
Defining the Relationship: Contractor vs. Employee

An important threshold issue to consider before hiring a new employee is how best to define the employment relationship. Specifically, whether or not to structure it as a traditional employee and employer relationship, or as an independent contractor relationship.

Why is it important to decide whether the newly hired worker should be an employee or an independent contractor? The answer is that the classification has a dramatic impact on the duties and obligations between the employer and the worker:

- Employers need to deduct income taxes, EI, and CPP contributions from an employee's wages, but not independent contractors.
- Under the [BC Employment Standards Act](#), employers have obligations to pay overtime and vacation pay to employees, but not independent contractors.
- Employees have generally broader legal rights and remedies available compared to an independent contractor. Of prime importance to most employers is that employees dismissed without cause are entitled to reasonable notice or pay in lieu, whereas independent contractors generally are not.

How do you know if the worker is an independent contractor or an employee? The central question is whether the person who has been engaged to perform services is performing them as a person in a business on their own account. In making the determination, the level of control the employer has over the worker's activities will always be a factor.

The Employment Standards Branch (ESB), the body in charge of administering the ESA in British Columbia, will apply the common law rules in conjunction with the statutory definitions of "employer" and "employee", to determine whether an individual is an employee or an independent contractor. In particular, the ESB has identified key factors that they will consider:

- **Control** – Is the person under the direction and control of another regarding the time, place, and way in which the work is done? Is the person hired, given instruction, supervised, controlled or subject to discipline? Was the person told what to do, how to do it, and when to do it? Did the person have to do the work him or herself, or could that person give the work to someone else to do? Does the person perform work normally or previously performed by an employee? The greater the degree of control, the greater the likelihood the person will be found to be an employee.

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- **Ownership of tools** – Does the person use tools, space, supplies, and equipment owned by someone else? If so, this would indicate an employment relationship. However, it is recognized that some employers require employees to provide their own tools or vehicles.
- **Chance of profit** – Does the person have a chance of profit? If their income is always the difference between the cost of providing the service and the price charged for the service, the worker may be someone other than an employee.
- **Risk of loss**– Is the person at risk of losing money if the cost of doing a job is more than the price charged for it? This may indicate a non-employment relationship.
- **Payment** – Is the person paid regular amounts at set intervals? Does the person get paid regardless of customer satisfaction or customer payment? These factors indicate an employment relationship.

Key Practice Points – Contractor vs. Employee

- Factors helpful in determining if the worker is an employee or independent contractor:
 - Level of control over the worker
 - Whether worker provides their own equipment
 - Degree of financial risk assumed by worker
 - Responsibilities for investment and management held by worker
 - Worker’s ability to hire their own helpers
 - Worker’s opportunity to profit in the performance of their tasks
- A worker who sets their own hours, maintains control over work done, provides their own tools and equipment, is subject to minimal supervision, assumes financial risk over the work performed, hires their own helpers, has the opportunity to profit from their work, and has the ability to perform work for other employers is more likely to be classified as an independent contractor than an employee.
- The courts may consider someone who is otherwise an independent contractor, but has had a longstanding, close and largely exclusive relationship with the employer, to be a “dependent contractor”. A dependent contractor is an intermediate position between employee and independent contractor, developed to provide rights to reasonable notice. Thus, designing the relationship so that the worker will be an independent contractor does not in all circumstances remove the employer’s obligation to provide reasonable notice or severance.