

From Independent Contractor to Employee

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If your company uses the services of an independent contractor, at some point you should consider the following question: at what point does an independent contractor become an employee? A mischaracterization of the relationship can result in liability under numerous statutes. In order to ensure that the relationship is correctly classified, there are a number of characteristics that differentiate between an independent contractor compared to that of an employee.

Implications under Statutes

What are the implications of mischaracterizing an employee as an independent contractor? For tax purposes and in the context of employment law, it is important to accurately characterize the relationship. The Canada Revenue Agency may disagree with characterization and conduct an assessment of the relationship. This can create problems for both a company and also for the independent contractor. A company should be remitting taxes on behalf of an employee and the remittance would not occur if the company incorrectly thinks that a person is an independent contractor. In addition, a person who believes they are an independent contractor may be in for a surprise when they have been deducting business expenses and then find out that the Canada Revenue Agency considers them to be an employee.

For employment law, an employee is covered under various types of legislation including the *Employment Standards Act*, S.O 2000, chapter 41 (the “ESA”), the *Employment Insurance Act*, S.C. 1996, c. 23, the *Canada Pension Plan*, R.S.C. 1985, c. C-8, and the *Canada Labour Code*, R.S.C. 1985, c. L-2, to name a few. Each of these statutes have their own definitions of an employee, so even through a person is an employee under one statute, they may be considered as an independent contractor under another.

Companies will have obligations under some or all of these statutes for an employee. A company may be liable after the fact where an employee was incorrectly classified as an independent contractor. Under the *Workplace Safety and Insurance Act*, S.O. 1997, chapter 16, if an person is injured and it is determined that they are in fact a worker and not an independent contractor, then the company has an obligation to pay contributions. In the event the employer wants to end the relationship with a person, the classification is important since as an employee the person may be entitled to remedies under the ESA and the common law for wrongful dismissal, which would not be available to an independent contractor.

Characterization of the Relationship

When using the services of an independent contractor, you should be looking for someone who operates their own business and will be providing services to a number of

different companies. The contractor can even provide services to businesses in competition with you. The business operated by the contractor should have its own GST registration number and the business should submit invoices for the services rendered. The independent contractor should sign a contract clarifying these terms and confirming the status of the relationship.

However, classifying a relationship as that of an independent contractor is not enough. The entire relationship between the parties must be examined. The line between independent contractor and employee may begin to blur when the answer is “yes” to some or all of the following questions:

1. Does the company control the contractor’s activities?
2. Does the company provide equipment to the contractor?
3. Does the company assume all the risk in the projects with the contractor?
4. Does the contractor maintain an office at the company and only works out of such office?
5. Does the contractor participate in the company benefit plans?
6. Does the company reimburse the contractor for expenses?
7. Does the contractor work during hours specified by the company?

These questions do not represent an exhaustive list, since each individual relationship must be analyzed in its totality. However, it does provide an indication of whether the relationship is no longer as the parties have classified it.

It is also important to examine the duration or permanency of the relationship. If the independent contractor has been providing services for the company for years, has become dependent on the company for income, and is performing little or no services for other companies, that is an indication that the relationship is becoming that of an employer / employee.

Conclusion

In order to ascertain where the relationship falls, the company should begin by analyzing all relationships with independent contractors. Each relationship should be assessed individually. This is a good exercise for the company to engage in to establish where their obligations fall with respect to these workers and to determine the steps company can take now to ensure that the relationship does not stray any further.

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