

While all companies require human capital, companies under financial pressures will often examine alternative employment arrangements as a means to reduce costs. One such alternative is to hire “independent contractors” as opposed to employees.

## The Risks of Mischaracterizing an Employee as an Independent Contractor

### Benefits of Classifying Workers as Independent Contractors

An employment relationship is protected by, among other things, the duties and obligations set out in the *Employment Standards Act, 2000* (the “ESA”) (e.g. notice of termination, overtime, minimum wages, holiday pay, etc.). Furthermore, employers have withholding/contribution obligations under other federal and provincial legislation for:

- Income tax;
- Canada Pension Plan;
- Employment Insurance; and
- Workplace insurance.

As a result of these additional costs, it is estimated that companies can save approximately 30% by hiring an independent contractor as opposed to an employee. While this may appear to be an attractive option for companies, the common law is clear that a worker will be deemed an employee regardless of how they are classified if the substance of the relationship is that of an employee-employer.

### Is a Worker an Independent Contractor or Employee?

The following is a non-exhaustive list of factors that the Canada

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**July 12 in Toronto**

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Revenue Agency (“CRA”) and courts review when assessing whether a worker is an employee or independent contractor:

- Who has control over the manner in which work is completed?
- Who owns the tools and equipment?
- Does the worker have the ability to subcontract or hire assistants?
- Who carries the financial risk and reward and opportunity for profit?
- Does the worker have more than one “client”?
- Who is responsible for investment and management<sup>1</sup>?

If much of the responsibility in respect of these factors lies with the company, a court would find that an employee-employer relationship exists, notwithstanding how the relationship was labelled by the employer.

## Liability from Mischaracterizing an Employee as an Independent Contractor

Mischaracterizing an employee as an independent contractor could result in the following liabilities:

### Compliance with the ESA

- Unpaid wages resulting from overtime, minimum wages, holiday pay, vacation pay, etc., pursuant to the ESA.
- Notice of termination and severance pay pursuant to the ESA.

### Common law reasonable notice of termination

- Subject to contractual provisions, an employer would be liable for common law reasonable notice of termination. Courts have also held that workers who are otherwise correctly classified as independent contractors who rely primarily on one company for their income could be held to be “dependent contractors”. If an

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1 <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html#factors>

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employee is considered a dependent contractor, while the ESA may not apply in respect of things like overtime and holiday pay, the worker would be treated as an employee in respect of entitlements on termination. Indeed, the Court of Appeal in *Keenan v. Canac Kitchens Ltd.*, awarded 26 months' notice to a long-service dependent contractor. <sup>2</sup>

### Claims by the CRA for Income Taxes, CPP, EI and related interest and penalties

- An employer who fails to deduct income tax at source, as well as the required CPP contributions and EI premiums, must pay not only the unremitted taxes, but also the employer's share and the employee's share of any premiums owing, plus penalties and interest.

### Workplace Insurance

- For failing to properly register under the *Workplace Safety and Insurance Act* ("WSIA"), a company could be liable for unpaid premiums, interest and additional penalties. That said, only employers in industries listed under Schedule 1 or Schedule 2 of the WSIA must register with the Workplace Safety and Insurance Board.

## Takeaways

While it may be enticing to deem a worker as an independent contractor to save the company a little money, the full picture needs to be assessed to determine if that worker is in fact an independent contractor. While the company may save some money at the front end, it may be faced with some extensive unexpected costs at the back end if the worker's status is ever successfully challenged. To avoid this surprise down the road, companies should obtain a legal opinion on the worker's status when deciding how it intends to contract with the worker. 

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