

EMPLOYMENT MATTERS

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EMPLOYEE VS INDEPENDENT CONTRACTOR (DOES IT REALLY MATTER?)

What is the issue?

Organizations and individuals often perceive advantages to casting their relationship as a “fee for service” arrangement instead of an “employer-employee” arrangement. Cast in that manner, the independent contractor claims tax deductions not available to employees and the company avoids paying taxes, CPP, EI and the dreaded notice period. These perceived benefits are often illusory. More often than not, independent contractors are legally determined to be employees, either by the courts or by the tribunals that administer various legislative schemes.

What is the test?

Courts and tribunals apply a number of different tests to determine whether an individual is an employee or an independent contractor. The common thread in those tests is the element of control. The following factors form part of the analysis:

1. The degree of control exercised by the individual over the timing and manner of performance of the work;
2. Whether the individual owns the tools, supplies or equipment required to perform the work;
3. Whether the individual has a chance of profit; and
4. Whether the individual has a risk of loss.

Does the distinction really matter?

Absolutely. From a practical day-to-day perspective, the distinction may not appear to be important. However, the legal consequences of mischaracterizing the relationship can be very significant for the organization. For example, if your independent contractor is found to be an employee:

1. The *Income Tax Act* will apply, which means the organization has (and had) an obligation to withhold income tax from the individual’s salary. The organization can be liable to pay the taxes it ought to have paid in addition to paying penalties, fines and interest.
2. The *Employment Insurance Act* and *Canada Pension Plan Act* will apply in which case the organization can be liable to pay unpaid contributions, penalties and fines.
3. The *Employment Standards Act* will apply with a number of possible ramifications (e.g., unpaid vacation pay, overtime wages, leave benefits).
4. In the absence of a contract, the common law will apply to the termination of employment, which can amount to a significant notice period.
5. There may WSIB ramifications, depending on the industry.

How can you protect yourself?

Before engaging an independent contractor, consult with an employment lawyer who will be in a position to characterize the true nature of the relationship and advise you about the risks of engaging an “independent contractor”.



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