

## 瑞士法的“虚假自雇”概念

### “Fictitious self-employment” in Switzerland



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**S**upposedly self-employed service providers (e.g., freelancers, contractors or subcontractors) in Switzerland are often in fact so-called “fictitiously self-employed persons”. As a result, the actual employer does not pay any social security contributions and there is a risk that the fictitiously self-employed person will not be covered by social protection for workers. If the fictitious nature of the self-employment is revealed, the employer faces various obligations, some of which are applied retroactively. But when is there fictitious self-employment and what are the legal consequences?

**When is there an employment relationship or respectively fictitious self-employment?** In practice, the distinction between normal employment and self-employment is important because of the different legal consequences. Therefore, it is necessary to examine, on the basis of economic circumstances, whether a service provider is actually self-employed or whether there is in fact an employment or similar relationship with all the rights and obligations associated with it.

Among others, the following criteria indicate an employment relationship: The service provider (1) does not have to provide a work result or a success, but rather a work performance on time; (2) is integrated into the work organization of the contractual partner; (3) is bound by the instructions of the contractual partner, that is, he does not act autonomously; (4) cannot move freely on the market, e.g. conclude contracts himself; (5) operates on a regular basis and essentially only for one (main) contractual partner (and is thus economically dependent on it); (6) is not paid on a flat rate but per hour; (7) is subordinated to the contractual partner, that is, it must not only be accountable, but the contractual partner

**在**瑞士，乍一看是自雇人士的服务提供者（如自由职业者、承包商或分包商）常常实际上是所谓的“虚假自雇人士”。由于“自雇”的外衣，事实上的雇主不缴纳社保，这些虚假自雇人士也不能获得职工社会保险的保障。一旦此类虚假自雇被揭穿，那么雇主就会面临各种各样的义务，其中一些有被追溯的效力。但是，何为虚假自雇，其法律后果又是如何？

**雇佣关系，或虚假自雇，何时构成？**实践中，考虑到两者不同的法律后果，普通雇佣和自雇之间的区别很重要。因此，有必要根据经济情况来判断一个服务提供者到底是不是真的是自雇，还是实际上存在雇佣或类似关系。若是后者，则此类关系将伴随着相应的权利和义务。

在众多的因素中，以下条件指向雇佣关系的存在：服务提供者（1）不必提供工作成果或完成一项任务，只需要按时完成工作；（2）是合同对方团队组织中的一部分；（3）受合同对方的指示约束，即不自主行事；（4）不能在市场上自由流动，如自行签订合同；（5）定期工作，且根本上是为一个（主要）合同对方工作（因此在经济上依赖于它）；（6）不收取固定费用，而是按小时支付费用；（7）应服从于合同对方，即不仅要为合同对方负责，且合同对方可以控制其绩效和表现；（8）不面临创业风险；（9）由合同对方提供工作设备；且（10）有获得保护的必要。

上述条件仅是表明雇佣或类似关系存在的一些指标。决定性因素还是服务提供者是否“在经济上依赖于”合同对方。服务提供者对合同对方的依赖程度越高，雇佣关系或虚假自雇就越可能成立。

一般来说，若要构成雇佣关系或虚假自雇，前述依赖程度必须很高，以至于应当适用劳动法规定的保护规则。

can control the performance; (8) bears no entrepreneurial risk; (9) gets his working equipment provided by the contractual partner; and (10) has a need for protection.

These criteria provide only indications as to whether an employment or similar relationship exists. The decisive factor is whether a service provider is “economically dependent” on a contractual partner. The greater the dependency of the service provider on the contractual partner, the more likely an employment relationship or a fictitious self-employment, respectively, is assumed. In general, the dependency on the contractual partner must be so intense that the application of the protection rules provided under labour law is justified. It is important to note: Not the designation of a contractual relationship by the parties, but the actual co-operation is significant.

#### LEGAL CONSEQUENCES

According to a widespread concept of Swiss law, individual protection rules provided under labour law (e.g., protection against dismissal, continuation of salary payments in case of sickness, paid holiday, work reference, lower liability standard, etc.) should be applied, at least by analogy, to fictitiously self-employed persons. The “employer” is therefore at risk of being confronted with substantial financial claims by a fictitiously self-employed person that were not budgeted for or are not insured.

When a foreign service provider works in Switzerland for a limited period of time, the Swiss Federal Posted Workers Act (PWA) and its related ordinance apply. Upon request by the authorities, the supposedly self-employed Chinese service provider has to prove his self-employment and provide copies of relevant

需要注意的是，重要的不是各方将其之间的关系称为合同关系，而是各方之间的实际合作。

### 法律后果

根据瑞士法的普遍概念，劳动法规定的个人保护规则（如免受解雇的保护、病假期间继续支付工资、带薪休假、雇主推荐信、较低的责任标准等）至少应当通过类比的方式适用于虚假自雇人士。因此，“雇主”可能面临虚假自雇人士提起的在预算外或未入保险的大额经济索赔。

外国服务提供者在瑞士工作一段时间的情况适用《瑞士联邦外派人员法》（PWA）及其相关条例。一旦主管部门提出要求，所谓的自雇中国服务提供者必须证明其自雇状态，并提供以瑞士官方语言书就的相关文件副本（如工作许可和服务合同等）。

若瑞士有关部门将外国服务提供者认定为是雇员，则其雇主需要承担PWA规定的一系列义务。将雇员派往瑞士工作一段时间的外国雇主应保证该雇员在瑞士的最低工作和工资条件（如最低工资、工作时间、健康保护、不受歧视等）。

若违反PWA规定的义务，该雇主可能会受到行政处罚（如罚款、瑞士市场禁入一至五年、公开通报等）或刑事处罚，如高达100万瑞士法郎的罚款，以及扣押非法所得等资产。

2017年7月19日，中瑞两国签订的《社会保障协定》生效。它规定，若

雇主将其在一国的雇员派往另一国工作，则在头72个月内，该雇员受派出国的社保条例管辖。

此后，在一般情况下，该雇员受其被派往国的社保条例管辖。有关部门必须签发一张外派证明，该证明需提交给雇主申请豁免缴纳社保的国家的有关部门。在瑞士，此类豁免仅适用于养老和遗属保险（AHV）和伤残保险（IV），而不适用于意外险等。

假设一个虚假自雇人士在瑞士社保局进行了登记，其表面看来就是自雇人士，至少需支付自己的社保。如果有关部门随后在工资审计时发现了该自雇的虚假性质，且该假自雇人士被视为依赖于雇主的雇员，则可以向其实际雇主追偿此前五年未缴的社保。意外险保费也必须追溯支付，并可以收取罚金。此外，若该雇员尚未独立登记，则其必须加入职业年金基金。

如果一个虚假自雇人士没有参保任何社保，则该人士同其实际的雇主也可能因违反有关未申报工作的刑事条款而被起诉。

综上所述，雇佣情况不清晰的公司应向瑞士派出服务提供者之前，最好对其雇佣状态进行审核，并解决任何不确定因素。

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documents in an official language of Switzerland (e.g., work permit and service contract).

If the foreign service provider is qualified as an employee by Swiss authorities, his employer faces several duties under the PWA. An employer based abroad who sends an employee to Switzerland to work for a limited period of time, shall guarantee the minimum employment and salary conditions in Switzerland (e.g., minimum pay, working hours, health protection, non-discrimination, etc.). In case of violations of his duties according to the PWA, the employer can be punished with administrative sanctions (e.g., fines or exclusion from the Swiss market for one to five years, public list, etc.) or criminal sanctions such as fines up to CHF 1 million, and seizure of assets such as unlawful earnings.

On 19 July 2017, the Social Security Treaty between the States of China and Switzerland came into force. It basically states that an employee sent by his employer in one state to work in the other state is subject to the social security regulations of the former during the first 72 calendar months. Afterwards he is generally subject to the social security regulations of the state he was sent to. The competent authority has to issue a certificate of posting which has to be submitted to the authorities of the state where the employer applies for exemption of social security contributions. In Switzerland, these exemptions only apply to Old-Age and Survivors' insurance (AHV) and disability insurance

(IV), and not to accident insurance, for example.

If a fictitiously self-employed person has registered with Swiss social security, he appears as self-employed and pays, at least, his social security contributions. If the fictitious nature of the self-employment is then discovered by the authorities during a payroll control and the fictitiously self-employed person is deemed a dependent employee, the missing social security contributions can be claimed from the actual employer for up to five preceding years. Accident insurance contributions must also be paid retrospectively and penal premiums may be charged. In addition, the employee must be connected to the occupational pension fund, provided that he is not already registered independently.

If a fictitiously self-employed person is not enrolled in a social security scheme, both the fictitiously self-employed person and the actual employer can also be prosecuted for violating the penal provisions on undeclared work.

For these reasons, it is advisable for companies which have unclear employment situations to verify them and to resolve any uncertainties before sending service providers to Switzerland.

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