

Employee or Independent Contractor?

Richard Kirby

Think your current work force is made up of independent contractors and not employees? The *Employment Insurance Act* (EI Act) and the *Canada Pension Plan* (CPP) provides for some adverse consequences if you are wrong. By way of background, every worker engaged in "insurable" or "pensionable" employment, as defined, is liable to pay premiums or contributions based upon their insurable or pensionable earnings. Employers must deduct and withhold the employee portion of these premiums or contributions and remit payment, together with the employer's portion to the Receiver General.

If a payor incorrectly treats an employee as an independent contractor, the payor will be responsible for remitting both the employee **and** employer portions of these premiums and contributions. If a corporate employer is unable to do so, the directors of those corporations can be held liable for such remittances.

What constitutes an "employment relationship" leading to "insurable" or "pensionable" employment is not defined in either of the two statutes.

The "Four Part Test"

The courts have set out a "four part test" for determining whether a worker is an employee or an independent contractor. This test, which is discussed in more detail below, considers the following factors:

- The degree or absence of control exercised by the alleged employer;
- Ownership of tools;
- Chance of profit/risk of loss; and
- Integration

No one test is conclusive, and all are considered together.

Control

Did the payor factually control the worker or set the worker's hours? Who decided whether the workers could come and go at will (i.e., without the payor's permission), whether the workers had to perform services personally or whether they could hire others to complete the job if absent. Generally, the more control that the payor exercises over a particular worker, the more akin the relationship is to an employment relationship. The focus of the control is on "how" the job is done. For example, a plumber may be either an employee of a plumbing shop under control of the manager, or may be an independent contractor if hired to repair your kitchen sink.

Ownership of Tools

Who provided the tools used by the worker? If the payor provides all of the necessary tools, then this factor will lend itself towards employment; however, if the worker purchases and supplies all the tools, then this is one indication that the worker is in business for himself and is not an employee.

Risk of Profit/Chance of Loss

A worker receiving a set wage based upon piece-work or time spent, with no risk of loss, is likely an employee rather than operating a separate business. Workers who are able to increase their profits through, for example, working more efficiently, working more hours, acquiring new customers, reducing expenses, etc. may be operating a separate business. A worker bearing a risk of losing money, for example, by paying for significant expenses, not being able to work on a regular basis or being exposed to significant liability, more closely resembles an independent contractor.

Integration

The questions to be answered are from the perspective of the work. The courts will ask "whose business is it?" Is the worker "fundamental" to the payor's business or is the worker carrying on a business in his or her own right? Thus, if a worker is generally unable to carry on a particular business without the facilities or other business trappings offered by a payor, perhaps the worker is an employee. For example, a worker could not likely provide contracted services as a burger flipper ("Burger Flippers "R" Us?); rather that worker would likely be integrated into a restaurant to provide a service as an employee. A person who is called to fix the plumbing at the same restaurant, however, would generally be an independent contractor because that plumber would not be viewed as being as "integrated" into the restaurant's core business, which is selling fast food.

Practical Considerations

Workers sometimes wish to be treated as independent contractors because there are arguably more expense deductions available to independent contractors than employees (subject to the so called "personal services business" rules which will be discussed in a later article). Payors often want to hire independent contractors to save the cost of EI and CPP. Unfortunately, court decisions and the Canada Revenue Agency (CRA) audit practices are very inconsistent in this area and there is no sure-fire way for an "individual" to escape challenge by the CRA. Corporations, on the other hand, cannot be employees. Therefore, if an individual wants to avoid EI or CPP, the payor could hire the worker's corporation to do the job. CPP will then be the responsibility of the worker's corporation on the "salary" received from that corporation.

As independent contractors, individuals should be free to come and go as they please, to hire other people to carry out their duties, and to work for more than one payor. If possible, workers should not be subject to a schedule or controlled in the manner of their work. Workers should also pay for the majority of their costs, including tools, insurance, licencing fees and any other work related expenses. Workers should be also registered for, and charge Goods and Services Tax on all services.

Finally, there is a line of cases which supports the notion that if a payor and a worker agree and intend to create an independent contractor relationship, then this relationship should be

respected by the courts. A written agreement stating this intention will provide evidence that the parties did not wish to create an employment relationship. The foregoing circumstances may not be practical from a commercial standpoint and payors should not be surprised if the CRA challenges an alleged "independent contractor" relationship in any event.

For more information regarding how the CRA determines the appropriate employment status see: www.cra-arc.gc.ca/E/pub/tg/rc4110/

Richard Kirby is a lawyer with the firm of Felesky Flynn LLP, in Edmonton, Alberta.

This article was originally published in the June/July 2004 issue of LawNow magazine (www.lawnow.org).

Revised November 2010.