



Organisation for Undocumented Migrant Workers vzw

BEING YOUR OWN BOSS ? INFORMATION ABOUT SELF- EMPLOYED STATUS

The Organisation for Undocumented Migrant Workers has for a couple of years been helping foreign employees who work in Belgium without having the appropriate work permits. We help these people, who often do not have a residence permit, to defend their labour rights: concerning unpaid salary, work-related accidents, etc.

Increasingly we come across foreigners who have no residence permit and are self-employed.

There are also many foreigners who are legally self-employed. Some do so because they want to have their own business and to be their own boss. Some of them also have self-employed status because someone proposed it to them, or because that way it is easier for them to work legally in Belgium. In reality, they are not truly in charge of their own work. Suite often these persons get serious problems and do not know where to go.

WHAT IS SELF-EMPLOYMENT?

*** *Employees (paid workers) work for an employer (=a boss)***

They receive a fixed salary, and the employer is responsible for the payment of employer's tax (=payroll taxes) and Social Security contributions.

*** *Self-employed persons work for themselves***

They are paid according to performance, and they determine how much they charge. They are responsible for their own tax and social security contributions.

This brochure is meant for migrant workers, with or without documents, who at some point receive an offer to become self-employed, or who are thinking about setting up their own business.

The brochure lists the rules and the pitfalls. It helps you to make good choices whenever you receive a specific work offer. It tells you about your rights and duties, whether you work legally or illegally, whether you are truly self-employed or not.

This brochure is only an introduction. The rules are complicated, and to be really sure you need to examine your specific situation with an expert advisor. After reading the brochure, you can seek further information:

- by contacting OR.C.A. or a trade union if you want more information on workers' rights
- by contacting an organisation for self-employed persons if you wish to start your own business and therefore need all the necessary information.

A short address list can be found at the end of this brochure.

LEGAL OR CLANDESTINE (ILLEGAL) WORK

Foreigners without a residence permit valid for an INDEFINITE PERIOD almost always need a special permission to work:

- Employees need a work permit (A, B or C). If they are citizens of one of the 'old' 15 EU member states* or Cyprus or Malta, they do not need a work permit.
- Self-employed persons from outside the EU need a professional permit. Citizens of the former 15 EU member states do not need such a permit, nor do citizens of the 12 new EU member states**.

If you work without this permission then you are an undocumented (illegal) worker. This is forbidden and a punishable offence.

- In the case of undocumented (illegal) employees, it is the **employer** who is punishable. He or she will have to pay a fine per undocumented worker employed.
- Self-employed persons are **themselves** punishable if they work illegally. Make sure you are applying with all the rules for foreign self-employed persons:

Foreign self-employed persons: an overview of the rules

- Foreigners who are self-employed in Belgium must apply for a **professional permit** in their country of origin. Those who already have a temporary residence permit for another reason can also apply for this professional permit in Belgium.
- Only
 - o EU citizens (including those of the new member states**)
 - o Foreigners with a permanent residence permitcan legally start an independent business **without a professional permit**, provided that they are truly self-employed (see below).
- You can **NEVER** work legally **if you have no residence permit**. If you want to regularise your situation, you must first make sure that your residence permit is in order or you must return to your country of origin and apply for a professional permit over there.
- Self-employed nationals of an **EU member state** do not need to follow any special procedures for their residence permits. They must carry out their self-employed activities according to the rules and must be able to prove after five months that they have started a business. This means they will have to pay their social security contributions and that they will have an income from their activities as well. If they cannot prove this, their residence permit expires.
- By law **you may not affiliate with a social security fund** if you do not have a professional permit. In practice this does happen, but in that case the social security fund is not respecting the rules.
- An affiliation with a social security fund is not the same thing as a residence permit or a professional permit. It gives you certain social rights (see below), but **you are still working illegally**. You can still be deported if there after a workplace control. You can also be fined because you have practised an independent profession without a professional permit.
- Without a professional permit or work permit you may not carry out a **mandate** (director, executive, secretary, etc.) in a company, such as a limited company, a private limited company, a limited partnership... even if it is an unpaid position! You may carry out a mandate only for a non-profit organisation, provided that you are not being paid for it.

Your rights

When clients or employers are taking advantage of you, it can make a big difference whether you are working as an employee or as a self-employed person. This is certainly true if you are working illegally.

The Belgian law provides for a wide protection for employees. There are rules concerning the minimum wage you should receive, the number of hours you may work, the employer's duty to be insured for work-related accidents, etc. These rules also apply to undocumented workers. This means that undocumented workers do have **RIGHTS**. A guide to your rights was published by OR.C.A, ACV and ABVV and can be consulted at www.orcasite.be.

Self-employed persons are much less protected. If you have problems or if you are cheated by those who gave you the job, it will be (even) more difficult to defend yourself.

- A (legal) self-employed status allows you to make your own decisions about your work and your wage, but it gives you less certainty.
- If you are not in charge of you own work, you have the uncertainty of the self-employed status, but not its advantages.

Therefore it is very important that you work out for yourself which is the right status! We explain below the exact differences between employees and self-employed persons.

THE DIFFERENCE BETWEEN EMPLOYEES AND SELF-EMPLOYED PERSONS

An employee works under the authority of another person. If you don't work under the authority of another person, then you are self-employed.

AUTHORITY

According to a new law, also known as the 'Laruelle Law', there are four criteria to determine whether a person is working under the authority of another person or not.

- 1. The will of the parties:** in principle you can decide for yourself if you make a contract as employee and employer, or as contractor (self-employed) and client. But your work must be organised in such a way that it is in agreement with your status.
- 2. Freedom to stipulate your working hours:** an employer decides when his employees start and stop working. The employee must ask permission in order to be absent from work.
This does not apply to a self-employed person, except if the work requires you to stick to certain agreements: for instance because the business is open for clients at certain hours.
- 3. Freedom in organising your work:**
 - An employer stipulates how his employees should execute their work.
 - Self-employed persons only need to produce certain results, and they are free to decide how they will do so.
- 4. Hierarchical supervision:** an employer can always supervise his or her employees. The possibility for supervision is what counts, even if the employer does not always make use of this possibility.

In addition to these four general criteria, there are specific criteria per sector (the kind of work you do). Contact a specialised organisation to obtain information.

The following criteria **DO NOT** specify by law if you are an employee or an employer. Therefore you cannot use these criteria to prove or deny self-employed work.

- the name the parties give to their agreement
- affiliation a social security fund
- registration at the **Crossroads Bank for Entrepreneurs** (whether you have a company number)
- registration with the VAT administration (whether you have a VAT number)
- the way you declare your taxes

What does this mean?

A truly self-employed person:

- Can freely choose for whom he or she works. He has no employer but clients, and can work for other clients if he or she wants to.
- Makes his own invoices and determines how much he asks for his work.
- Begins and ends his work as he pleases. He also works the way he prefers.
- If you are a partner in a company, you may also co-decide upon the running of the company; you participate in meetings, help determine how much money is charged, for which client one works, etc.
- Pays employees if there are any.

If the above description applies to you, or if you wish to work in such a manner, then you can contact an organisation for self-employed persons in order to get extra information. Consult the list of addresses.

What is a pseudo self-employed person?

A number of dishonest employers try to convince their employees to work on a self-employed basis, even if, in practice, they continue working as employees. This gives employers some advantages:

- They are not obliged to pay minimum wages and follow other rules applicable to employees.
- Social insurance contributions and taxes are much lower than those for employees.
- It is much more difficult or even impossible to bring them to court if they do not pay their employees, if their employees have a work-related accident, etc.
- It will be a lot more difficult to punish employers if undocumented workers are involved. (see above: legal or clandestine work).

Such an employer might suggest that you join a social security fund. The following situations occur, and sometimes a combination of different situations is involved:

- The employer helps you to join a social security fund (SVMB, Partena, Acerta, Groep S). He promises to pay all the invoices you get from this insurance fund; the invoices might even be sent to your employer's address.
- The employer helps you to join a social security fund, but you are the one who receives the invoices and pays them.
- The employer suggests that you become a partner in his company. He makes you buy shares, or makes you sign a document in which you declare having bought the shares, without paying anything. If on top of that you do work for the company, you become a 'working partner' ("associé actif" in French– "actieve vennoot" in Dutch). Working partners are always supposed to be self-employed.

Sometimes employers use attractive arguments to convince you. They say you will receive a share of the profit (but is the company a profit-making venture, can you check this somewhere, is the profit-sharing mentioned in a contract?) Employers sometimes say that you work more legally on a self-employed basis, or that you can apply for a residence permit after a certain period. **THIS IS NOT TRUE!** Check the above table to see if you have met all the rules for self-employed foreigners.

The employer may try to represent you as a self-employed person, possibly without informing you first. He will manipulate the work to make it look like the job of a true self-employed person as described above. For example:

- He pays you and requires you to pay your colleagues, whom you may in fact have recruited yourself. Perhaps you even receive a percentage of your colleagues' wages, or you receive a higher salary.
BE CAREFUL! If you cannot prove in court who the actual employer was, then you are responsible for the salary of your colleagues (and the taxes and contributions that come with it). **Then you become an employer yourself!** If the workers are illegally employed, you can be fined.
- The employer does not pay you per hour, but per square metre or piece. He may even give you invoices for it (instead of pay slips).

Yet by law it is forbidden to declare someone as a self-employed worker if this person is actually an employee, even if all the necessary conditions seem to be met. This is called '**pseudo self-employment**'. If the inspectors or the court find out that a self-employed person was *supervised* by an employer, the employer can be forced to regularise the situation:

- he must pay the taxes and contributions that should have been paid for an employee
- he must pay the employees according to the minimum wages
- he may receive a fine if it is proven that he did not respect the rules.

Social Ruling Commission

The new Laruelle Law sees to it that you can check on the validity of the proposed status when making a contract as a self-employed person or an employee. For more information, please contact an organisation for self-employed persons.

PSEUDO SELF-EMPLOYMENT: WHAT TO DO?

Cancelling pseudo self-employment

If you are actually an employee but officially registered as a self-employed person, you cannot claim any workers' rights, such as unpaid salary or workers' compensation for work-related accidents. First you must prove you are a pseudo self-employed person. This can also be important if you are in debt to the RSVZ/INASTI¹ (see below).

To do so, you have to lodge a complaint with the Social Inspectorate. Normally the inspector is not obliged to inform the Aliens' Office if you lodge a complaint at his/her office and you have no residence permit. If you feel uncomfortable about it, ring them before hand or ask someone to do it for you. The inspector can then explain the possible consequences of a complaint.

If you lodge a complaint with the social inspectorate, it is best to contact a specialised service (trade union or OR.C.A.). Often you need a lawyer who makes sure the proper procedures are followed so that you receive what you are entitled to.

The Social Inspectorate shall, by means of a detailed interview, try to determine whether you were an employee or a self-employed person. They will check if any relationship of AUTHORITY was present in the relation between you and your employer.

These criteria have been described above, but are not always clear in practice. They are interpreted with lots of nuances. Moreover, one single criterion is not enough to determine whether you were an employee or a self-employed person. All criteria will be taken into account. Pay attention to the following aspects:

- Who pays, how are you paid, and who determines how much you earn?
- If you were an employee first and afterwards self-employed, did something change in your work situation the moment you became self-employed?
- If the firm uses employees as well as self-employed persons, is there a difference between both groups?
- Do you depend on only one 'client' (who is thus your employer)? Would you be able to work for other clients? (e.g. do you speak the language, etc.)?
- Who pays the social insurance contributions? Who does the bookkeeping? Do you declare your taxes yourself?
- Can you choose when you begin and stop working? Do you need to seek the permission of someone if you want to stay away from work?
- What instructions do you get from your employer/client? What happens if you do not follow these instructions?

Attention: it might seem suspect if you first accept to be self-employed and later want to change status the moment you get into trouble. Explain clearly why you first accepted the self-employed status and why you have changed your mind.

¹ National Institute for the Social Security of the Self-employed.

After the Social Inspectorate has examined your file, it will be sent to the RSZ/ONSS (National Office for Social Security) (see below). If the RSZ/ONSS decides that you were indeed an employee, then they will ask the employer to pay the social security contributions (for employees). Social security contributions (for the self-employed) which you may have overpaid will be refunded. With the decision of the RSZ/ONSS you can also claim in court your other rights as a worker.

To become truly self-employed

Trying to cancel pseudo self-employment is not always the best solution, for instance if you have hardly any proof. Moreover, you also need an alternative: some foreigners are unable to find a job as an employee or cannot even work legally as an employee.

Another option is that you try to change your pseudo self-employment to true self-employment. That means looking for your proper clients so that you no longer depend on your current employer. That is possible only if you are legally employed (with a professional permit if needed, and with the payment of all necessary taxes and social insurance contributions).

Make sure you would really like to be your own boss, and that you have every chance of making it work. Know that a proper business involves a lot:

- For certain professions you need to have the necessary qualifications.
- For many professions, basic knowledge of business management and accounting is required. If you have taken a course in business management, you can request your own company number.
- You must speak your clients' language sufficiently well: Dutch or French, or even better both!
- You must have a good business plan with the possibility of enough profit to take care of yourself.

If you decide to start your own business, it is best to seek some advice from a specialised organisation. Consult the address list below.

CONCLUSION:

If you want to start your own business in Belgium, it might be a good idea to become self-employed. This brochure tells you more about your rights and duties. But be careful if someone makes you a proposal in which you recognise certain aspects mentioned in the section on "pseudo self-employment". It can be very difficult to put things right afterwards. Even if it is very clear to you that you are not self-employed, it can be difficult to prove it to a judge.

It is always better to avoid the self-employed status if in fact you are working as an employee.

SOCIAL SECURITY FOR THE SELF-EMPLOYED

Social security contributions

Contributions are paid to the **RSZ/ONSS** by the employer for **employees**. The contributions are compulsory. When the social security contributions are paid, you obtain certain rights: you can subscribe to a mutual health insurance fund; you qualify for a child allowance and a maternity allowance, paid sick leave, pension, unemployment benefits... (Important notice: employees can only receive unemployment benefits if they are legally resident in Belgium).

Self-employed persons pay their own contributions to the **RSVZ/INASTI**. This is also compulsory. The contributions are lower for the self-employed, but the self-employed have fewer social rights (though this is improving):

- The health services used to refund fewer medical costs (only "major risks"). For newly self-employed persons (registered after 01.07.2006) this has been changed, and the so-called 'minor risks' are also reimbursed. From 1.1.2008 onwards this will apply to all self-employed persons. To know precisely what the major and minor risks include, consult the website of RSVZ/INASTI: www.rsvz-inasti.fgov.be.
- The child allowance for the first child and the pensions are lower.
- You will never get any sick leave allowance in the first month of an illness. After that period a fixed allowance is paid per day. That allowance is not a percentage of your normal income, as is the case for employees. The benefit is generally paid only after you have been self-employed for at least 6 months.
- You have no right to unemployment benefits, but you do qualify for a bankruptcy benefit (12 months).

Employees and the self-employed do not need a residence permit to enjoy these rights! The only condition is that the contributions were paid. For the reimbursement of medical costs and the payment of allowances for illness and/or maternity leave, you must subscribe to a mutual health insurance fund.

Self-employed persons who are unable to work (because of illness) for more than three months can ask for an 'equalization'. That means that they keep the same medical insurance as a working self-employed person, but no longer need to pay social insurance contributions.

Companies must also pay a yearly contribution (347.50 € or 872.50 € in 2006, depending on the company's balance sheet). Working partners and (managing) directors may be asked to pay the contribution themselves! If the contribution is paid late, interest will be charged.

Additional insurance

Because until recently the compulsory insurance for self-employed persons covered fewer medical costs, most social security companies offered an extra insurance for the so-called 'minor risks' (for self-employed persons registered before 01/07/2006, see above). If you do not pay these, you cannot ask for these extra reimbursements. From 1.1.2008 onwards all self-employed persons are automatically insured for minor risks (see above) and this additional insurance expires.

Health insurance and urgent medical aid

Those without a valid residence permit can only join a mutual health service if the social security contributions have been paid. In order to make sure that people without valid residence permits receive the needed medical assistance, there is the procedure called Urgent Medical Aid. You must therefore contact the OCMW/CPAS² where you live. This "aid" contains all necessary medical assistance. Only a doctor can determine whether medical assistance is necessary. Some costs, such as special dental care, are generally not reimbursed.

For urgent medical aid, all medical costs are refunded if the OCWM/CPAS accepts it. If you do have some form of insurance, the "Urgent Medical Aid" procedure can still intervene for medical costs for which you are not covered.

If you as a self-employed person are subscribed to a mutual health insurance fund, then you can turn to the OCMW/CPAS for those costs not reimbursed by the mutual insurer. You must mention to them that you are insured as a self-employed person. The OCMW/CPAS will, after approving the "Urgent Medical Aid", refund the amount not reimbursed by the mutual insurer. For medication, you can be reimbursed for the amount you must pay yourself after showing your SIS card.

If you are too ill to go first to the OCMW/CPAS, inform the doctor or Social Services at the hospital of your residence status and also of the fact that you probably won't be able to pay the bill. They will do what is necessary.

Don't worry that your name will be reported to the Aliens' Office when applying for Urgent Medical Aid. **But it is important that you follow the right procedure.** Consult one of the 'medical care for undocumented persons' services if you would like further information (see address list).

Debts to the RSVZ/INASTI

The social security contributions for the self-employed are compulsory. If they are not paid, the bailiff can come and claim them, whether you work legally or not. So make sure they are paid:

- Make sure you receive the invoices of the social security fund yourself. Make sure they are paid punctually.
- If your employer/partner says that he/she pays the contributions, check it regularly by contacting your social security fund. You need your national number in order to get that information (= the number which is on the SIS card and which begins with your reversed date of birth. This can also be a 'bis' number if you are not officially listed in the national register; in that case, 20 or 40 is added to the number of your birth month).

If your contributions were not paid, the debt can quickly increase to thousands of euros. You are responsible for this debt, even if someone else had promised to pay. There are two ways to prevent this:

- Within the RSVZ/INASTI, a commission decides upon the debts of the self-employed who are no longer capable of paying. If you can not prove that you were in fact an employee, you can ask the social security fund to send your file to this commission, with the request for 'exemption from payment'. Explain why you cannot pay. The commission then decides whether the debt will be reduced or cancelled. This is possible only for the debt of the 4 quarters which precede or follow your request.
- If you have enough proof, you can try to cancel your self-employed status. This procedure for doing so is mentioned above. If the self-employed status is cancelled,

² Public Social Welfare Centre.

the RSVZ/INASTI also cancels your debts. A debt to the RSZ/ONSS will at the same time be created, but that debt is to be paid by the employer.

!! If you want to cancel your self-employed status, you must communicate this by postal letter (preferably by registered post) to your social security fund! Mention your national number as well. As long as your status has not been cancelled, you will continue to receive further invoices and your debt will keep increasing!

Even if you have never registered, you can be forced to pay your debts to the RSZ/INASTI. This happens if it is decided that you have been working work illegally as a self-employed person. The same goes for your taxes (see below).

TAXES FOR THE SELF-EMPLOYED

Self-employed persons must pay taxes on their income themselves. Every year you must let the tax service know how much you earned. They then calculate (for the next year) how much tax you need to pay. If you don't indicate your income to the authorities, then you are engaging in non-declared work ("under the counter", called "black work" in Belgium). If this is discovered by inspectors, then you will be forced to pay the necessary taxes.

This also applies to anyone who is caught during a control and cannot prove that he/she is working for an employer.

Just as with social security contributions, is it not possible to avoid paying income tax.

If you really work as a self-employed person and you want to declare your income, then it is best to make advance payments. For more information, contact a specialised service (see address list). They explain how to fill out a tax declaration form.

** 'Former' EU member states or EU-15: Belgium, the Netherlands, France, Luxembourg, Great Britain, Ireland, Germany, Spain, Italy, Portugal, Greece, Denmark, Sweden, Finland, Austria.*

*** 'New' EU member states: Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Romania, Bulgaria Cyprus, Malta.*