

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

MISCLASSIFICATION OF WORKERS CAN BE COSTLY

Businesses are often looking to cut costs, especially in difficult economic times. Because employees can be expensive, a recent trend is to replace employees with contractors. Labeling a person as a "contractor", however, does not necessarily make it so.

Despite the appeal of hiring contractors rather than employees, the characterization of a worker's engagement with an organization should not be made arbitrarily, nor taken lightly. Careful consideration must be given to the circumstances of every particular case due to the serious legal consequences that can arise from an incorrect classification.

Some of the consequences include the following:

- In Ontario, as in all other Canadian provinces, most employers must be registered with the Workplace Safety and Insurance Board, and must pay workers' compensation premiums. This is not required for contractors. However, if the authorities determine that a person has been incorrectly labeled as a contractor, a company could be: required to participate in a formal investigation; pay outstanding premiums with interest; found guilty of a provincial offence; and/or hit with substantial fines.
- Failure to deduct income taxes, Canada Pension Plan contributions, and Employment Insurance premiums from an individual's wages could also have significant repercussions for an employer who has incorrectly classified a worker as a contractor. In such circumstances, not only will the employer be required to pay the unremitted taxes to the Canada Revenue Agency, but also the employer's and the employee's share of unpaid premiums, as well as penalties and interest.
- Businesses may also be exposed to claims for wrongful dismissal damages following the termination of contractors who later take the position that they were employees. This is because contractors do not benefit from severance requirements that otherwise apply to employees. Therefore, if a dismissed worker is found by a court to be an employee rather than a contractor, they will be entitled to wrongful dismissal damages.
- The applicable provincial employment standards legislation sets out a number of obligations that organizations must adhere to regarding their employees. A "true" contractor will not enjoy the statutory benefits afforded to employees including, for example, overtime pay, pregnancy leave, parental leave, and vacation pay. Therefore, the incorrect classification of a worker may result in an order from the relevant authorities requiring payment of these various obligations.

The risks associated with the incorrect classification of workers can be significant. Consequently, it is vital for organizations to be familiar with the manner in which the law distinguishes a contractor from an employee. A non-exhaustive list of factors that Canadian courts will consider in making this assessment includes the following:

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- the level of control the organization has over the worker;
- whether or not the worker provides his/her own tools and equipment;
- whether the worker can subcontract the work;
- whether the worker can take on other jobs or must provide exclusive services;
- whether the worker is providing services through a corporation;
- the degree of financial risk taken by the worker;
- the opportunity for profit by the worker; and
- other factors including written agreements.

The crux of the courts' assessment will be whether the individual is performing services for an organization as a person in business on his/her own account. Accordingly, the level of control an organization exercises over a worker's activities will always be a factor in this determination. Other factors will also be considered, however, there is no set formula as to their application. The relative weight of each factor will depend on the facts and circumstances of each specific case.

Organizations must ensure that their contractual agreements are well drafted, and that the relationship with their workers is structured to accurately reflect the parties' intentions. To this end, employers should undertake a comprehensive assessment of the duties being performed and whether the classification of a worker as an independent contractor, as opposed to an employee, can survive scrutiny by the courts, the CRA, and other authorities. There are a number of online governmental resources to help with this assessment; however, expert legal advice is instrumental in eliminating any doubt and reducing an employer's legal risk.

IN THE MEDIA

About 3000 retired employees of General Motors Canada have won a class-action lawsuit against their employer, who was found wrong in cutting healthcare and life insurance benefits of the retirees.

Daniel Lublin was asked to appear on CTV News to comment on the recent decision of the Ontario Superior Court. He explained how important is to have proper employment contracts as well as workplace manuals and policies in place. He says there are ways for employees to protect themselves from these changes even if the employer is going through economic hardship. To learn more, watch Daniel's interview on CTV News.

Daniel Lublin and The Globe and Mail have created a video series that is accompanied by a resource companion in Daniel's column, where all the important links can be found to major information regarding maternity leave.

Maternity/parental leave videos:

What recourse do I have if my job is changed?

Taking paternity leave? Men have the same rights as women

What do I do if I've been discriminated against because of my pregnancy?

How can I lose my job while I'm on maternity leave?

If I go on maternity leave, am I guaranteed to get my job back?

LAW BLOG

Losing your job while on maternity leave

Some striking elevator technicians to be forced back to work

The answers to your maternity leave questions

With or without a contract

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