

Employee or Independent Contractor

Section 1 of the *Employment Standards Act* (the Act) defines an employee very broadly as follows:

Employee includes:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall.

The Act applies to those persons who are employees, but not to those who are independent contractors. A person who is an independent contractor is considered to be self-employed.

Persons working in an employment relationship are employees for the purposes of the Act, regardless of whether they are employed on a part-time, full-time, temporary or permanent basis.

In order to be an independent contractor, a person performing services has to be in business for himself. Designating a person as an independent contractor does not decide the issue.

To help decide, various tests have been developed by the courts and applied by the Employment Standards Branch and the Employment Standards Tribunal. Not all elements of the tests apply in all situations.

Control – Is the person under the direction and control of another regarding the time, place, and way in which the work is done? Is the person hired, given instruction, supervised, controlled or subject to discipline? Was the person told what to do, how to do it, and when to do it? Did the person have to do the work him or herself, or could that person give the work to someone else to do? Does the person perform work normally or previously performed by an employee?

The greater the degree of control, the greater the likelihood the person will be found to be an employee.

Ownership of tools – Does the person use tools, space, supplies and equipment owned by someone else? If so, this would indicate an employment relationship. However, it is recognized that some employers require employees to provide their own tools or vehicles.

Chance of profit – Does the person have a chance of profit? If their income is always the difference between the cost of providing the service and the price charged for the service, the worker may be someone other than an employee.

Risk of loss – Is the person at risk of losing money if the cost of doing a job is more than the price charged for it? This may indicate a non-employment relationship.

Payment – Is the person paid regular amounts at set

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intervals? Does the person get paid regardless of customer satisfaction or customer payment? These factors indicate an employment relationship.

In general, the more the party who pays for the service provided controls the supply of material and tools and retains direction and control of the activities, the more likely it is that the Director will find the relationship to be one of the employer/employee.

Common misunderstandings

One or more of the following factors is often wrongly believed to establish an independent contractor relationship:

Agreement: The act of signing an independent contractor agreement does not necessarily create an independent contractor relationship. The actual work relationship determines if a person is an employee or independent contractor. Any agreement to waive employment standards entitlements is prohibited by the Act.

Charges GST: GST filing numbers are provided upon request, and the requester may or may not be in a lawful position to charge GST.

No Deduction for Income Tax, EI or CPP: May indicate contraventions of the *Income Tax Act* and *Employment Insurance Act*. Or, if the employer received a ruling from Canada Revenue Agency (CRA) or Human Resource and Social Development Canada (HRSDC) that the employee is a contractor, it does not decide the Employment Standards issue. It may merely reflect the different purposes of those Acts.

Person sets own hours and is not actively supervised: The business may provide significant levels of flexibility to its employees.

Works for several businesses: Many people work at more than one job.

Submits a bill for labour provided: It may be nothing more than a record of hours worked; in effect, a time card.

Drives his or her own vehicle/provides own tools: It may be a condition of employment that a person provides a vehicle so as to perform the work. In some sectors employees are expected to provide their own tools.

Payment by commission or other forms of incentive pay do not necessarily indicate a chance of profit or risk of loss; these are simply ways of linking pay to productivity.

Example

A drywall business hires a painter. The company has the worker sign a written agreement in which the worker declares himself to be an independent contractor. The company buys the paint and supplies the brushes, the ladders and other equipment. The company pays the worker an hourly rate. The company tells the worker what to do and when to do it, and decides if it was done satisfactorily. The worker does not have a business licence.

The worker is an employee because:

- He performs work normally done by an employee;
- The work is integrated into the company's business; and
- The company has direction and control over the worker.

The written agreement, being an attempt to waive the requirements of the Act, is not valid and does not change the relationship as determined by these factors.

