

Contractor or Employee? Guidelines for British Columbia

DIN0188-1011

Among the many changes arising from a rapidly evolving economy has been the expanded nature of services provided by independent contractors. Whether home based, or more traditional in structure, it is important to recognize that the business relationship between your company and the independent contractor is different in the eyes of various government agencies. Failure to understand these government rulings on independent contractors can, in some instances, result in cost increases and penalties that may be greater than the cost of hiring the contract labour in the first place.

The following information, developed from Canada Revenue Agency (CRA) and Workers' Compensation Board (WCB) sources, is provided as a guide only. The regulations affecting independent contractors are constantly being rewritten and are affected by decisions arising out of the courts. The intent of this information sheet is to make members aware of the issues surrounding such contract business relationships. **If there is any doubt as to what your obligations or responsibilities are, or with some aspect of an independent contractor's status, please call the CRA or the WCB numbers provided at the end of this information bulletin.**

Canada Revenue Agency

Basically, two types of employment contracts are considered:

1. Contract **of** service (insurable employment income—employer must deduct EI, CPP)
2. Contract **for** service (non-insurable contract work)

There is a four-fold test that the CRA uses to help determine whether or not someone is an independent contractor or an employee. **By merely saying that one party is an independent contractor, or having a lawyer draft an agreement does not legally or conclusively ensure that the party is an independent contractor.** The legislation is specific, but due to the many forms of contract work the rulings often fall into very grey areas.

None of the following factors **on their own** are conclusive, but all contribute to the decision on whether a worker is an employee or an independent contractor.

Four Fold Test

1. Control

Authority to exercise control over what will be done and the manner of doing it is one of the most important criteria. It does not matter if the control is actually exercised. A *master/servant* relationship exists if the right to control exists.

- **Method of Pay.** Payment for work by the hour, week, or month as opposed to a lump sum may be considered strong evidence of a *master/servant* relationship.
- **Hours of Work.** Specified hours of work is a strong indication that the worker is an employee, and freedom to choose his/her own time of work is an indication that the worker is a contractor.
- **Travelling Expenses.** Payment by the payer of the worker's travelling expenses and other expenses incidental to the payer's business can indicate control over the worker.

- **Employee Benefit Plans.** Does the payer contribute on behalf of the worker? Are the plans for the specific benefit of employees? If so, this tends to indicate an employee relationship.
- **Training.** Training of a person by an experienced employee, by correspondence, by required attendance at meetings, or other methods is a factor of control because it indicates the payer wants work performed in a particular manner. An independent contractor generally uses his/her own methods and comes with his/her own expertise. Therefore, the independent contractor should receive no training from the payer.
- **Full-time Service to the Payer.** If a worker must devote full time to the business of the payer, the payer then has control over the amount of time the worker spends working and therefore restricts him/her from other gainful work. If a person provides services or represents a number of firms at the same time, it usually indicates an independent status.
- **Facilities Provided by the Payer.** Providing the workspace, equipment, and furnishings necessary to the work tends to indicate control on the part of the payer. On the other hand, if the worker has a substantial independent investment (i.e. lease/rent/own) in the facilities used in performing services this tends to show an independent status.
- **Payer's Premises.** Work done on the payer's premise is not by itself an indication of control, but it does imply that the payer has control, especially where work can be done elsewhere. A person working in the payer's place of business is physically within the payer's direction and supervision. In addition, the use of desk space, telephones, etc., provided by the payer places the worker within the payer's direction unless the worker has the option to use the facilities.
- **Establishes Routines and Schedules.** If a person must perform work in the order or sequence set out by the payer, it shows the worker is not free to follow his/her own pattern of work, but must follow the established routine or schedule of the employer.
- **Compliance with Instructions.** A person required to comply with instructions about when, where and how (s)he is to work is ordinarily an employee.
- **Oral or Written Reports.** If regular reports must be submitted to the payer, it indicates control in that the worker is compelled to account for his/her actions.
- **Right to Discharge.** The right to discharge is an important factor for indicating control through the ever persistent threat of dismissal. An independent contractor normally cannot have his/her work terminated without liability as long as (s)he produces a result that measures up to the contract specification.
- **Specific Result.** Acknowledges that an independent contractor is usually hired to do a very specific job and, once completed, the business relationship is over. On the other hand, employees are available to the company for a variety of tasks in a continuing relationship.

2. Ownership of Tools & Equipment

Where the payer supplies tools, materials, etc., it is indicative of control over the worker. It also indicates a substantial investment in the business. This supports an employer/employee relationship. Alternatively, where the worker provides the tools, equipment, materials, etc., it indicates a lack of control by the payer. This also indicates (depending on the size of the investment) that the worker is in business as a self-employed contractor with an investment into his/her business. However, this does not necessarily apply to occupations where it is customary for employees to use their own hand tools, e.g. mechanics.

3. Risk of Profit/Chance of Loss

This indicates that a person is in business to make money and is at risk of losing money as opposed to earning a fixed wage/salary or ongoing commission.

4. Integration

The CRA is likely to consider someone an employee when the existence of a business operation depends upon the performance of the worker's service because that service is integral to the operation. If the worker is an independent contractor the work would be classified as necessary, but not integral. An example of this

would be a retail carpet store that also offers installation: installation is necessary, but not integral to the retail carpet business.

Professionals (i.e. Lawyers, Doctors, Accountants, Engineers, etc.)

The manner and degree to which a professional has become integrated into the payer's operation is a deciding factor. The following are some factors that can be used to establish integration:

- a) Is the professional restricted from hiring associate professionals or engaging substitutes if (s)he is absent from work?
- b) Is the professional permitted to engage in private practice where his/her services can be offered to the public? If so, is there a provision that (s)he may not assume outside duties to the detriment of his/her primary services to the payer?
- c) Does the professional have to follow a schedule of fixed hours of work that is to be followed without substantial deviation?
- d) Is the professional subject to the direction and control of the payer, or must (s)he comply with the payer's general policies?
- e) Is the professional accorded the rights and privileges that the payer has created or established for employees (i.e. benefit plans, vacation pay, etc.)?

Answering yes to most or all of these questions gives the CRA a strong indication of employee status rather than independent contractor status. Other considerations:

- f) How is the professional paid? (Salary, commission, percentage, etc.)
- g) Does the professional lease/rent office space or is (s)he provided the facilities by the payer?

Other Factors

- **Hiring Others.** Hiring one's own employees indicates that a person is an independent contractor, unless the supervising and payment of assistants is by the payer, which shows control over all workers on the job.
- **Status Under Other Legislation.** The fact that a worker may be covered under a Workers' Compensation Act **does not necessarily establish** that the worker is considered an employee for CRA purposes.

Penalties

If your company is audited and the CRA rules that your "contract workers" are actually employees each party will be responsible for the following:

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|-----------------|--|
| Payer | <ol style="list-style-type: none">1. CPP and EI employer and employee contributions for the current and previous year.2. 10% penalty on the total assessment and interest of approximately prime plus 1% from the date each of the contributions were due. |
| Employee | <ol style="list-style-type: none">1. Personal back-taxes, if unpaid. |

Workers' Compensation Board

Labour Contracts

For WorkSafeBC purposes, all persons under contract to a principal (known as "prime" by WorkSafeBC and is the owner of the project or the person or firm authorizing the contract) are either workers or independent businesses. To be eligible to register as an independent business in principal/subcontractor situations, you must be able to show that you have a business existence separate from the prime. Where that is not clear, you may register if you contract with multiple firms, supply materials or employ workers.

Where you do not have a business existence separate from the prime and do not meet the criteria to register as an employer or an independent firm, you will generally be found to be a worker of the prime contractor.

Employers Personal Coverage

Personal Optional Protection (POP) is optional workplace disability insurance for individuals who are not automatically covered under the Workers' Compensation Act. This would include people, who are self-employed, as well as partners and proprietors in a non-limited company. POP protects you against wage loss and may provide medical and rehabilitation services if you are injured while on the job or if you contract a disease as a result of your work. In order to determine if you are eligible please visit WorkSafeBC online or contact their local office.

Once coverage has been requested it will continue from year to year until changed or cancelled by yourself or WorkSafeBC. However, not having personal coverage does not exclude you, as a registered employer, from protection from lawsuits arising out of a work-related injury to your employee.

In a limited liability company, shareholders or officers working in the business are deemed workers with automatic coverage. Their earnings are subject to assessment and in the event no earnings are recorded, they are assessed on an evaluation of their earnings.

Operators of Hired or Rental Equipment

Operators of hired or rented equipment, including the owner-operators, are workers of the principal and their labour earnings must be reported to WorkSafeBC by the principal unless the owner of the equipment has established an account with WorkSafeBC.

Clearances

A clearance is a letter from WorkSafeBC stating that your contractor's account is in good standing with WorkSafeBC. Clearances are required primarily in principal/contractor relationships like those that occur in construction or renovation type projects. If full payment is made without obtaining a letter of clearance on that subcontractor, a principal could be held responsible for any outstanding assessment due on the labour portion of the contract. Obtaining a clearance releases the principal from this potential liability. A letter of clearance can be obtained either through your nearest WorkSafeBC office or online at: www.worksafebc.com

Still not sure? Need Further Advice?

If you have any questions as to the status of an independent contractor, you can contact the following offices for advice:

Canada Revenue Agency at **1 800 267-6999** for automated service or **1 800 959-5525** for business information.

Workers' Compensation Board in Vancouver at **604 244-6181** or toll-free at **1 888 922-2768**.

CFIB

1430-625 Howe Street, Vancouver, BC V6C 2T6

Phone: **604 684-5325** or **1 888 234-2232**

Fax: **604 684-0529**

E-mail: msbc@cfib.ca

www.cfib.ca

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