

The Risks and Rewards of Engaging Independent Contractors

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Why Important?

- **Our Courts and Legislation Provide Protection for “Employees”**
- **Taxing Legislation Requires Remittances by “Employers”**

Results?

- **Independent contractor status is subject to close scrutiny**
 - **courts**
 - **M.O.L.**
 - **Federal Gov’t.**

Why Important Now?

- Increased foreign Competition has resulted in pressure to save staff costs
- One result is moving staff off-shore
- Another is designating “employees” as independent contractors

Example #1

- **Home care worker hired for specific purpose of caring for ailing spouse. Agrees to hourly rate, specific and limited hours/week, works for others including a nursing home. Files tax returns showing income as “self-employed”. 4 months after spouse died, home care worker commences action for pay in lieu of notice of termination, overtime pay, public holiday pay, vacation pay. In Court, she argues that status for tax purposes is different than that for common law and statutory rights as an employee. How could this have been avoided?**

Advantages of Independent Contractor Status

- **Advantages for Employers**
 - Save Administrative Costs
 - No obligation to deduct and remit (EI, CPP, IT)
 - No personnel records
 - No contributions to
 - CPP, EI, Health tax
 - No need to include on payroll for WSIB

- **Avoid Employment Standards Obligations**

4% Vacation Pay

No Statutory holidays or holiday pay (presently 9 days in Ontario)

Minimum Wage (presently \$10.25 per hour)

No requirement to pay overtime after 44 hours/week

No requirement to provide notice of termination

No requirement to provide statutory severance pay

No requirement to comply with leave provisions (pregnancy, parental, emergency etc.)

Advantage for Employees

Cash Flow

- No statutory withholdings (EI, CPP, IT)

Greater Net Income

- Deductions for travel, entertainment
- Deductions for cost of home office

Greater Freedom

- Ability to work for more than one “employer”
- More difficult for employer to enforce restrictive covenants

Risks of Independent Contractor Status

- **Risks for Employers**
 - **Statutory Withholdings**
 - **Employment “Rights”**

The fact that the individual has agreed to be paid and treated as an independent contractor does not necessarily prevent a wrongful dismissal or a related claim. Nor does it prevent an assessment by Canada Revenue Agency.

Can the Employer Reduce the Risk?

The risks resulting from the non-withholding of statutory deductions can be effectively eliminated by requiring the individual to incorporate and paying the Corporation. Furthermore, the employee must submit invoices and charge HST. This would not, however, eliminate the risk of the individual seeking common law or statutory employment rights.

Risks for Employees

Gives up Protection

As a Contractor, he gives up the “safety net” provided by statute. Notice provisions, vacation pay, public holiday pay, minimum wage, benefits etc.

Has to Run it Like a Business

Keep records, Remember to make quarterly installments and keep money aside to do so

Tax Exposure

If Corporation is designated a “personal service corporation”, the only allowed deduction is the salary paid to the individual and the corporation is taxed and the highest rate.

If it Looks Like a Duck... What is the Test? Examples of the Test being Applied

Intention of the Parties

While the intention of the parties is important, it is not determinative.

Four-fold Test

Control, ownership of tools, chance of profit, risk of loss

Boiling it Down and Making it Simple(?)

**The essential question is “whose business is it?
Who decides what to be done, the way it is to be done, the means employed in doing it, the time and place where it shall be done.**

Factors Considered by CRA

Does worker require consent to work for others

Does the employer have priority on the worker's time?

Does the employer provide training?

Who has final word about how work is to be done?

Does worker get benefits?

Ownership of Tools - note, however, hand tools for carpenters and mechanics, namely, what is the significance of the investment in the tools

Can the worker use assistants?

Does worker have fixed monthly costs regardless of amount of work?

Is the worker financially responsible if the job is not done properly?

Jaremko v A E Lepage

Salesman set his own working hours

Paid commissions only

Declared himself self-employed on tax returns

Held to be employee because he was bound by policy regarding dismissal and discipline, used employer office and secretarial services, covered by fringe benefits, was eligible for promotion

Hogan v Drover

Financial Security Advisor with insurance company was an independent contractor

Belton v Liberty Insurance

Fact that written agreement stated it did not create an employer-employee relationship was not determinative.

Agents were restricted to sale of Liberty product, Liberty purported to own the book of business

Liberty assumed responsibility for policy changes

Powertrend Electric v MNR

**Worker hired as repair man, On call every day of year
to complete calls within certain timeframes
not required to report results of calls**

**Worker supplied hand tools and employer specialized tools to service lottery
terminals, Worker used his own car, received fixed monthly fee
he invoiced bi-monthly for his services**

**held to be an employee because of control over on call and complete calls within
specified time, While he was permitted to work elsewhere, he had to work around
employer's needs.**

Parron v MNR

**Hairdresser has agreement to use a workstation at hair salon
Paid weekly rent to salon, Supplied her own blow dryer, curling iron, scissors, clippers, combs, hair spray and other hair products
Only one telephone line for appointments shared
had right to charge what she wanted
Cash is taken by worker**

**Worker decides when to work and when to take vacation
Worker held to be employee for purpose of Employment Insurance Act because they were exposed to risk of being deprived of work. Question left open as to whether she was an employee for IT purposes.**

Canada Financial v MNR

Beauty salon worker held to be employee where salon provided most of the tools and work activities and hours of work were controlled by salon

Steiner v MNR

Worker was pizza delivery man

Signed agreement designating she was independent contractor

Worker had to use own vehicle and pay all related expenses

Pizza store exercised control over hours of work and dictated delivery rates as well as dress code and how to interact with clients.

Worker was employee

Therrien v True North Properties

CA sold his practice and started to work exclusively for one client
He billed the client for his services through his professional corporation in order to minimize his taxes and because he didn't need benefits
Therrien considered the client his "boss" and would do nothing without the client's express authority.

Therrien hired one staff member but otherwise had no hiring or firing power.

Therrien only did small amount of work outside of client
Notwithstanding designation and method of payment, Therrien was held to be an employee and entitled to damages for constructive dismissal when his wages were unilaterally cut.

Conclusions

- “Employer” can reduce risk by
 - Compelling individual to incorporate
 - Carefully drafted agreement emphasizing minimal control