

## Employment and Labour

December 6, 2017

### Time to Review Your Independent Contractor Relationships

The Canadian workforce encompasses a diverse array of business relationships. In the face of economic pressures, many companies moved away from hiring employees and have begun to favour hiring independent contractors. In many workplaces, the line between employees and independent contractors has blurred. Increasingly, workers are being classified as independent contractors when they are, for all intents and purposes, treated the same as employees of the business.

Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, which came into force on November 27, 2017, attempts to address this misclassification. To avoid unintended liability under the *Employment Standards Act (ESA)*, businesses should review their independent contractor relationships to determine if they can withstand scrutiny from government agencies. With no set formula for determining a worker's classification, professional legal advice may be needed to effectively address any unintended consequences resulting from the changes imposed by Bill 148.

#### Why is Misclassification Problematic?

From an employer's perspective, a misclassified worker who works exclusively or almost exclusively for the business offers all the benefits of an employee, with very limited liability. However, misclassification often results in deprivation of benefits to which workers are entitled under the *ESA*, such as:

- vacation pay
- public holiday pay
- overtime pay
- termination pay
- severance pay

In addition, independent contractors do not benefit from employer CPP contributions or employer EI premiums. In fact, they are responsible for the full annual CPP contribution and cannot collect EI benefits unless they voluntarily register for limited EI special benefits, which do not include protection against unemployment.

Bill 148 attempts to address these issues and in doing so poses significant risk of unintended liability for the unwary employer, including:

- automatic joint and several liability of related businesses
- penalties including prosecution, public disclosure of conviction, and monetary penalties

#### The Risk of Misclassification – “Contractor” or “Employee”?

There is no universal test to distinguish between an employee and an independent contractor. The central question is whether the employment relationship looks more like a contract *of* service (i.e., are the parties behaving as employer/employee) or a contract *for* service (i.e., are the parties behaving as principal/independent contractor). To make this determination, the parties' conduct and the particular facts of each case must be examined.

So what questions should you, as “employer”, be asking? The following checklist provides a helpful starting point:

- Do you have a high degree of control over workers' activities (employees) or do they decide where, when and how to work (independent contractors)?
- Do you provide workers with workspace and equipment, such as computers, phones, and photocopiers (employees) or are they responsible for providing them (independent contractors)?
- Do you require workers to do the work themselves (employees) or do they have the right to hire their own helpers/subcontractors (independent contractors)?

# Goodman's Update

---

- Do you manage all aspects of the work (employees) or do workers have a degree of responsibility for the management of their business' finances (independent contractors)?
- Do you pay the workers the same regardless of the results (employees) or do workers bear any financial risk based on results (independent contractors)? For instance, if the project goes over budget or has to be redone due to faulty workmanship, are these costs at workers' expense?
- Do workers get paid the same, even when they achieve good results (employees) or do they have the opportunity to earn a profit (independent contractors)? For instance, if the project comes in under budget, do they benefit from this?
- Do you require workers to provide services directly to the business (employees) or can workers provide services through a corporation (independent contractors)?
- Do you require exclusive service (employees) or do workers take on other jobs (independent contractors)?

Depending on your responses to these questions, your business may be at risk for misclassification and, by extension, exposed to liability if the working relationship comes under review by government agencies. Notably, corporate directors can also be held personally liable where the corporation fails to meet its obligations under the *ESA*.

For further information on Bill 148 and the risks of misclassification, contact any members of our Employment Law Group.