

# Employees and Independent Contractors: How to Create the Relationship You Want

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There are a number of classes of businesses in which it has become common for business owners to attempt to create independent contractor relationships with individuals providing service, rather than employment relationships. The distinction between these two categories of service providers creates significant consequences for both sides to the relationship in a number of areas, including employment legislation, wrongful dismissal actions, priorities and insolvency and contractual rights and above all, Employment Insurance, CPP, and income tax. In many cases, both company and service provider find it advantageous to categorize their relationship as that of independent contractor.

By the same token, because of the tax consequences, Canada Revenue Agency can be rigorous in examining such relationships to be absolutely certain that they involve genuine independent contracts. CRA takes a dim view of attempts to characterize as an independent contract a relationship which is obviously that of employer-employee.

Adverse decisions by CRA can be appealed by business owners to the Tax Court of Canada, but obviously, the business owner's 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.

As one might expect, there is no one factor that will define the relationship. The court will make a comprehensive assessment of the entire relationship and take into account 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 usually sufficient for the court to characterize the relationship as that of employer-employee.

The test subsequently evolved to a more sophisticated one involving four key elements: control (as described above), ownership of the tools used in the performance of the tasks, the worker's opportunity for profit, and which party took a more significant financial risk or assumed more liability in the event of a loss.

Subsequently, a further test was added involving a review of the degree of integration of the worker's activities into the owner's business, i.e. the degree of economic dependence involved in the relationship.

Today, a further evolution has taken place in recognition of the fact that it is simply 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 that the business owner has over the worker's activities, whether the worker provides his or her own equipment, whether the worker hires his or own helpers, the degree of financial risk taken by the worker, the degree of responsibility for management and investment held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

Not only are these rules not exhaustive, they can also be open to a great deal of interpretation. In one case, for example, 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 sales person does not constitute control.

The court will also consider the intention of the parties as 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 in the subsequent challenge by CRA.

When CRA challenges the relationship, it will communicate to the parties the list of factors in which it relies to say that the relationship is one of employment. For example, factors suggesting that the worker is an employee might include the following:

- The owner controls the hours of work;
- The worker has to attend meetings;
- The worker has to perform services personally;
- The worker cannot hire others to complete the work;
- The worker cannot work for other business owners;
- The owner establishes the worker's clientele;
- The owner provides any supplies, materials and equipment necessary to complete the work; and
- The worker cannot profit from a sale (other than through commission) and will not be exposed to any risk or loss in the course of discharging his or her duties because he does not establish the sale price and does not have to purchase any material used to complete the work.
- Factors that might suggest an independent contractor relationship, on which an owner would rely, include:
  - A written contract in which the relationship is described as one of independent contractor;
  - The worker has his or her own sales leads;
  - The worker does not receive any car or car allowance or payment of expenses;
  - Hours are set by the worker;
  - There is no dress code;
  - No benefits are paid;
  - There are no performance reviews;
  - The worker has no other duties for the owner;
  - The worker is paid on commission, based on invoices generated;
  - There are no prescribed sales methods and the worker can determine his or her own sales strategy;
  - The worker will sometimes complete a sale outside of the owner's premises, such as in the customer's place of business or home; and
  - The worker charges HST on his or her invoices.

These are examples which I have seen while representing clients either facing or concerned with the possibility of CRA challenges. Needless to say, there are any number of other factors that might be relevant. If you have a concern of this nature, you should 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.