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Independent Contractor or Employee?

Our business clients frequently ask us about hiring “independent contractors” instead of employees. The attraction is obvious:

- (a) independent contractors can save a business owner from having to pay CPP and Employment Insurance which would otherwise increase the amount a business would need to pay in total compensation;
- (b) hiring independent contractors saves business owners the administrative task of making monthly payroll remittances, and preparing T4 slips annually;
- (c) if business should slow down a business owner does not have to maintain expensive overhead for under-performing employees.

So, I am frequently asked to draft independent contractor agreements. However, calling someone an independent contractor does not make him or her so.

The question of whether a person is an independent contractor or an employee is a question of law and is based on a number of different factors, not all of which will apply in every situation. The primary factors are:

- (a) Control. The greater the degree of control the hirer has over the hiree, the more likely it will be found to be an employment relationship. If the business owner asks the hiree to provide a specific deliverable by a specific date, that would appear to be an independent contractor relationship. But if the hirer tells the hiree when to work, how to work, and then supervises the work and/or can discipline the hiree for failing to do the work correctly, all of those are factors of control which would make the situation appear to be an employment relationship.
- (b) Chance of Profit and Risk of Loss. If the hiree can make the same amount of money regardless of whether it takes the hiree five minutes or five hours to deliver, this may indicate that the hiree has the risk of profit and loss (i.e., if they if perform their work quickly they are making a profit on their time, if they perform their work slowly they are working at a loss as they are not making as much per hour). If the hiree has the ability to outsource the work to someone else that can do it at a cheaper rate and the hiree can profit from the difference, this would also appear to be an independent contract arrangement.

- (c) Ownership of Tools. If the hiree provides all of their own tools for the provision of the services and bears their own overhead expenses (i.e., office space, printing costs, cell phone and long distance costs, etc.) this would appear to be an independent contractor relationship. If the hirer is providing the tools necessary in order to complete a service that would appear to be an employment relationship.

There are some common myths business owners may rely on in attempting to establish an independent contractor relationship that is actually an employment relationship:

1. Signing an independent contract agreement. It is not possible to contract out of the *Employment Standards Act* of British Columbia.
2. Having the hiree charge HST. Just because a person charges HST does not mean that they are supposed to or even lawfully permitted.
3. The hirer does not deduct for income tax, EI, or CPP. This may simply mean that the hirer is in contravention of the *Income Tax Act* and the *Employment Insurance Act*.
4. The hiree gets to set his or her own hours. Some businesses simply permit employees to have greater levels of flexibility. If an employee sets their own hours but is required to make himself or herself available to the hirer on demand, that could indicate an employment relationship.
5. The hirer works on several “contracts”. Lots of people work at more than one job and are still employees.
6. Having the hiree submit an invoice for services, which simply lists their hours worked. Some employees are required to submit timecards in the course of their employment.
7. The hiree is paid according to productivity (commission). The Employment Standards Act covers commission employment and receipt of commission does not necessarily indicate a chance of profit or a risk of loss.

The risk of incorrectly categorizing an employee as an independent contractor can be significant for a business. As a business owner you may be responsible for remitting unpaid many year’s worth of payroll taxes, EI, and CPP, even if it is your belief that such amounts were the responsibility of the employee. In addition, every separate violation of the *Employment Standards Act* (such as failure to pay minimum wage or failure to provide a statement of earnings) could result in individual penalties made against a small business owner by the Employment Standards Branch.

In view of the risks (and expenses) associated with incorrectly identifying an employee as an independent contractor we recommend that your independent contractor agreements be reviewed by legal counsel before they are entered into.

If you have any questions about hiring employees or independent contractors, please contact Jacqueline Flett at jacqueline@flettlaw.com.