

One-person GmbH – Federal Social Court on Evasion Models in the Case of False Self-employment

INTRODUCTION

Contractor compliance when using outside personnel has now become a permanent feature of compliance practice. The various needs for availing oneself of **external personnel** – such as in IT or other classic consulting fields, are faced by expansive criminal liability and other liability risks for companies and those individuals acting for them, should the outside personnel be integrated too deeply in business processes and should it be necessary to thus evaluate their work as false self-employment and/or as illegal labor leasing. One favorite **evasion model** is the so-called “one-person GmbH” under whose shell external personnel offer and perform their services.

This is not as simple as it would appear, as the Federal Social Court (*Bundessozialgericht* or *BSG*) showed – not quite unsurprisingly - in its clarifying and precedent-setting series of judgments from the other day.

BSG JUDGMENTS OF JULY 20, 2023 – B 12 BA 1/23 R, B 12 R 15/21 R AND B 12 BA 4/22 R

The decisions, which are only available to date as press releases, go back to situations in which consultants or nursing professionals formed a **UG** (entrepreneurial company) or **GmbH** in order to then provide services as a nursing professional employed by the company or managing sole member of the consulting company on the basis of a service agreement entered into by the relevant company and a third party (such as a hospital). As the BSG has now stated in absolute clarity, this corporate law shell is **irrelevant** for the question of what the status of a person is:

“If the work of a person, according to the actual overall situation, constitutes dependent work, an employment relationship subject to social security contributions cannot be ruled out merely because contracts only exist between the client/customer and a corporate entity whose sole managing director and member is said person.”

The situation thus remains that even in the case of the interposition of a legal entity, the applicable standard continues to be the well-known “**evaluative overall view**“ in which numerous aspects, the core of which being the duty to follow instructions and the integration into business processes, are governing.

ADVICE FOR BUSINESS PRACTICE

The decisions of the BSG are hardly surprising. What was surprising were the prior decisions of the superior social courts which answered the aforesaid core issue in a decidedly different manner. The Superior Social Court of

Hesse, the **LSG Hessen**, was recently of the opinion that the interposed legal entity **could not simply be erased from the picture** and that the fact that the GmbH had leased office space and had hired an employee argued against an evasion model (*LSG Hessen* judgment of November 18, 2021 – L 1 BA 25/21). Other superior social courts, however, had already been in line with the current ruling of the BSG (*LSG NS-Bremen* judgment of March 18, 2022 – L 1 BA 54/18).

The BSG has thus provided **clarity**. This is also relevant to businesses, as the one-person GmbH was not unusual and was used again and again by “interested circles“, given the backing of decisions such as by the LSG Hessen to justify the intended use of outside personnel in the individual case by merely referring to the corporate law shell. The plug has now been pulled on these approaches.

The situation remains the same: that is, **contractor compliance**, meaning the planning and ongoing monitoring of the deployment of outside personnel, remains absolutely necessary. Business practice has developed numerous tools (from check lists to interface controls to ticket systems, etc.) which can effectively provide exactly this. An overview of this entire subject can be found in the reference book edited by us and recently published in a 2nd edition by C.F. Müller Verlag “**Contractor Compliance - Haftungsprävention und Fallmanagement beim Einsatz von Fremdpersonal**“ (Contractor Compliance – Liability Prevention and Case Management When Using Outside Personnel).

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CONTACT



Dr. Daniel Klösel
d.kloesel@justem.de



Dr. Thilo Mahnhold
t.mahnhold@justem.de