

## **WORKING AS AN INDEPENDENT SUBCONTRACTOR**

Definition of 'la sous-traitance' :

According to Loi n°751334 du 31 décembre 1975

**« La sous-traitance est l'opération par laquelle un entrepreneur confie à une autre personne appelée sous-traitant l'exécution de tout ou partie du contrat d'entreprise ou d'une partie du marché public conclu avec le maître d'ouvrage. »**

Article L.8221-6-1 du code du travail

**« Est présumé travailleur indépendant celui dont les conditions de travail sont définies exclusivement par lui-même ou par le contrat les définissant avec son donneur d'ordre »**

We are not free to decide whether a trainer can be employed as a salaried trainer or as an independent sub-contractor. It's the context which determines what should happen.

Whenever there is a '**lien de subordination**' (employer-employee relationship) between the client and the subcontractor there should be a 'contrat de travail', even if the subcontractor has their own company and usually works through it.

### **What constitutes an employer-employee relationship?**

- Fixing the course schedule / timings and asking the independent to follow it.
- Drawing up course programmes and asking the independent to follow them.
- Providing course materials for the trainer to use.
- Requiring the independent to use admin docs (presence sheets, report forms etc.) drawn up by the employer and with the employer's logo on.
- Informing the independent of the hourly rate without any negotiation.
- Asking the independent to attend meetings with salaried trainers.
- Giving any kind of instructions as to how a course should be managed.
- When the employer makes the independent sign a contract.
- When the contract includes a « clause de non-concurrence » which is not limited to the specific clientele involved in the mission.
- When the contract between the employer and independent is an open-ended one rather than limited to a specific mission.
- When the employer leaves the independent little space for taking initiatives as to how to manage the course.
- When the employer coerces the trainer into becoming independent and even helps them with the formalities.

**Independents working with training organisations in this way are putting themselves in a situation of 'fausse sous-traitance' and this is illegal. The URSSAF considers it organised fraud and the sanctions are heavy.**

## If it's illegal, why is it happening everywhere we look in training in France?!!!

Trainers can earn a higher net salary by becoming autoentrepreneur.

Employing people in France is difficult and risky for employers so they are happy to work with more independents and fewer salaried trainers. Unscrupulous employers also benefit from the fact that an autoentrepreneur's charges are lower. They can allow the autoentrepreneurs to earn slightly more per hour than if they were salarié, but the employer can still save money compared to paying a trainer in salary.

Back in 2009, over 40% of trainers « recruited » by training organisations (language schools, higher education establishments) were autoentrepreneurs. We can imagine that this trend has continued and the figure is probably much higher today.

With the reform and the **new quality norms**, there will be **more audits**, from the OPCAs, DIRECCTE as well as URSSAF.

Unsurprisingly, the URSSAF and the DIRECCTE are increasingly focussing their audits on subcontracting arrangements and schools are being caught out and fined on a regular basis.

## Who is at risk if an inspector detects a situation of 'fausse sous-traitance'?

The employer first of all. Failure to sign an employment contract when it is required is considered a **crime of 'travail dissimulé'** under French law.

Employers that are caught in an employer-employee relationship with independent contractors can face **heavy fines**.

The amount paid in 'honoraires' is converted into net salary for the whole period and the usual social charges are then due by the employer, as well as 'majorations' for not paying on time.

It can cost employers dearly and even lead to bankruptcy if the situation has been going on for some time.

The independent can also be affected if their 'donneurs d'ordre' becomes wary of working with independents, having been audited and fined for irregular practices.

## If the law isn't new, why are we only talking about it now?

Most employers have been aware of the risks of using independents and especially of the notion of 'lien de subordination'. However, many have chosen to ignore these rules or have been badly advised.

Going through a **quality process** helps to bring these problems to light. We are becoming better informed about the situation thanks to the quality requirements.

## So how can training organisations continue to work with independent trainers without putting themselves at risk?

Even if, in reality, there is often some kind of 'lien de subordination' between a training organisation and an independent trainer – and incidentally the term 'formateur' implies a salaried trainer - what really matters is the paperwork. This will be the first thing inspectors look at. There will rarely be time for an in-depth analysis of the situation. Even so, don't rely on it never happening!

Require the following from the independent:

- An URSSAF '**attestation de vigilance**' (which should be requested at least on an annual basis)
- Proof of **registration with the DIRECCTE**
- Proof of subscription to an '**assurance responsabilité civile**'
- A 'devis' (or some proof of **price negotiation**)
- A **Règlement Intérieur**
- A **Contrat de prestation** for a specific mission (never open-ended!) & conditions générales de vente

DO ...

- ask the independent to provide a programme for the course.
- allow them freedom to schedule the course as they please.
- use independents for specialised or unusual courses that your usual salaried trainers aren't able/qualified to do.
- keep your independent contracts etc. in a different file to your employment contracts.

DON'T ...

- use independents for regular clients alongside salaried trainers.
- give independents too many guidelines.
- call them 'formateurs' (prefer 'prestataires').
- pay independents at the same time as salaried trainers.
- be an independent's only client or allow them to do more than 4/5 of their work with you (to avoid suspicion of 'dépendance financière').
- allow a trainer to switch between salaried & independent status unless it is justified (which it could well be) as it could alert an inspector to irregularities.
- put the word 'formateur' on the presence sheets – use 'sous-traitant' or the more neutral 'intervenant' instead. And if possible have a different model of presence sheet for salaried trainers and independents.
- don't invite independent trainers to teachers' meetings with your salaried trainers.
- don't provide training for your independent trainers.

**If any of your independents are requested to go to court in the event of a suspected case of 'travail dissimulé', tell them not to show up – it will make matters worse.**