

# EMPLOYEE VS. INDEPENDENT CONTRACTOR

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There is a growing trend in today's workplace of hiring contractors rather than employees to perform necessary services. This trend is a result of a number of factors, including greater flexibility, reduced overall costs and often a greater specialization that contractors bring to a project. The distinction between the two is somewhat difficult to determine. The distinction, however, has wide reaching implications for a company's practices.

An employee has certain rights on termination that generally are not available to contractors. Additionally, an employer is under statutory obligations regarding withholdings and remissions for income tax, workers' compensation and employment insurance. As well, employees have certain entitlements under the employment standards legislation, such as overtime pay, minimum wage and paid vacation, which are not available to contractors.

Problems arise when companies have independent contractors providing services, but there are some aspects of the relationship that suggest or resemble a traditional employer/ employee relationship.

The courts have used various tests to determine whether one is an employee or an independent contractor. The tests used by the courts attempt to ascertain whether the work done by the individual is actually an integral part of the employer's operation or if the individual's work is done as part of the individual's independent business. Each element of the various tests must be reviewed, with emphasis shifting depending on each case by case situation.

The initial test used by the courts was the "control test". This test evaluated the degree of control held over the 'employee' by the employer; the greater the control, the more likely the courts would find an employer-employee relationship. Four aspects of control were considered:

1. The employer's power of selection of the employee;
2. Whether the employer paid wages;
3. The employer's right to control the method of doing the work; and
4. The employer's right to suspend or dismiss the worker.

This test became inadequate when situations arose involving highly trained workers. In these situations it was clear that the employer did not control the professional or highly skilled worker in how they did the task. Thus a new test evolved, called the "entrepreneur test" or the "fourfold test". Under this approach, the courts consider the question of "whose business is it" by examining the following factors:

1. Control (as in the "control test");
2. Ownership of tools;
3. Does the individual have a chance of profit; and
4. Who bears the risk of loss?

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These four elements are an attempt to examine all aspects of the relationship with an emphasis on determining if the 'employee' is carrying on his activities for himself or on his own behalf and not merely for a supervisor.

A third test was developed in order to consider the broad range of potential employer-employee relationships: the "organization test", or as it is also known, the "integration test" or the "economic dependency test". This test looks at the integration of the worker into the employer's business and asks: "is that worker economically dependent on the company?" or "are the worker's activities an essential component of the business?" If the answer to either is "yes", then the worker will likely be considered a 'dependent contractor' or an employee.

Given the above tests, following is a list of some of the factors that should be considered in determining whether an individual is an employee or an independent contractor. No one factor is determinative. For example, there could be one or more characteristics under the employee category and the individual could still be found to be an independent contractor or vice versa. Courts and tribunals will consider the complete relationship between the company and the worker and each case will depend on its individual facts.

It is obvious from the chart that determining whether one is an employee or an independent contractor can only be done on a case by case basis. Accordingly, it is important to seek proper advice when establishing an independent contractor relationship to help reduce the risk of the individual being found to be an employee. It is also generally advisable that a contract be entered into between a company and an independent contractor in order to help distinguish the individual from the regular employees.

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