

Employees and independent contractors: Creating the right relationship



Automotive retail is one of those businesses where it's common for owners to try to create independent contractor relationships rather than employer-employee relationships with individuals such as sales representatives supplying services.

The distinction between these two categories creates significant consequences for both sides in a number of areas, including employment legislation, wrongful dismissal actions, priorities in insolvency actions, contractual rights and, above all, EI, CPP, and income tax.

In many cases, both company and service provider find it advantageous to categorize their relationship as that of independent contractor.

However, because of the tax consequences, the Canada Revenue Agency will rigorously examine such relationships to be certain they involve genuine independent contracts.

The CRA takes a dim view of attempts to pass off an independent contract relationship when it's obviously that of employer-employee.

Dealers can appeal a CRA decision to the Tax Court of Canada. But the best course of action would be to avoid the problem by putting into place as many features of an independent contractor relationship as possible. Doing so requires an understanding of the general principles that a court would apply in deciding the point.

There is no one factor that will define the relationship. The court will assess the relationship and consider a wide variety of relevant factors.

The original criterion used by the court simply involved the question of control. If the business owner had the right to direct what the worker had to do, including the right to say how the task had to be done, that was enough for the court to say the relationship was that of employer-employee.

Over time, the court has added other tests. But today, the court recognizes it's impossible to make a reasoned decision based on specific tests.

The court will look at the total relationship and ask whether or not the worker is performing the required tasks as a person in business on his own account. In doing so, the traditional tests will be reviewed.

The court will look at the level of control the business

owner has over the worker's activities, whether the worker supplies their own equipment, whether the worker hires their own helpers, the degree of financial risk taken by the worker, the extent the worker manages independently, the amount of money the worker invests in the work, and the worker's opportunity for profit.

Not only are these rules not exhaustive, they are open to a great deal of interpretation. In one case, for example, the CRA took the position that the owner's ability to fix remuneration constituted control for the purpose of assessing whether the worker was an employee or an independent contractor.

While this view was upheld at trial, the Federal Court of Appeal rejected it. Similarly, courts have held that the ability to control the commission structure of a commission salesperson does not constitute control.

The court will also consider the intention of the parties a factor. The words that the parties choose to use to describe their relationship, for example in a contract between them will not determine the issue.

However, and especially where an assessment of the factors on each side gives rise to a close call, any contract between the parties describing their relationship, or evidence of their mutual understanding of the relationship, will be taken into account as well.

In one case I dealt with several years ago, the parties were able to demonstrate a number of features of an independent contractor relationship. However, when the structure was created, the owner had each worker sign a document entitled "employment contract." Needless to say, the existence of this document did not help weather the CRA's challenge.

When the CRA challenges the relationship, it will send the parties a list of factors in which it relies to say that the relationship is employer-employee.

For example, in a situation involving an auto dealer's sales representative, factors suggesting that the worker is an employee might include factors such as the owner controls the hours of work, the worker has to attend meetings and can't work elsewhere.

Factors that might suggest an independent contractor relationship include a written contract where the relationship is described as one of independent contrac-

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tor, the worker has their own sales leads, sets their own hours, doesn't receive any car or car allowance and isn't paid for expenses or benefits.

There are numerous others that might be relevant.

If you have a concern, consider how the features of your relationships with your workers stack up against these lists and consult with a knowledgeable legal practitioner for more guidance. Appropriate adjustments at an early stage will help protect you from a CRA challenge down the road.

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