



Worker Misclassification: An Innangard Report on Employee Status and Consequences of Worker Misclassification in Key Jurisdictions

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If you have any questions in relation to worker misclassification, or any other employment law questions, **ASK INNANGARD:**

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EXECUTIVE SUMMARY

Worker Misclassification in Key Jurisdictions

Australia: In Australia, a person performing paid work will be either an employee or an independent contractor. An employee is someone who serves their employer within the employer's business, whereas an independent contractor carries on a business of their own. Misclassification of an employee as an independent contractor may amount to "sham contracting", which is prohibited under Australian employment law, and may also lead to other contraventions. Employers who engage in sham contracting can be subject to heavy fines and forced to compensate the employee for any unpaid employment entitlements.

England: Generally in England an individual will fall into one of three main categories: employee, worker and independent contractor. Although there are definitions of an employee and a worker in English legislation, there is no such definition for an independent contractor and much of the law in this area has developed through case law.

Employees have a full suite of statutory right and protections, including the right not to be unfairly dismissed and the right to maternity leave and pay; workers have fewer rights than employees, as against their employer; and genuinely self-employed independent contractors have almost no statutory employment rights against the people to whom they provide services. Misclassification as an independent contractor as opposed to a worker or employee can lead to an employer being liable for, amongst other things, the national minimum wage, holiday pay, the worker's torts and any unpaid tax and employee and employer national insurance contributions.

France: Hiring independent contractors is particularly appealing in France where the classical employee status comes with significant constraints and risks. However, in a context where employees' rights are fiercely protected, there is a strong resistance against the current on-demand economy trend and companies should carefully double-check whether the independent contractor criteria are met i.e. that there is no subordination link: the independent contractor should freely organise his work, use his own tools, bring skills that are distinct from the company's core business, and be able to provide services to other clients. The outcome of the current litigation launched against Uber will provide useful guidance as to the definition of independent contractors.

Germany: The legal consequences in cases of worker misclassification in Germany are severe and a very recent reform will further restrict the use of temporary agency workers and increase the sanctions in cases of bogus self-employment and illegal temporary agency work. In cases of bogus self-employment or illegal temporary agency work, employment law and social security law are fully applicable, leading to the duty to repay all outstanding social security contributions plus surcharges. Other major risks include the personal liability as well as criminal liability of directors and board members and a loss of the entitlement to deduct input tax.

In order to reduce the risk of employee misclassification, it is highly advisable to introduce or review corporate guidelines on the deployment of external staff, conduct spot-checks regarding the current deployment of external staff, and raise the awareness for bogus self-employment and illegal temporary agency work as compliance risks.

Ireland: While some legal commentators have questioned whether Ireland's employment categories are out of date, suggesting that the new 'gig' economy requires Ireland to create a category of 'worker' it seems the Irish Courts have already made provisions for such an employment relationship and a 'gig' worker in Ireland is more than likely to be deemed an employee as opposed to self-employed.

Italy: Workers in Italy can be either subordinate employees or autonomous workers depending on the activities they carry out and on the manner of performing them. In fact, whilst the employee is a person who works within a hierarchical structure, under the employer's organisational and disciplinary powers and strictly follows the employer's orders (in terms of working hours, place of work, assigned duties, manner of performing the working activities, etc.), the autonomous worker is a person who carries out his / her activity by autonomously establishing the timing, the place and the modalities of work.

Misclassification of workers is forbidden in Italy and the consequences are heavy: in fact, misclassification leads to a declaration of a subordinate relationship between the parties with all the relevant consequences in terms of salary, social contributions and sanctions (and in some cases also in terms of compensation for damages).

Netherlands: Dutch legislation covers numerous categories of workers. Most of them can be classified as employees. If the relationship of authority is missing, the worker will be qualified as a contractor. Employers who misclassify their workers can face serious consequences. It is important to keep in mind that the way in which an agreement is executed takes precedence over the wording of the agreement.

Portugal: The key distinction to be made when considering paid workers is between an employee and an independent contractor. It can be seen as advantageous to hire independent contractors since the legal framework applicable to the employee is much more protective and restrictive. Still, if a self-employment arrangement is deemed to be false, the contractual relationship with the misclassified self-employed contractor will be reclassified as an employment contract. This comes with a severe outcome to the employer: contractual termination will amount to an unlawful dismissal resulting in the compulsory reinstatement of the worker or compensation, repayment of outstanding social security contributions and in the application of an administrative misdemeanour fine. The best advice is always to enter into a written contract with the self-employed contractor.

Spain: In Spain, labor authorities particularly tend to control the misclassification of employees given that in Spain classification as a self-employed worker is abused. Consequences of misclassification are severe. Therefore, it is advisable to apply the correct employment regime to the individual. In order to distinguish between employee and self-employed worker it is important to look at the following criteria:

- i) the payment of a periodic remuneration;
- ii) the provision of tools and materials by the employer; and
- iii) the subordination and dependence to the employer's working organisation, among other factors.

In Spain, there is also a current concern regarding the legal articulation of new forms of relationships between digital platforms (Uber, etc.) and service users or suppliers as usually they represent false self-employed workers.

AUSTRALIA

Determining Classification in Australia

Where an individual performs paid work for another person or entity, he or she will be either an employee or an independent contractor. An employee is generally defined as someone who serves the employer within the employer's business, whereas an independent contractor is someone who carries on a business of their own.

The status of a worker must be determined by considering a number of factors / indicators. For example, the following factors would indicate that a worker is an independent contractor:

- the worker controls the way they perform the work;
- the worker supplies and maintains their own tools or equipment;
- the worker is paid according to task completion, rather than wages or salary;
- the worker is able to subcontract or delegate any aspect of the work to another person;
- the worker is free to work for others at the same time.

No single factor is determinative and the purpose of the exercise is to assess the overall relationship between the two parties.

Employment protections for worker misclassification in Australia

Employers are specifically prohibited from engaging in "sham contracting" (i.e. where an employment relationship is represented as being an independent contractor relationship). If an employer is found to have engaged in sham contracting, a court may impose a fine on the employer as well as any individuals who were "involved" in the contravention, such as managers and HR practitioners. The maximum fine is currently AUS \$54,000 for corporations and AUS \$10,800 for individuals.

Tax consequences of worker misclassification in Australia

Employers are required to pay and withhold tax in respect of employees' salary payments, as well as make mandatory contributions to employees' superannuation funds. Where an employee has been misclassified as an independent contractor, the employer may have failed to comply with these obligations with respect to that employee, in which case the employer may be liable to pay fines and address any payment shortfalls.

Other consequences of misclassification in Australia

Employees enjoy a range of statutory entitlements, including minimum wages, leave entitlements, penalty rates and limitations on hours of work. Where an employee has been misclassified as an independent contractor and does not receive these entitlements, a court may:

- require the employer to compensate the employee for unpaid entitlements;
- impose a fine on the employer as well as any individuals who were "involved" in the contravention.

The maximum fine is currently AUS \$54,000 for corporations and AUS \$10,800 for individuals.

Interesting developments or cases to report in Australia

In July 2016, Australian media reported that certain employee organisations are considering legal action against “on demand” food delivery businesses, Foodora and Deliveroo, in relation to their engagement of delivery riders as independent contractors. It has been reported that, on average, delivery riders engaged as independent contractors earn significantly less than the minimum wage payable to employees performing the same work.

TOP TIPS:

1. Prior to engaging a worker as an independent contractor, carefully consider the risk of sham contracting and seek legal advice if necessary.
2. Ensure that workers who are engaged as independent contractors:
 - provide their own equipment and resources;
 - are able to control how they perform the work;
 - are paid for work performed rather than on a salary basis;
 - are able to advertise their services and perform work for other clients; and
 - are able to delegate or subcontract work to others.
3. Ensure that workers who are engaged as independent contractors enter into a written agreement (prepared by your employment lawyers) to clarify, among other things, the intention of the parties as to the status of the worker.

ENGLAND

Determining Classification in England

Employees

For much of UK employment law, an employee is defined as "*an individual who has entered into or works under...a contract of employment*" (section 230 of the Employment Rights Act 1996 (ERA 1996)). There has been much case law on this issue and an Employment Tribunal in England would usually consider the following when assessing if someone was an employee:

- whether there was an agreement for the person to provide the service personally in return for a wage or remuneration;
- whether there is mutuality of obligation, that is the obligation on the employer to provide work and on the putative employee to accept and perform the work;
- whether there is control of the person by the employer; and
- whether the other terms are consistent with a contract of service (for example, if the person provides and maintains the tools or equipment used in their work, whether the person hires their own help, the degree of financial risk adopted, the degree of investment in and management of the business, whether the person has the opportunity to profit from their own good performance, whether the person is paid a fixed wage or salary and whether the person is paid when absent due to holiday or sickness).

Workers

A worker is a category of individual between an employee and someone who is genuinely self-employed.

Generally, a worker works under a contract to personally perform work or services and is not in business on their own account (most definitions of a "worker" also includes someone who is an "employee"). It will be important to look at whether the worker actively markets his service to the world in general (which might infer independent contractor status), or whether he has been recruited by a "principal" to work as an integral part of the principal's operations (tending to infer worker status). Other relevant factors could include: the degree of control exercised by the putative employer; the exclusivity of the arrangement; its typical duration; the method of payment; which party supplied the equipment used; and the level of risk undertaken by the worker.

There are three key definitions of a worker in English legislation.

- **Worker status for general rights:** this worker definition applies for the purposes of the national minimum wage, part-time workers rights, the right to paid annual leave and rest breaks, the right to a maximum working week and protection from unauthorised deduction of wages. The definition is: an individual who has entered into or works under a contract of employment or any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract. However they are not a worker if they are carrying on a business undertaking or profession and the other person is a client or customer.
- **Worker status for whistleblowing rights:** in addition to the above definition, this includes a person who is not a worker under the general definition above but who works in circumstances in which the person is introduced or supplied to do that work by a third person and where the terms on which they are engaged to do the work is in practice substantially determined not by that person but by the person for whom they work, by the third person or by both of them. This would

generally cover a situation where a worker has been placed with an end user client by an employment agency.

- Worker Status for discrimination law: it is generally accepted that this definition is intended to be roughly equivalent to, if not wider than, the ERA definition of “worker”, however this definition may also cover individuals who are technically self-employed but who are under an obligation to do the work personally (for example, where they are not permitted to sub-contract any part of the work or employ staff to do it for them).

Independent Contractors

An independent contractor is someone who runs a business on their own account and takes responsibility for its success or failure. Independent contractors in England do not have employment rights and are responsible for their own national insurance and tax contributions.

Employment protections for worker misclassification in England

If a worker is wrongly classified as self-employed, when they are in fact a worker, they could be entitled to a host of worker rights including: the right to national minimum wage, the right to paid annual leave, rest breaks, a maximum 48 hour working week, protection from unlawful deduction of wages and the benefit of whistleblowing and discrimination legislation.

If the individual is misclassified as self-employed when in fact they are an employee, they will be entitled to the full range of statutory employment law protections which apply to employees in the UK (subject in certain cases to required minimum periods of service), including unfair dismissal, statutory redundancy payment, maternity, paternity, adoption and shared parental leave and pay rights, and pension auto-enrolment rights amongst others.

Tax consequences of worker misclassification in England

Her Majesty's Revenue and Customs (“HMRC”) (the English tax authorities) apply employment case law together with their own guidance, to determine an individual's employment status (employee or self-employed). Employee or worker status categorisation for tax purposes does not automatically guarantee the same characterisation under employment legislation and vice versa. This is particularly the case given that HMRC are alive to organisations and individuals trying to avoid national insurance contributions (NICs) and tax by trying to characterise their relationship as one of self-employment, and have specific rules aimed at targeting false self-employment.

As an employer is responsible for assessing and deducting income tax and employee NICs from a worker's pay and paying employer national insurance, if the employer wrongly classifies the individual as self-employed and has not been accounting to HMRC for these payments then they would be liable to HMRC for the employer NICs, under-deducted tax and employee NICs together with any penalties and interest.

In order to recover the accrued tax liability from the worker, the employer must have a contractual entitlement to do so. It would be much harder for an employer to recover the accrued NIC liability from the worker in the same way, as this is governed by detailed social security legislation

Other consequences of misclassification in England

In addition, worker status gives the worker various rights to bring claims against the employer, including claims arising from discrimination, whistleblowing or a breach of working time or minimum wage legislation. Such claims can expose an employer to very high awards of compensation, especially in discrimination or whistle-blowing claims.

Further there has been case law that suggests that an employer may be vicariously liable for the tortious acts of a worker; despite the absence of an employment relationship and arguably even if they incorrectly misclassify them as an independent worker, although much will depend on the facts of any particular case.

Additionally a worker may have the right to pension contributions from employer under the auto-enrolment scheme.

Interesting developments or cases to report in England

McTigue v University Hospital Bristol NHS Foundation Trust UKEAT/0354/15

The Employment Appeal Tribunal (EAT) held that an agency nurse, who was assigned to work for a hospital trust by an agency, could be classified as a worker of the trust under the extended definition of worker provided for in whistle-blower protection legislation.

Aslam and others v Uber BV and others ET/2202550/15 ("the Uber case")

The employment tribunal recently held that Uber drivers are workers. Uber had argued that it is simply a technology platform which puts drivers in touch with passengers and that it is in no way a provider of taxi services, the tribunal concluded that in reality Uber is in the business of providing taxi services and engaged the drivers as workers to deliver its business. Further, although Uber had complex contractual documentation that purported to underpin the relationships between it, its drivers and passengers, the tribunal decided that the contractual documentation did not correspond with reality.

TOP TIPS:

- Employers should consider carefully what type of worker they need, and avoid deliberate misclassification of workers or employees as self-employed contractors. Employers should draft their contracts carefully, having regard to the type of worker they need, and the legal responsibilities which they will have to that worker and the worker will have to them.
- A Tribunal or Court will look at the reality of the relationship, not just the contractual provisions. The English courts are alive to the risk of certain employers trying to avoid classification of employees or workers by inserting a provision into the contract expressly denying a particular facet required for that status, for example providing a right for the employee to provide a substitute to defeat the criterion of personal service. Employers should consider the facts of the particular situation and the likelihood that a Court or Tribunal would re-classify the person as a worker or employee.
- If seeking to have someone classified as a self-employed contractor, the employer should pay particular attention to whether there is mutual obligation to provide and accept work, the degree of autonomy they give to that person, including allowing them to send a substitute to perform the work, allowing that person to control how and when they do the work, and avoiding full integration of that person into the business such as would be seen in an employee/employer relationship.
- Be aware that employment status will normally afford the employer the best protection in terms of protection of confidential information, duty of loyalty and fidelity, and ownership of IP rights created by the individual during the course of the engagement.

FRANCE

Determining Classification in France

Employee

A person performing services for and under the direction of another person in return for which remuneration is paid. The employer has management powers over the employee concerning job description, performance, time and place of work.

Test:

- The key element is the subordination relationship. The Courts carry out an overall assessment of the working relation regarding autonomy, working hours, remuneration to determine if this criterion is met.
- The execution of the contract prevails on the intent of the parties and the wording of the contract.

Intermediate classification: employees under an umbrella company (*portage salarial*): a tripartite contractual relationship in which the employee, who is tied to an employer by a contract, performs services for the business clients of the employer. One service contract is entered into between the client and the employer and one employment contract is entered between the employer and the employee. A company that provides such services to its clients must make a prior declaration of their activity.

Self-employed worker

This type of worker is not tied to an employer by an employment contract therefore there is no subordination relationship, nor economic dependency. They have great autonomy over their work and their deliverables.

Under French law, a person is presumed to be a self-employed worker in the following situations:

- they are incorporated and as such their activity is recorded on an official register (Companies Register for example) or affiliated with an insurance institution;
- their area of expertise is distinct from the company's core business; eg an IT consultant for a wholesale company;
- they are a business manager;
- they can determine their own working conditions unless these are defined by a contract with the ordering customer.

Employment protections for worker misclassification in France

The main consequence is that a self-employed worker is recognised as an employee under an indefinite duration contract.

The employee will be entitled to benefit from all applicable legal and conventional dispositions concerning remuneration (minimum wage), working time, paid leave and following the termination of the employment contract (damages for redundancy without actual and serious basis, compensation in lieu of notice).

Tax consequences of worker misclassification in France

The employer will be forced to pay the social security contributions with surcharges and penalties to the Payroll Taxes Collecting Entity (URSSAF).

The employer could also be forced to pay these contributions for the three previous years.

There is a risk for the employee of a tax adjustment.

Other consequences of misclassification in France

This infraction of undeclared work (article L. 8221-1, 3^e, of the Labor Code) brings criminal and administrative charges:

Criminal charges:

- Private persons: three years in prison and a €45 000 fine.
- Legal persons: a €225,000 fine.
- Dissolution of the company where its purpose was to commit these offences.
- Prohibition from exercising directly or indirectly a particular business or social activity permanently or for five years.
- Placement under judicial supervision for five years or more.

However the intention to commit these offences must be proven otherwise no criminal charges can be brought against the employer.

Administrative charges:

- Temporary or definitive closure of the establishment where the offences were committed.
- Temporary or definitive exclusion from the award of public contracts.
- Prohibition of any State aid for five years.

Any person convicted for using the services of a company that employs undeclared workers is held to be jointly liable to pay security and social contributions with surcharges and penalties and taxes.

Interesting developments or cases to report in France

The Payroll Taxes Collecting Entity (URSSAF) is suing Uber in order to consider the drivers as employees before the Social Security Court (le Tribunal des Affaires de Sécurité Sociale).

The URSSAF is arguing that:

- Uber hires and trains the drivers;
- the drivers' fee is capped;
- Uber receives the entire price paid by the customer and gives a percentage back to the drivers;
- the drivers lack autonomy.

TOP TIPS:

Legal measures:

- Implement checklists to ascertain that the execution of the contract does not appear as a subordination relationship: favour a flat-rate remuneration and not in consideration of working hours.

- Implement procedures to ensure that workers are affiliated, that they have discharged their obligations with regard to taxation and social insurance.

Practical measures:

- The workers should use their own working equipment (laptop for example).
- They should have their own email address and business cards.
- They should not appear as belonging to the organisation.

They should have other clients or at least the possibility to develop their own.

GERMANY

Determining Classification in Germany

Employee / worker: An employee is a person performing services for and under the direction of another person in return for which remuneration is paid. The employer's directions may concern the content, performance, time and place of work (subordination relationship).

- Multi-factor test: the Courts carry out an overall assessment of the situation, taking all relevant factors of the individual case into consideration.
- The actual execution of the contract takes precedence over the wording of the contract.

Executive staff: Employees with significant managerial powers, in particular with the power to employ and dismiss employees.

Some legislative Acts use a broader notion of employee. For example, the Federal Data Protection Act or the General Act on Equal Treatment also covers trainees or civil servants who do not fall under the scope of most of the employment law.

Managing Directors namely members of the Board of Directors in general are not considered employees under labor law.

Employment protections for worker misclassification in Germany

The contractual relationship with the misclassified worker (or any other form of external staff) is reclassified as an employment contract. As such, the following may apply:

- employment law and social security law are fully applicable;
- non-wage labor costs: repayment of outstanding social security contributions plus surcharges (for up to four years of employment; in case of intent, even up to 30 years).

Tax consequences of worker misclassification in Germany

Loss of the entitlement to deduct input tax, repayment of outstanding income taxes, with high risk that remuneration paid to freelancer will be regarded as intended net payment. Thus, taxes and social security contributions will be calculated on projected gross income.

Other consequences of misclassification in Germany

Other legal consequences / possible sanctions include:

- Fines: personal liability of directors and board members and fines for the company; up to €1 million per infringement; skimming off of profits gained from offences;
- Criminal liability of directors and board members pursuant to Section 266a of the German Criminal Code (non-payment and misuse of wages and salaries) and Section 370 of the Fiscal Code (tax evasion), imprisonment not exceeding five years or a fine;
- Exclusion from public procurement and private tendering procedures.

In addition to that, there may be severe damages to the company's reputation, arising from dawn raids, media coverage and pressure from the works council.

Interesting developments or cases to report in Germany

After some major reforms on the liberalisation of the employment law (“Agenda 2010” / so-called agenda reforms of the Schröder administration), there have been several reforms that restricted the use of external staff. Currently, there is another reform on its way that will further restrict the use of temporary agency workers and increase the sanctions in cases of bogus self-employment and illegal temporary agency work.

TOP TIPS:

Measures we have taken for several clients typically include:

- Introduction or enhancement of corporate guidelines on the deployment of external staff; introduction of checklists in the procurement process as a tool for assessing the risk of bogus self-employment and illegal temporary agency work;
- Spot-checks regarding the current deployment of external staff (optimisation of standard contracts, interviews & reports);
- Communications strategy and raising the awareness for bogus self-employment and illegal temporary agency work as compliance risks (including through training sessions for board members or executive staff).

IRELAND

Determining Classification in Ireland

There is no general definition of an employee but there are certain definitions specific to relevant pieces of legislation, e.g. "a person who has entered into or works under a contract of employment".

Similarly, there is no set definition of "independent contractor". In practice, there has been considerable jurisprudence on how best to determine employee / contractor status. Historically, the governing test was whether the individual is "in business in his or her own account". The Courts' current view is that no fundamental test had been established, and that each case must be considered in light of its particular facts. While a contract will be persuasive, the actual relationship will determine status.

Agency workers are assigned by their agency employer to work for third parties and also have a specific statutory status.

Industrial relations and whistleblowing legislation define "Worker", in the former as "any person who is or was employed", and in the latter specifically including employees, contractors, agency workers and trainees.

Employment protections for worker misclassification in Ireland

When a contract of employment is identified, the common law rights of an employee are activated, together with a series of statutory rights, principally the protection against unfair dismissal as well as entitlements to minimum wage, rest breaks and rest periods, leave, consultation and immunity from civil suit when engaged in industrial action. It is also a mandatory requirement to record an employee's work arrangement in writing.

Equality rights arguably apply even when employee status has not been achieved.

Tax consequences of worker misclassification in Ireland

The employer pays tax, social insurance contributions and pension contributions for and on behalf of the employee, whereas an independent contractor makes his or her own arrangements. In circumstances where the revenue authorities determine that an independent contractor is in fact an employee, the employer will be liable for unpaid taxes, interest and penalties. Tax non-compliance could also impact upon an employer's eligibility to employ individuals subject to employment permits.

Other consequences of misclassification in Ireland

A specialised and enlarged duty of care applies not to cause injury to employees due to negligence.

Insurance against injury at work is usually provided by employers where independent contractors will be obliged to make their own arrangements.

Damages caused by an employee may be attributed to an employer through implied, command or vicarious liability so damage caused by an individual who is deemed an employee may become the responsibility of the employer.

When an employer becomes insolvent, independent contractors will hold no special ranking whereas employees can avail of the protections contained in the Employers Insolvency Act 1984.

Interesting developments or cases to report in Ireland

The most high-profile on-demand company, Uber, has been unable to take a foothold due to stringent transport regulations limiting services to licenced taxi drivers. However, it is clear from the growth of app-based services that the legal concept of an employee increasingly involves short-term flexible work rather than traditional employment. The definitions contained in most employment legislation (excepting the most recent 2014 whistleblower legislation, which defines a broad concept of "worker") have become outdated. As such, close attention is being paid to cases in other jurisdictions (including Uber disputes in the US, UK and France) but, as of yet, no specific cases have arisen here.

The UK Employment Tribunal decided on the Uber dispute last week finding that the two test claimant drivers were in fact 'workers', stating that:

'It is unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary.....The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is.....faintly ridiculous. In each case, the 'business' consists of a man with a car seeking to make a living by driving it. [Uber] spoke of assisting the drivers to 'grow' their businesses, but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel.'

This status entitles the drivers to protection in a number of areas particularly national minimum wage and paid annual leave while also allowing them to maintain some of the benefits of a self-employed person, for example flexible working hours and relevant tax breaks.

In 2015, the Department of Social Protection in Ireland deemed construction sub-contractors employees for tax and social insurance purposes, based on the employer's provision of equipment and tools (usually not relevant in on-demand), set work hours and the high level of control exerted.

We understand the Department and Revenue Commissioners have also set up a working group to further consider the rapidly changing employment status landscape.

The Competition (Amendment) Bill 2016 was reintroduced in the Irish Senate earlier this year. This Bill, if passed, will permit collective bargaining for certain self-employed workers, which may impact upon this area.

But at this moment in time, should a test case arise the Irish Courts are likely to determine a worker who is working for a 'gig' company, an employee as opposed to self-employed.

TOP TIPS:

For the time being, pending any changes to law or governance, we ordinarily advise:

- Carefully consider whether an independent contractor arrangement really is appropriate in the circumstances, bearing in mind the risks involved if it proves inappropriate.
- Consider engaging the contractor through an incorporated entity, in order to create a further contractual layer between the parties.
- Ensure contractual documentation is in order and not suggestive of an employment relationship, including anticipated control levels, manner of payment, ability to sub-contract, insurance obligations, indemnities in terms of any future tax liabilities, etc.
- Monitor the relationship, on an ongoing basis, to ensure that it does not evolve into an employment relationship in terms of levels of control over the contractor, degree of integration within the organisation (including email address, business card, inclusion at team meetings, representation at events, control of rate of pay/fees, insurance, etc.
- Be prepared for change and the implications this could have.

ITALY

Determining Classification in Italy

Employee: A person who works within a hierarchical structure, under the employer's organisational and disciplinary powers and strictly follows the employer's orders (e.g. working hours, place of work, duties to be carried out, methods of performing the working activities, etc.). There are 4 categories of employee (in the following hierarchical order): blue-collar, white-collar, "Quadri" and managers.

Autonomous worker: A person who carries out his / her activity without any kind of subordination by autonomously establishing the timing, the place and the methods of work. There are different types of autonomous workers:

- Consultant: is an autonomous worker who undertakes the obligation to perform a specific activity or supply a service (the consultant can be a professional enrolled in a professional register - e.g. doctors, notaries public, lawyers, architects, etc. – or not);
- Coordinated and continuous collaborator: an autonomous worker who carries out activity in coordination with the company's organisation;
- Agent: a person in charge of procuring business on behalf of the company and promoting the conclusion of commercial contracts.

Board Member: Normally an autonomous worker (with a specific compensation for the assignment or not), and can also have, in addition to the assignment, an employment relationship (normally as an executive) with the Company. In such cases, the salary as an employee may or may not include the compensation for Board assignment.

Temporary workers: A person hired (for a definite or an indefinite period of time) by a Temporary Work Agency (which must meet specific financial and legal requirements and be registered with the Labour Agency Register) and engaged to work at the other Company's premises (the "User") under a specific commercial contract between the latter and the Temporary Work Agency. The Temporary Worker must follow the User's orders and directives but is paid by the Agency and remains subjected to the latter's disciplinary power.

Employment protections for worker misclassification in Italy

In cases of recognised misclassification of workers, the consequences are the followings:

- the Judge will declare a subordinate relationship between the parties;
- the employer would be sentenced to pay the difference between what has been paid to the autonomous worker and what should have been paid to the employee;
- moreover, the employer would be sentenced to pay the social security contributions (which are higher in the subordinate relationship case) and, sometimes, compensation for damages.

Tax consequences of worker misclassification in Italy

If misclassification is declared, taxes on the amount corresponding to the difference between what has been paid to the autonomous worker and what should have been paid to the employee are due.

Other consequences of misclassification in Italy

The Labour Office is a public authority that has a considerable power in checking and investigating the compliance of the Labour legislation.

In cases of ascertained violations the legal consequences will be:

- fines for unpaid social contributions;
- administrative and / or criminal sanctions in some particular cases provided for by law.

Interesting developments or cases to report in Italy

On-demand economy and new technologies often require new types of working modalities.

In Italy a national agreement on teleworking is currently in force and is signed by all the main national trade unions and entrepreneurial associations. However, teleworking is not frequently used in Italy due to some legislative restrictions and to its cultural heritage.

The Italian Parliament is currently discussing a Bill about “smart working and work life balance” with particular attention to: working hours, remote surveillance by employers, compliance with health and safety legislation and the “right of disconnection” (that is the employee’s right to turn off the working technological devices at the end of the working hours).

TOP TIPS:

Daverio & Florio’s philosophy is “prevention is better than cure”. As a consequence, in order to reduce the risk of employees’ misclassification, we normally suggest our clients:

- choose the contract which is most suitable to the client’s needs always bearing compliance with the Italian legislation in mind;
- always draft contracts complying with the formal requirements set forth by the Italian legislation;
- read very carefully our legal opinions and guidelines on the concrete modalities in which the different contracts must be performed and on how the different types of workers (autonomous or subordinate) must be treated;
- pay attention to our periodical newsletters in order to be kept informed about the recent developments of the legislation and the case-law;
- always contact us in case of doubt.

NETHERLANDS

Determining Classification in the Netherlands

Dutch legislation covers numerous categories of workers.

Most workers can be classified as employees. There are three requirements to qualify an agreement as an employment agreement:

- there has to be a **relationship of authority** whereby the employer can give instructions to the employee;
- the employee is obliged to **personally** carry out the employment agreed upon; and
- the employee receives **salary**.

The actual execution of the agreement takes precedence over the wording of the agreement.

If the relationship of authority is missing, the worker will be qualified as a contractor. For contractors a contract for professional services is used.

Companies who need a temporary workforce can hire agency workers from a temporary employment agency. These workers have an employment contract with the temporary employment agency. This is a specific type of employment agreement.

Other kinds of workers are for example civil servants, managing directors and trainees. For these workers specific rules apply and different agreements are used.

Employment protections for worker misclassification in the Netherlands

Employers who misclassify their workers can face serious consequences. The employer may be faced with the fact that he (still) has to apply all applicable laws and regulations related to employees. For instance, in cases of an employment agreement as meant by law, the employer has to observe a notice period, pay wages during illness and holidays, minimum wages apply, there are stricter rules regarding the non-competition clauses, and in cases of a termination by mutual consent a reconsideration period of fourteen days on behalf of the employee applies, there are stricter rules regarding termination of the employment agreement (i.e. in most dismissal cases prior permission to terminate is required), etc.

Tax consequences of worker misclassification in the Netherlands

The misclassification of an agreement can mean that the employer is held liable for social security insurance contributions and wage tax.

Other consequences of misclassification in the Netherlands

To ensure employers comply with all aspects of health and safety laws, the health and safety inspector can check and investigate various business premises. This may result in fines as well as negative publicity.

Interesting developments or cases to report in the Netherlands

The fairly strict rules of Dutch employment law will often clash with values and needs of employers to recruit flexible employees. The legislator and social partners keep trying to find the right balance

between flexibility of employment and protecting employees. The “Wet flexibel werken” (Flexible Work Act) provides regulations for a better work-life balance for employees.

Another example is the “Wet deregulering beoordeling arbeidsrelaties” (Deregulation on the Assessment of Employment Relationships Act). This law entails a stricter regime and has been in force since 1 May 2016. It requires clients and their contractors to pay much more attention to their contractual arrangements in order to avoid tax liabilities. Tax authorities publish model agreements that guarantee a sufficient degree of independency of the contractor. If the agreement used by the parties is not an agreement approved by tax authorities, the authorities may rule that the relationship qualifies as an employment agreement and hold the client liable for (amongst others) wage taxes. Unfortunately there has been a lot of discussion about this law and the model agreements due to the fact that the guidelines are open to several interpretations. Hopefully better guidelines will follow soon.

TOP TIPS:

- Keep in mind that you should choose an agreement that is most suitable for the situation. Ask yourself if you want the agreement to qualify as an employment agreement or a contract for professional services.
- Please notice that the actual execution of the agreement takes precedence over the wording of the agreement.
- Avoid the situation that workers (who are not employees) are performing substantially the same work as regular employees (otherwise these workers might be classified as employees).

PORTUGAL

Determining Classification in Portugal

Classifications:

One of the most relevant distinctions, which is frequently the origin of employment lawsuits, is the one between services contract (independent contractor) and employment contract (subordinated employee), since the legal regime applicable to the latter is much more protective of the employee.

An employment relationship generally exists when the employer is entitled to control not only the result of the services rendered, but also the means by which that result is achieved. The employee renders his services for and under the direction of the employer. The employer's directions may concern the content, performance, time and place of work.

An independent contractor relationship is generally created when an individual (self-employed) is given a task to do but is free to use her/his own judgment when performing that task, works without supervision, typically using her/his own tools and materials on the job and is being paid by commission or lump sum based on the job or project rather than by the hour.

Employment law does not include any specific classification for workers, although explicit provisions or protections are applicable to:

- Workers employed on fixed-term contracts;
- Part-time workers;
- Juvenile workers; and
- Working students.

Categories of worker based on the different duties and responsibilities are usually set by collective agreements.

Key Tests:

Under Portuguese employment law, there is a general presumption of an employment contract when some of the following situations occur:

- the activity is carried out in a place which belongs to the hiring entity or determined by the latter;
- the equipment and work tools belong to the hiring entity;
- the activity's provider complies with a work schedule determined by the hiring entity;
- a certain amount is paid with regularity to the activity's provider, as compensation for this activity;
- the activity's provider performs management or leadership functions in the organic structure of the company.

Please note that these assumptions must be understood and examined in a case-by-case context. Typically, and beyond the general assumptions listed above, Portuguese Courts will assess if the contractual relationship in question implies any kind of subordination (or at least minimal self-government) on the behalf of the self-employed contractor, which is widely regarded as characteristic of an employment relationship.

Employment protections for worker misclassification in Portugal

The contractual relationship with the misclassified self-employed contractor (or any other form of external staff) will be reclassified as an employment contract.

As such, the following contingencies may apply:

- (i) Termination of the relevant contract by the company may be deemed as an unlawful dismissal. In such an event the risk exists of compulsory reinstatement of the relevant worker (including potential accrued rights) or, alternatively, the payment of a seniority compensation (corresponding to an amount between 15 and 45 days of salary plus seniority allowance times the respective years of seniority). Payment of all salaries due between the dismissal and the final Court decision would also be due;
- (ii) Payment of salary differences, at least in what concerns vacation and Christmas allowances.

Tax consequences of worker misclassification in Portugal

Concerning tax liability, independent contractors are responsible for paying their own income tax and social security contributions, thus the hiring party may at least avoid the latter (since they are self-employed).

In the event of misclassification, the company will have to repay the outstanding social security contributions at least for the last 5 years: 23.75% of the amounts effectively paid to the self-employed contractor, and of payable supplementary amounts.

In this regard, please be informed that tax and social security authorities are generally very responsive towards apparent false self-employment arrangements.

Other consequences of misclassification in Portugal

So called “false self-employment” also constitutes a very serious administrative misdemeanour, punishable with fines between EUR 2,040.00 and EUR 61,200.00 per self-employment contractor, depending on the company’s turnover and degree of fault.

Recent improvements and amendments to the applicable legislation came into force which aims to control misclassification type situations, namely enabling a specific legal entity (Authority for the Labour Conditions) to trigger administrative infraction proceedings every time there is evidence that an apparently self-employment situation is in fact a situation of employment. This also enables said authority to trigger specific proceedings against the employers for the acknowledgment and regularisation of these situations.

Interesting developments or cases to report in Portugal

In September 2016, a new law aimed at the prevention of modern forms of hard labour (Law 28/2016) entered into force and extended the liability for the payment of all agency workers’ credits to the Company, as a way to operate a stricter control over potential violations of workers’ rights. This means that, from now on, the Company will also be liable for the payment of all credits due to the workers by the Agency, by virtue of any misclassification, alongside with any misdemeanour due.

TOP TIPS:

The first advice in this regard would be to enter into a written rendering of services contract with the self-employed contractor. Despite such written nature not being mandatory under Portuguese

legislation, it might confer enhanced safety to the hiring entity, especially regarding the nature of said arrangement.

In said written contract, it would also be advisable:

- (i) to include a clause which specifies that both parties acknowledge and agree that their relationship does not have an employment nature;
- (ii) not to stipulate payment on a time spent basis or any time schedule or exclusivity (in rendering of services' agreements, what really matters is the delivery of the product / result and not how that product / result was made / achieved); and
- (iii) to underline the autonomy of the self-employed contractor to the maximum extent, namely excluding reference to terms like subordination and hierarchy (or any other deemed comparable).

During the execution of the contract, the company must pay special attention to avoid integrating the self-employed contractor in the latter's organisational structure, since she / he should not be subject to any kind of hierarchy or actual relationship that may be deemed comparable.

SPAIN

Determining Classification in Spain

1. **Employee:** a person who voluntarily renders his / her services in exchange for remuneration, under the management and within the organisational sphere of another person who is the beneficiary of that service (usually the employer). The employee's contract can be of an indefinite or temporary duration.
2. **Autonomous worker:** a person who, on a regular basis, directly and personally carries out a professional activity or business at his / her own risk, outside of another person's management and organisational sphere and without receiving a regular wage, regardless of whether he or she engages employees.
3. **Trade:** Spanish law separately regulates the "economically dependent autonomous employee", who is a natural person who:
 - performs a professional activity for profit on a regular basis;
 - carries out that activity personally, directly and principally for one natural or legal person (called a client);
 - depends on this client to receive at least 75% of their income.

Economically dependent autonomous employees are a particular category of the self-employed and are regulated under a specific legal framework.
4. **Board Member:** They will be classified in one or another regime depending on the tasks performed and the remuneration received:
 - When a member to the board only carries out duties inherent to his / her condition as a member to the board and does neither perform duties of management and control of the company nor any other task, he / she is not subject to any Social Security Regime.
 - When a member to the board performs managerial duties of the company or any other job duties (not only as managers) and receives remuneration for this but does not possess the Company's control, he / she is considered an employee and subject to a similar regime as the General social security regime but without unemployment benefit and the wages guarantee fund.
 - When a member to the board performs managerial duties of the company or any other job duties (not only as managers), receives remuneration for this and possesses, directly or indirectly the Company's control, he / she is considered an autonomous worker.
 - When a member to the board has at least 50% of the company's shares, performs managerial duties, even though he / she does not receive a remuneration for this, he / she is considered an autonomous worker.
5. **Temporary Agency workers:** a person hired (for a definite or an indefinite period of time) by a Temporary Work Agency (which must meet specific financial and legal requirements and must obtain an administrative authorisation) and engaged to work at a Company's premises (the "User enterprise") under a specific commercial contract between the latter and the Temporary Work Agency. The Temporary Worker must follow the User's orders and directives but is paid by the Agency and remains subject to the latter's disciplinary power.

Employment protections for worker misclassification in Spain

In cases of recognised misclassification of workers, the company must:

- Pay the corresponding social security contributions for the period in which the person has been working as an autonomous worker;
- In cases of termination of the contract, the company would be obliged to pay the severance corresponding to an employment relationship and recognise the seniority of the employee as from the commencement of employment
- If an inspection were to take place, the company would face two possible penalties:
 - for not registering the employee in due time and form (EUR 626.00 – EUR 6.250.00 for each employee); and
 - for not paying the corresponding social security contributions (100% - 150% of the amount of unpaid contributions).
- In addition to these penalties, the delay in the social contributions' payment can lead to a surcharge (20% up to 35% of the unpaid contributions).

Tax consequences of worker misclassification in Spain

Under the Spanish Law, withholding taxes in relation to salary are subject to a progressive tax scale, while those relating to the remuneration paid to self-employed workers are subject to a fix tax rate. For high salaries the latter is usually lower than the former.

If misclassification is declared, withholding taxes on the difference between what has been paid and what should have been paid are due.

A tax audit might indicate the payment of the tax due, penalties and delay interests. The regularisation by the Company would avoid penalties but a surcharge for late payment would apply.

Interesting developments or cases to report in Spain

The traditional Spanish way of understanding labor relations does not fit the new phenomenon of economy on demand. Currently questions regarding how to articulate these kinds of relationships are increasingly being raised, especially with regards to the new digital platforms: Uber, Helping, Eslife, Bla Bla Car, etc.

In Spain, there is a trend towards the articulation of the relationship between the digital platform and the service users or suppliers as independent contractors although in most of the cases they actually represent what it is called a "false self-employed". Experts are now trying to define the better legal way to articulate these kind of relationships.

TOP TIPS:

In order to reduce the risk of employee misclassification, we normally suggest our clients to:

- Pay attention both to the duties performed by the worker as well as the form in which he / she will perform those duties;
- Choose the contract which is most suitable to the company's needs always bearing the compliance of Spanish legislation in mind; and
- Always draft contracts complying with the formal requirements set forth by Spanish legislation.



Innangard is an international employment law alliance bringing together leading employment law specialists from around the world to collaborate on international and cross-border employment law and HR issues. Each firm is individually recognised in their own country for their expertise in labour and employment law issues.

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Innangard Members (November 2016):

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