



This factsheet has been prepared for general information purposes. It is not a legal document. Please refer to the *Employment Standards Act* and Regulation for purposes of interpretation and application of the law.

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Employee or Independent Contractor

The *Employment Standards Act* (the Act) applies to employees, regardless of whether they are employed on a part-time, full-time, temporary or permanent basis. The Act does not apply to independent contractors. A person who is an independent contractor is considered to be self-employed; that is, in business for him or herself.

Calling a person an independent contractor, even if the worker agrees, does not decide the issue. This is because the requirements of the Act are minimum requirements and any agreement that tries to waive the requirements of the Act is not valid.

In order to determine whether a worker is an employee or an independent contractor under the Act, it is important to consider the definitions of “employee”, “employer” and “work”. The Act defines these terms very broadly. They read in part as follows:

“employee” includes:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee ...

“employer” includes:

- (a) a person who has or had control or direction of an employee, or
- (b) a person who is responsible, directly or indirectly, for the employment of an employee.

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

It is also necessary to look at the purposes of the Act, which are to ensure that employees receive at least basic standards of compensation and conditions of employment, to promote fair treatment and open communication between employers and employees, to foster a productive and efficient labour force and to assist employees to meet work and family obligations.

The Act is intended to protect as many workers as possible. When deciding if a worker is an employee or an independent contractor, one of the main questions to ask is “Whose business is it?”

The courts have developed some common law tests that may be useful, but they must be considered in a manner consistent with the definitions and purposes of the Act.

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Some of these tests include how much direction and control the worker is subject to, whether the worker operates their own business and has their own clients, whether the worker has a chance of profit or a risk of loss, whether the work they are doing is integral to the business and whether there is an ongoing relationship.

The longer a person works for another, the more closely the worker's duties are connected to the purpose of the business, the more the person who pays the worker controls the material and tools and directs the activities, the more likely it is that the relationship is one of employer/employee.

Common misconceptions

The following factors are not, on their own, enough to show that a worker is an independent contractor. There may be an employment relationship, even if the worker does some of the following:

- agrees to be an independent contractor;
- charges GST;
- works at more than one job;
- submits invoices instead of time cards,
- doesn't have statutory deductions taken from earnings;
- works independently without much direct supervision;
- drives their own car;
- provides their own tools; or
- is paid by piece rate or commission.

Examples

1. A painting business hires a painter. The company has the worker sign a written agreement in which the worker agrees he is an independent contractor. The company supplies the paint, brushes, ladders and other equipment. The company pays the worker an hourly rate. The company tells the worker what to do and decides if it was done satisfactorily. The painter works at several different jobs over a period of several months.

This worker is an employee because:

- He does not have his own painting business and does not provide services to his own clients;
- He has an ongoing relationship with the company;
- He performs work normally done by an employee;
- He is doing the work the company is in the business of doing; and
- The company has direction and control over how he does his work.

2. A company hires an outside salesperson to sell its products. The salesperson is responsible for selling product in a territory assigned by the company. She sets her own hours, uses company order forms and brochures for generating sales and attends mandatory monthly company sales meetings. She is paid entirely by commission at a rate set by the company.

This salesperson is an employee because:

- She is doing work to benefit the company and increase its profits;
 - The company has control and direction over her work in setting the sales territory and commission rate and requiring her to attend sales meetings.
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