

Who is an Independent Contractor under *The Employment Standards Code* (Manitoba)?

Submitted by Chris Donaldson

It may be advantageous for an organization if one or more of its workers is classified as an “independent contractor” rather than an “employee” under *The Employment Standards Code* (Manitoba) (the “Code”). Such a classification can mean that the organization has reduced obligations to those workers, including obligations relating to holiday pay, vacation pay, notice of termination or pay in lieu thereof, and overtime pay.

An organization seeking to enter into an independent contractor arrangement with a worker should, however, be aware that the factors taken into account in determining whether or not the worker is an employee may differ depending on the legislation being considered. In addition, the onus is typically placed on the organization to prove that the worker is an independent contractor rather than an employee.

Whether an organization’s workers are employees or independent contractors for the purposes of the Code can be a hotly disputed subject, usually with the organization arguing in favour of independent contractor status and the worker alleging that he or she is an employee for the purposes of the Code. Between January 2009 and December 2012, the Manitoba Labour Board (the “Board”) issued reasons for decision in no fewer than eight cases under the Code in which it considered whether the worker was an employee or independent contractor.

When will a worker in Manitoba be considered an independent contractor rather than an employee for the purposes of the Code? In classifying workers as employees or independent contractors under the Code, the Board determines whether the worker is performing services as a person in business on his or her own account. If so, he or she is an independent contractor; if not, he or she is an employee. In order to make that determination, the Board will consider the following factors:

1. The level of control that the alleged employer has over the worker’s activities. Generally speaking, “control” means the right to say how and when the work will be done. If the worker is able to determine how and when she will perform the tasks the alleged employer needs her to perform, this factor will likely weigh in favour of the worker being an independent contractor. If the worker has scheduled hours and has to follow the instructions of a supervisor, this factor will likely weigh in favour of the worker being an employee.

2. The provision by the worker of his or her own equipment. When a worker makes a substantial capital investment in the work – for example, by buying his own tools and equipment to perform the work – this factor will likely weigh in favour of the worker being an independent contractor. If the alleged employer provides all the necessary tools and equipment, this factor will likely weigh in favour of the worker being an employee.

3. The hiring by the worker of his or her own helpers. Generally speaking, independent contractors have the right to delegate the performance of their work to others, whereas employees do not.

4. The degree of financial risk taken by the worker. The Board will consider the extent to which the worker has invested financially in the enterprise through which she performs the work by, for example, incorporating a business, engaging in marketing activities, purchasing rights, purchasing or leasing office space, etc. The greater the financial investment, the more heavily this factor can weigh in favour of the worker being an independent contractor.

5. The worker's degree of responsibility for investment and management. This factor considers the worker's authority to make investments and manage the business independently from the alleged employer. Generally speaking, the greater the worker's authority to make decisions with respect to the enterprise through which he performs the work, the more heavily this factor can weigh in favour of the worker being an independent contractor.

6. The worker's opportunity for profit and loss. Does the worker have more to gain than the receipt of a wage for a day's work? Can the worker obtain a greater profit from the work if she performs it more efficiently? If the worker has the opportunity of profiting from the sound management of the performance of the task, this factor will likely weigh in favour of the worker being an independent contractor. If not, it will likely weigh in favour of the worker being an employee.

7. Other factors specific to the circumstances of the individual case, such as:

- a requirement that the worker work exclusively for the alleged employer,
- the characterization of the relationship between the parties (i.e., in written agreements, etc.),
- the characterization of the relationship held out to the public (i.e., the worker wearing the alleged employer's uniform, etc.),
- the manner in which the worker files his or her income taxes, and
- the provision of a pension or other benefits to the worker.

Generally speaking, the more control that the alleged employer exercises over the worker, the more likely it is that the worker will be found to be an employee under the Code. No single factor will be determinative, and some factors may not be applicable in the circumstances of each case.

Often, some of the factors will point toward the worker being an independent contractor and others will point toward him or her being an employee. In the final analysis, the Board will weigh all of the factors together to determine whether or not the individual is performing services as a person in business on his or her own account.

There may be subtle nuances to the relationship between your organization and its workers that can tip the balance one way or the other. Before asserting that a worker is an independent contractor rather than an employee for the purposes of the Code, consider speaking to a lawyer so that your organization doesn't end up adding to the Board's case load.

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