



FAQ's: Declaration of Independent Contractor Status (in Dutch: "VAR-verklaring") will cease to exist in 2016

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1. What is the importance of the difference between an employee and contractor status?

Employment law, tax law and social security law makes a distinction between employees and contractors. The importance of the question whether the mandatory clauses of the employment and dismissal law are applicable, is to establish whether there is an obligation to withhold and pay premiums for the wage tax and an insurance obligation for the social security schemes. Also, the difference is relevant for the question whether the contractor should charge VAT and can make use of fiscal entrepreneur facilities.

Below you will find an overview with examples of laws and regulations which are applicable to an employee and/or contractor:

Laws and regulations	Employee	Contractor
1. Employment law	Rules/regulations with respect to the employment agreement as provided for in the Dutch Civil Code (a.o. vacation/leave, continued payment of wages during 104 weeks, re-integration, equal treatment and notice period)	Not applicable
	Work and Security Act (a.o. the new provisions on succession of fixed-term employment contracts, mandatory termination routes and transitional compensation)	Not applicable
	Act on Flexible Work (a.o. adjustment of working time)	Not applicable
	Work and Care Act (a.o. leave)	Not applicable
	Works Council Act	Not applicable
	Pension law	Not applicable, unless the person falls within the definition of "employee" for the purposes

		of participation in a sectoral pension fund
2. Social security law	Social premiums employee insurance schemes (Unemployment benefits, Sickness benefits and disability benefits), national insurance schemes and sickness benefits	Not applicable
3. Tax law	Wage tax	Not applicable
	Not applicable	VAT and fiscal entrepreneur facilities

2. What is the difference between an employment agreement and an agreement for the provision of services?

The main differences between an employment agreement and an agreement for the provision of services are:

Elements	Employment agreement	Agreement for the provision of services
1. Activities	Employee should personally perform activities and substitution is only possible with the permission of the employer.	Contractor does not have to personally perform labour.
2. Wages	Employee receives wages for the activities performed.	Contractor receives a (management) fee.
3. End result	Not applicable (note: the employer, and not the employee, is responsible for the end result).	The assignment is <i>aimed</i> at bringing about a result and the contractor bears the responsibility in this respect (nonetheless it is not necessary that the contractor is obliged to <i>obtain</i> the result).
4. Relationship of authority	A relationship of authority exists between the employee and employer.	The contractor has a limited right to give instructions, only to the extent it regards the execution of the assignment.

3. What is the difference between the VAR and the Assessment of Employment Relationships (Deregulation) Act?

the Assessment of Employment Relationships (Deregulation) Act (in Dutch: “Wet beoordeling deregulerende arbeidsrelaties, **WDBA**”) will enter into force as of 1 May 2016. The WDBA will abolish the VAR. Instead, the parties can voluntarily choose to use template - and pre-approved - agreements which are available on the Tax Authorities’ website and have been submitted by (branch) representatives as well as individual parties. There is no obligation to use these template agreements. If you change the template agreement or use your own tailor made agreement, you can request a ruling from the Tax Authorities with respect to the obligation to withhold and pay wage tax and social security contributions. In the event that the parties use an approved agreement, whether this is a revised template or their own agreement, you will have certainty about the status of the agreement and obligations of the parties, subject to the condition that the factual execution is in line with the contractual arrangements. Below you will find the differences between the VAR and the WDBA:

Subject	VAR	WDBA
1. Methodology	<u>Contractor</u> can request 4 types of VAR (a declaration of income status) with respect to: 1. income from employment (in Dutch: “ VAR-loon ”) 2. results from other activities (in Dutch: “VAR resultaat uit overige werkzaamheden”, VAR-row) 3. profits from business activities (in Dutch: “VAR winst uit onderneming”, VAR-wuo) 4. income from activities at the company’s risk and expense (in	<u>Contractor and client</u> can <u>choose</u> : 1. tailor made agreement 2. template agreement of individual parties or (branch) representatives, available (solely in Dutch) on the website of the Tax Authorities (http://www.belastingdienst.nl/ozo) 3. “ruling” of the Dutch tax authorities (requesting approval <u>upfront</u> of the tailor made agreement or a revised template agreement).

	Dutch: “VAR directeur-groootaandeelhouder”, VAR-dga).	
2. (Period) indemnification	In principle indemnification of wage taxes and social premiums for the duration of <u>1 year</u> if the factual execution of the contractual arrangements is in accordance with a <u>VAR-wuo or VAR-dga</u> .	In principle indemnification of wage taxes and social premiums for the duration of <u>5 years</u> if the factual execution of the contractual arrangements is in accordance with the <u>template agreement or the approved tailor made agreement</u> .
3. Enforcement Tax Authorities	In retrospect.	<u>Upfront</u> (in case of requesting approval of a revised template agreement or a tailor made agreement) <u>and in retrospect</u> .
4. Liability	<u>Contractor</u> is liable for wage taxes and social security premiums if the factual execution of the contractual arrangements is not in accordance with a <u>VAR-wuo or VAR-dga</u> .	<u>Client</u> is liable for wage taxes and social security premiums if the factual execution of the contractual arrangements is not in accordance with the <u>agreement for the provision of services</u> . The client can however recover the wage taxes and social premiums to some extent from the <u>contractor</u> .
5. Policy rules Tax Authorities	Not applicable, or not made public.	Assessment criteria are made public: Guide assessment employment relationships (“ DBA Guide ”).
6. Court qualification of agreement	A <u>VAR-wuo or VAR-dga</u> is just one of the factors that are taken into account by a court when examining the agreement. The judge will look at the factual situation and focus on a.o.: <ul style="list-style-type: none"> - if there are other clients; - the intention of parties; - registration of the business at the Dutch Chamber of Commerce; - content of the agreement and factual execution (perform work in person); - the existence of a relationship of authority; - entrepreneurial risk - obligation to personally perform labour or via a management company; - manner of payment (invoices with VAT afterwards); and - payment during vacation, illness, or other absence. 	The availability of an <u>agreement for the provision of services</u> is one of the factors that are taken into account when examining the factual situation. There is no change with respect to the other assessment criteria.

4. What will happen with the current VAR?

A transitional arrangement applies to the current VAR, which will remain valid until 1 May 2016. The Tax Authorities have indicated that they will apply an implementation term until 1 May 2017 in order to provide the contractors and clients with sufficient time to adjust their working method. Until 1 May 2017, the Tax Authorities will, except for clear cases of fraud, not impose any penalties. There is however an obligation to make an effort, this means that the contractor and client should actively try to factually shape their employment relationship, and if necessary amend their contract, in order to prevent that there is an employment agreement.

Subject	Explanation	
Transitional arrangement until 1 May 2016	VAR for 2014 and 2015	VAR will remain valid until 1 May 2016 if the contractor performs the

		same work under the same circumstances.
	VAR for 2016?	Contractor can request a new VAR which will remain valid until 1 May 2016.
	Effect VAR between 1 May 2016 and 1 May 2017	No new VAR will be issued and an existing VAR will not provide any indemnification.

5. What should parties do in the future?

Practically speaking, the most relevant question for the moment is: what should parties do as of 1 May 2016 to make their current agreement for the provision of services WDBA-proof? In fact we will return to the pre-VAR period in which there is no certainty upfront, but only afterwards. As from 1 May 2016, parties can choose from the (currently limited) offer of template agreements from the Tax Authorities. In practice, parties will usually require tailor made and extensive clauses. The WDBA-assessment of a tailor made agreement by the Tax Authorities will take place on the basis of its policy rules in the DBA Guide, which essentially refer back to the already existing case law. This assessment by the Tax Authorities will likely not differ from the current (court) assessment, which takes into account all circumstances of the concrete matter. If parties choose to maintain their current (more extensive) tailor made agreement and choose to not request approval from the Tax Authorities, it will become essential for them to prove that their intentions on paper actually reflect the reality and this is possible by: 1) a possible further specification of their arrangements, 2) good file management and 3) in-between monitoring of the factual execution. The parties can voluntarily submit their agreement to the Tax Authorities for a ruling, but it is important to note that this does not mean that you will (always) receive a clear ruling.

Use of:	Advantages and disadvantages	Explanation/remarks
1. Template agreement of the Tax Authorities	<p><u>Advantage:</u> It provides certainty upfront, subject to the condition that the factual execution is in accordance with the arrangements in the template agreement.</p> <p><u>Disadvantage:</u> At the moment the offer of approved versions is limited and usually the content will not cover the concrete assignment.</p>	<p>If you amend the template agreement, you do not have any certainty, unless you choose to request approval from the Tax Authorities upfront. However, it is not certain that you will actually receive a clear ruling.</p>
2. Tailor made agreement	<p><u>Advantage:</u> It will only provide certainty upfront of the contractor status if you request prior approval from the Tax Authorities and subject to the condition that the factual execution is in accordance with the arrangements in the tailor made agreement.</p> <p><u>Disadvantage:</u> If you do not request prior approval, you will only have certainty afterwards in the event of an assessment by the Tax Authorities in case of enforcement or in the event of a court assessment if parties eventually have different opinions with respect to the nature of the agreement.</p>	<p>The DBA Guide shows that the Tax Authorities will mainly focus on the availability of:</p> <ol style="list-style-type: none"> 1. a relationship of authority: this has to be specified as much as possible (for example by (partial) exclusion or limitation of the right to issue instructions); and 2. the personal obligation to perform work: the arrangements should essentially allow (random) substitution (for example, by including objective and limitative criteria for substitution). <p>In addition, the court assessment will remain the same after 1 May 2016, whether the parties use a template agreement or a tailor made agreement. The qualification of the contract is not decisive, but the factual execution and the circumstances of the matter will be taken into account. The court will focus on a.o.:</p>

		<ul style="list-style-type: none"> - the agreement for the provision of services; - if there are other clients; - the intention of parties; - registration of the business at the Dutch Chamber of Commerce; - content of the agreement and factual execution (perform work in person); - the existence of a relationship of authority; - entrepreneurial risk - obligation to personally perform work or via a management company; - manner of payment (invoices with VAT afterwards); and - payment during vacation, illness, or other absence.
<p>3. An alternative</p>	<p>The alternative constructions each have their own advantages and disadvantages, which we will not discuss in this newsletter. Naturally, we will gladly provide you with further advice in this regard.</p>	<p>Parties can choose for another form of cooperation, such as:</p> <ul style="list-style-type: none"> - an employment agreement (on an on-call basis) for a limited period or project; - working through a temporary employment or payroll agency, or outsourcing.

If you wish to examine whether your current agreement for the provision of services is WDBA-proof, you can contact Martine Hoogendoorn (m.hoogendoorn@denklaw.nl) and Chris van Wijngaarden (chris.vanwijngaarden@taxand.nl).

