

There is no universal test to determine whether a person is performing services as an employee or an independent contractor.

All relationships in the workplace exist on a spectrum; on the one end, there are employment relationships and on the other, are relationships of independent contracting. It can be difficult to determine where on this spectrum the relationship is located, and the consequences of error can be significant.

If an individual is performing services as an independent contractor and is later deemed to be an employee, the newly deemed “employer” will be responsible for unpaid wages, payroll deductions, remittances, penalties, fees and interest. Consider the following situations:

- An independent contractor applies for employment insurance benefits. Employers are legally obligated to remit payroll deductions for income taxes, pension contributions and employment insurance premiums. If Service Canada deems the independent contractor to be an employee, the employer would be liable to pay the outstanding employment insurance premiums, pension contributions, penalties and interest.
- The independent contractor may be audited when filing income taxes. If the Canada Revenue Agency determines the independent contractor was providing services as an employee, the employer would be liable to pay outstanding payroll deductions, penalties and interest.
- The independent contractor is injured at the workplace and files a claim for workers compensation benefits. At that time, it would be up to the Compensation Board (i.e. WorkSafeBC in British Columbia) to determine if the person was providing services as an employee or independent contractor. If the relationship has been misclassified, the employer would be responsible for, at a minimum, the retroactive payment of unpaid premiums, penalties and interest.
- The independent contractor files a claim with Employment Standards for entitlements to unpaid wages such as termination pay, minimum wage, overtime pay, statutory holiday pay, and vacation pay. If Employment Standards determines the contractor was providing services as an employee, the employer will be obligated to pay all unpaid wages in addition to administrative penalties, plus interest. Once a complaint has been initiated, Employment Standards has the discretion to audit the employer for further contraventions which may include deeming other contractors to be employees, and attracting further unpaid wages, penalties and interest.
- The independent contractor is informed that his/her services are no longer required and commences a legal action in Court for wrongful dismissal damages.

To avoid these types of situations (or have a defensible argument in place in the event claims/complaints arise), it is important to consider the actual working relationship between the parties and whether it is an employment relationship or one of independent contracting.

If you assess that the working relationship falls somewhere in the middle of the spectrum (after completing the attached checklist), it would be prudent to classify these individuals as “employees” or be mindful that the organization runs the risk of these individuals being deemed employees, as set out above.

Employee or Independent Contractor:

Independent contractors are self-employed workers and are responsible for setting their own workplace standards. They are excluded from the *Employment Standards Act*, and are not entitled to reasonable notice of dismissal.

It is a common misconception that the parties’ mutual understanding is the main factor in deciding whether a person is providing services as an employee or independent contractor. The intent of the parties is actually one of many factors which need to be considered in making this assessment. The key question that needs to be answered is: “whose business is it”.

In considering whether an individual is performing services as an independent contractor and operating as a business, Courts and Administrative Boards will consider several factors:

1. Level of control over the worker's activities;
2. Whether the worker provides his or her own equipment;
3. Whether the worker hires his or her own helpers;
4. Degree of financial risk taken by the worker;
5. Degree of responsibility for investment and management held by the worker; and,
6. Opportunity for profit for the worker in the performance of his or her tasks.

No one factor is determinative of the relationship between the parties, and all six factors must be considered together in their entirety and taken together as a whole.

If an individual is incorporated and providing services through this corporation, this is only one factor to be considered (under factor 1 – level of control over the worker’s activities). The individual may decide for tax or other reasons to provide services through a corporation and the fact that an individual is paid through a corporation is not determinative of whether an employment relationship exists.

Disclaimer: This fact sheet is for general information purposes only. It is not intended to provide legal advice or opinions of any kind. If you have questions about your particular situation, we encourage you to seek legal, financial and other professional advice.