

Independent Contractor vs Employee Ontario

November 26, 2019



Are you an independent contractor or an employee in Ontario? Many people in Ontario work as genuine independent contractors. Think of the people that come to your office to fix your IT as true independent contractors. However, some employers misclassify their employees as independent contractors to avoid paying certain monies that are required under Ontario's Employment Standards Act [ESA], such as:

- minimum wage;
- overtime pay;
- vacation pay;
- public holiday pay; and
- notice and severance.

Under section 5.1 of the ESA, it is illegal for employers to misclassify their employees as independent contractors. However, for several reasons, employers still misclassify their workers as independent contractors in Ontario today. As stated above, the main benefit of an independent contractor-employer relationship versus an employee-independent contractor relationship is that independent contractors are not covered by the ESA, making it cheaper for the employer. If someone is an independent contractor in Ontario, their employer owes them nothing but what is stated in their contract. They don't have to pay the worker's overtime, vacation pay, etc.

In addition to ESA standards, it is an advantage for an employer to classify a worker as an independent contractor because they have no obligation to contribute to tax, EI and CPP and pay for WSIB.

Workers may benefit slightly from being classified as an independent contractor because they don't have to make statutory withholdings for tax, EI and CPP. In addition, independent contractors are free to make deductions for business expenses like travel, entertainment and their home office, etc.

However, in many industries, the worker gets little benefit from being classified as an independent contractor because they can't really make meaningful deductions anyway except for one or two things. For example, a pizza delivery driver may be classified as an independent contractor by his employer and he may think this classification is an advantage because he gets to write off the cost of his car and gas. However, he is losing far more money on lost vacation pay, overtime pay, even minimum wage. In most cases, the employer is getting a far greater advantage at the cost of the worker. Not to mention, in many cases, the employer is wrong, the pizza driver is an employee, not an independent contractor.

Thus, it is an issue for some workers – are they truly an independent contractor or is their employer abusing their rights to save money?

Independent Contractor or Employee?

It is a growing problem that employers are misclassifying their employees as independent contractors to save money. As a result, the courts, the Ontario Labour Relations Board [OLRB] and the Ministry of Labour have begun to scrutinize employers who misclassify their employees as independent contractors. In the result, various legal tests have been created over time as “common law” to truly determine if someone is an independent contractor or actually an employee.

The determination of whether someone is an employee or an independent contractor is complex and there are several legal tests created by the courts for checking whether someone is an employee or independent contractor. The Ministry of Labour and OLRB, which hears Ministry of Labour appeals, uses the same the common law tests as the courts to determine if an employee-employer relationship exists.

Are you an Employee?

The definition of an “employee” is contained in section 1 of the ESA. It states that an employee is:

- (a) a person, including an officer of a corporation, who performs work for an employer for wages,
- (b) a person who supplies services to an employer for wages,
- (c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or
- (d) a person who is a homemaker,

This definition is not very clear. It doesn't say whether a person performing work for an employer is an employee or an independent contractor and it doesn't define an "independent contractor". Thus, the courts have defined for themselves a definition of an "independent contractor" to separate them from "employees".

Are you Truly an Independent Contractor?

As made by the courts under the "common law", the Definition of an Independent Contractor is now essentially: **someone in business on their own account as opposed to someone in the business of their employer.**

To determine if someone is an independent contractor such that they are in business on their own account, the courts have fleshed out various factors to check and balance a worker's true character. A worker will be an employee, not an independent contractor if some of these factors are met:

1. If the worker cannot control the method of doing the work;
2. If the worker cannot hire and fire other employees;
3. If the worker does not have the power to control and discipline other employees;
4. If the worker gets most of his income from the employer;
5. If the worker exclusively (or almost exclusively) works for the employer;
6. If the worker cannot determine the place of work;
7. If the worker does not have much freedom in performing the work;
8. If the worker is supervised;
9. If the worker does not have the power to delegate;
10. If the worker cannot prescribe exactly the work to be done;
11. If the worker is accountable to the employer;
12. If the worker does not use his own tools;
13. If the worker has little chance in profiting off his own work;
14. If the worker has little risk in losing his own money;
15. If the worker is integral to the business of the employer, not just some side accessory;
16. If the worker ought to be protected by employment standards for public policy reasons;
17. If the worker does not have the power to bargain with the employer;
18. If the worker cannot set his own pay;

19. If the worker does the same thing as employees;
20. Any other factor showing the worker is more like an employee than a contractor;

The courts have held that the followings factors are **not** very relevant in determining if someone is an independent contractor or an employee:

1. Parties cannot decide employee status merely by mutual agreement or by the signing of a written employment contract or independent contractor agreement. In essence, a document saying “I am an independent contractor” is mostly useless.
2. Likewise, the method of payment (i.e. if there are statutory deductions or not) is mostly ignored.

The Courts do not require that a worker meet each and every point above to be genuinely classified as an employee. All it takes to prove a worker is an employee, not an independent contractor is a review of all the factors combined to determine if it is reasonably true the worker is in business for his employer, not himself.

For example, In *Warren v 2006515 Ontario Inc.*, 2005 CanLII 1757 (ON LRB), the OLRB looked at several factors in determining that a manager of a health food store was an employee and not an independent contractor. There were several facts that suggested the manager was an independent contractor: she invested in one product for sale to her own profit; for a period, she financed the balance of the inventory; she used the terms “Nutritional Services” and “Managerial Services” on documents to describe the work she did for the employer; and no statutory deductions were made from gross amounts owing to her for work performed. However, the OLRB found that there was substantial evidence to determine that the claimant was, in fact, an employee: the employer had control over her activities; the employer-provided the premises and the equipment used; the employer had ultimate control to determine what product would be stocked; and the claimant had essentially no opportunity for profit or risk of loss (See here).

<https://duttonlaw.ca/independent-contractor-vs-employee-ontario/>