employees-like persons are considered as employees in the meaning of the state right to holidays.

The Labour Protection Act (in German: Arbeitsschutzgesetz), which secures and improves the safety and health of employees and the law for the Protection from Discrimination (in German: Allgemeines Gleichbehandlungsgesetz) includes employee- like persons. (§§ 7 I Nr. 3 AGG, 2 II ArbSchG)

According to § 12 a TVG, the provisions of the collective contract law are applicable. Consequently, collective agreements are concluded for employee-like persons.

Moreover, the labour law is not applicable to employee-like persons. In particular, for they are applicable neither the employment protection law (Kündigungsschutzgesetz) nor the special dismissal protection provisions like §§ 2 ArbPlSchG (Employment protection) ,9 MuSchG (Maternity Protection Act), 18 BEEG (Law on Parental Allowance and Parental Leave), 85 ff. SGB IX. Not even the notice period of § 622 BGB (Civil Code) or the comparable periods of notice for home workers to § 29 IV HAG (Homeworkers Code) find application.

However § 5 PflegeZG (Nursing Time Act) granted in cases of nursing time employee-like persons with the highest special protection against dismissal, otherwise the German labour law is only known for the employees.

Beyond that a special protection for self-employed- persons without staff is not available. Essentially the applicable statutory provisions act in accordance with the selected contract type in the civil law. A major treaty protection is assured by the content review in accordance with §§ 305 continued following BGB (the examination of standard business conditions). In addition to that § 241 II BGB includes the general obligations of a contract. The provision requires the contractors to have regard to the rights, legal rights, and interests of the other part.

6. Are aspects of social security law extended to categories of workers who do not have a contract of employment? If so, which parts and under which conditions?

The German social security law system is contribution-funded and not tax-funded. It is divided into accident, medical a long-term care insurance, pension plans, unemployment support. The crucial point of these is the employment status. The term of employment acts as the connecting point, thus anyone who is working under a non-self-employed contract is considered per definition as an employee. The term is not identical with that of a contractual employment relationship, although employment as such is a typical example of a contractual employment relationship. The difference is in fact that an individual finds himself/herself under contractual protection as soon as he/she actually carries out work, which automatically proves the contractual employment relationship, even if the contract is void. Other crucial features of a non-self-employment are the integration into an employer's organization of work, as well as an obligation to follow instructions of an employer.

The term of pseudo-self-employment occurs when a person is self-employed according to the formal outline of the contract, though he is not according to the actual manifestation of the contract. In this case it is unclear whether the employment has the legal status of a contractual employment relationship. Therefore a status clarification process is carried out by the clearing point of the DRV (The German Pension and Social Insurance). Usually the registration with the DRV is carried out by an employee or an employer, though it can also be initiated by the DRV itself. The crucial points are the level of entrepreneurial decision independence (for instance, responsibility for an entrepreneurial risk), handling entrepreneurial opportunities, integration into an employer's organization of work, contractual obligations etc. Should pseudo-self-employment be proven, contributions for the 4 preceding years must be paid if the registration was not carried out within a month.

It is important to keep in mind that only the non-self-employed employees are under legal social protection.

Exceptions are represented by employee-like self-employed, who do not employ persons underlying the social insurance regulation and primarily carry out work for one contractor who creates about 83 % of the total turnover. Furthermore, they are both self-employed in terms of contract and require legal contractual protection similar to an employee, resulting in economic dependence much rather than personal dependence. That is why they are covered by compulsory pension insurance.

A further category consists of artists and publishers. The artists are defined according to a typical occupational image, e.g. a graphic designer; in ambiguous cases it should be checked whether the person is regarded as an artist in the relevant sphere of activity. Writers and journalists form the core of the publisher category. Both artists and publishers are covered by compulsory pension, medical and long-term care insurance.

Furthermore Farmers who have a certain minimal volume of production (e.g. an apiary of at least 100 colonies) are covered by compulsory accident, pension, health and long-term care insurance. The same applies to self-employed lecturers, kindergarten teachers, nurses, midwives and midwifery nurses, nautical pilots.

7. Are there recent developments in your country in view of protection of persons working without a contract of employment?

Back in the 90`s, a problem of pseudo self-employment emerged. A person was considered as self-employed according to the contract, although the actual working activity was much highly similar to an employee. Due to adroitly worded contracts, the social security obligation was omitted. As a reaction to this phenomenon, a catalogue of typical legal features was launched on 01.01.1999, which include

1. a person does not contractually employ staff with compulsory social insurance
2. a person basically reports and is virtually bound to one contractor/employer;
3. the contractor delegates similar relevant tasks to contractually employed employees;
4. the activity carried out by a person does not feature typical characteristics of a business or trade;
5. the activity complies with a previous one that stipulated contractual employment through an employer.

Should 3 of 5 features be verified, there was a legal presumption that the working activity of an individual excludes a classical self-employment. The catalogue was frequently criticized as inhibiting to the incorporation of enterprise (start-ups), as it was exasperating to controvert the legal presumption, and was abolished on 01.01.2003.

Today social security obligation depends on the overall impression.

On 01.01.1999 it has also been determined in § 2 Nr. 9 SGB VI (Social Security Code) that employee-like self-employed, whose status is similar to contractual employment, underlies the obligation of compulsory pension insurance. Further developments of this legislation currently remain open to question.

8. Do legal authors criticize the present protection of workers without a contract of employment? What is their line of arguments and do they provide any solutions?

Legal authors, too, strictly differentiate between self-employed and contractually employed. The problem of the whole issue is that the social security system directly depends on the protection of the classical contractual employees, (i.e. those bound by unlimited contractual employment, initiated directly by the employer and characterized by life supporting remuneration, which has been so far a secure source of income), whose proportion has significantly declined. Today, about 33% of all employment contracts consist of part-time jobs with 20 or less working hours weekly, agency work and temporary contracts. Additionally to it, there is "small self-employment" ("solo-employment" mostly). As a result, there are low assets from work performance, so the tax-funded basic security may be required at the retirement age, as the contributions and savings would not suffice and the problem of today is deferred.

As possible solutions, one could consider the following actions: as a vantage point, maintain the existing social security system, while supporting and promoting the classical contractual employment, whereas oppressing of precautious working conditions, which do not guarantee long-term social protection and are therefore not suitable for subsistence of an individual. Secondly, one could cancel the contribution benefits for minor income groups (minor contracts, which do not exceed €400; using workforce not covered by social insurance). A possible risk of maintaining the existent employment habit is that an employee with minor income levels does not qualify for medical, long-term care insurance and unemployment support; moreover, their pension entitlement is rather humble: a 45-year contribution through €400 payment will only amount to monthly €140. An additional critical point is that the function is unabridged and usually does not lead to full-time employment, even more; there has been a growing tendency of splitting full-time positions.

Another problem is the so called solo self-employment. It offers possibilities of averting oneself from the classical contractual employment, as it is usually assumed that solo self-employment has replaced contractual employment. Such individuals usually do not employ staff covered by social insurance but much rather market themselves. The number of such cases has rocketed from 1991 to 2005 for 66%. The problem is in fact that such individuals are not obliged to contribute into the social insurance pool as long as they are not contracted by one party mostly and therefore become subject to compulsory pension insurance. They also tend to be unable to provide for a sufficient pension savings due to the lack of financial means. Neither can it be legitimized that the contractually employed individuals contribute to their lifetime pension scheme, whereas the non-

insured are only provided a basic tax-funded security. As a solution one could see their consolidation with the compulsory social insurance. The clause describing the obligation as “mostly contracted to one employer” may be abolished. As a short-term solution, one could maintain compulsory social insurance as long as the pension contributions have reached a certain minimal level of security.

Nevertheless, one should above all aim to support benefits from contractual employment and not to extend the social security protection scheme.