



# Canada Labour Code Part II & III

## Employer–Employee Relationship



# Definitions

- Employer:
  - A person who employs one or more employees
  - Any person who acts on behalf of an employer
  - An employers' organization
- Employee: a person employed by an employer
- Workplace: any place where an employee is engaged in work for their employer



# Misclassification of Employees

- Employees are often misclassified as independent contractors
- Drivers incorporate as independent contractors however they use company equipment and do not perform actions/functions that are divisible from the company
- To deter misclassification of employees, sections 167.1 and 167.2 have been introduced in the *Canada Labour Code*



# Canada Labour Code, Part III

## Prohibition

**167.1** An employer is prohibited from treating a worker as if they were not their employee in order to avoid their obligations under this Part or to deprive the employee of their rights under this Part.

## Burden of proof

**167.2** If, in any proceeding in respect of a complaint made under this Part, the employer alleges that the complainant is not their employee, the burden of proof is on the employer.



# Why is this relationship important?

- When an employer–employee relationship exists, labour standards apply, such as:
  - Hours of work, minimum wage, vacation pay, holidays, etc.
  - Leave from work when sick or to take care of a critically ill family member, etc.
  - Protection from unjust dismissal and ability to make a complaint if you haven't received earned wages
- This is **important** for all employees to know when they accept a job in a federally regulated industry



# Why is this relationship important?

- When an employer–employee relationship exists, Occupation Health and Safety Laws apply, such as:
  - The employer ensures that the health and safety at work of every person employed by the employer is protected under part II of the CLC and the applicable regulations such as the COHSR, Workplace Committee, and Workplace Harassment and Violence Regulations
  - The annual report must reflect the accurate number of employees in each workplace
  - In the event of injury, reporting requirements followed for employees

This is **important** for all employees to know when they accept a job in a federally regulated industry



# Why is this relationship important?

- Working ‘under the table’ is risky (and unlawful):
  - Allure of pay without tax deductions also means no job protection or other labour standards, including promise of pay
- Simply calling an employee an ‘independent contractor’ does not mean that they are not an employee:
  - When an employer–employee relationship is in question, Labour Program officer investigates using several tests



# Definitions

- **Contract of service: Employer–employee relationship**
  - Contract in which a person (employee) undertakes to do work for remuneration, according to instructions and under direction or control of another person (employer), for limited or indeterminate period of time
- **Contract for service: Not employer–employee relationship**
  - Contract in which a person (independent contractor or service provider) makes a commitment to another person (client) to carry out material or intellectual work or to provide a service for a set price or fee and with no relationship of subordination





# How is this relationship determined?

- Control Test
  - Presence or absence of control by manager or supervisor
- Four-fold Test: *Whose business is it?*
  - Control
  - Ownership of the tools
  - Chance of profit
  - Risk of loss
- Integration Test



# How did these tests come about?

- 671122 Ontario Ltd. vs. Sagaz Industries Canada Inc.
  - Viewed as authoritative decision on how courts, tribunals and administrative bodies should determine whether ‘employee’ or ‘independent contractor’
- What level of control does employer have over the worker’s activities?
  - Right to exercise control is significant whether exercised or not



# How did these tests come about?

- Ownership of tools
  - Did the worker provide their own tools?
  - Amount of money invested by worker in tools also important
- Chance of profit and risk of loss
  - Is the worker financial invested in a business?
  - Is there a risk of loss or not?
- Integration: Business-like manner
  - Work integral or accessory to core of payer's business



# Employee Characteristics

- Worker:
  - Works exclusively for payer and must perform services
  - Regularly reports to payer's workplace
  - Paid vacation pay
- Payer:
  - Provides tools and controls duties (whether exercised or not)
  - Sets working hours
  - Pays salary or hourly wage and pays expenses
  - Offers pension and group benefits



# Independent Contractor Characteristics

- Worker:
  - May work for other payers and may accept or reject work
  - Provides own tools and may hire someone else to do job
  - Sets own working hours and pays own expenses
  - Decides how task is completed
  - Submits invoice to payer for payment
  - Paid by job on predetermined basis
  - No vacation pay, no restrictions on hours of work or time off
  - Not permitted to participate in payer's benefit plans



# Determination Assessment: Example of an Employee

## Employee

- Payer controlled work assigned and set up loads through dispatch system
- Driver cannot drive for another company while driving for payer
- Driver did not supply or own truck
- Truck leased & financed by payer
- Licence plates & insurance held by payer
- Truck maintenance done by payer personnel or their approved shop

## Employee

- Driver cannot change price of goods/services offered by company to their customers
- Driver cannot negotiate amounts paid by company
- Driver has no financial interest in company
- Company can discipline poor performance



# Determination Assessment: Example of an Independent Contractor

## Independent Contractor

- Driver has flexibility of changing price of goods/services offered
- Driver agrees to reimburse company up to 100% for sums paid by company for damaged, lost or incorrectly delivered cargo
- Driver has vested financial interest
- Driver responsible for insurance deductible

## Independent Contractor

- Driver signed agreement
- Driver can be hired for multiple jobs, not exclusive to payer
- Driver owns truck, owns and pays for licence plates & insurance
- Driver may have 'Finance Lease to Purchase' agreement to buy truck
- Driver agreed to 'assume and pay all direct costs & expenses incident to operating truck'



# Canada Labour Code: Employer Duty

- Ensure health and safety at work of every person employed is protected, which means:
  - Employees (and any others) granted access to work place:
    - Have access to sanitary and personal facilities
    - Are familiar with, and use in prescribed circumstances and manner, safety materials, equipment, devices & clothing
    - Do not endanger health and safety of employees
    - Informed of every known or foreseeable health or safety hazard to which they may be exposed in work place





# Labour Program Initiatives

- An education and awareness program was launched with a focus on road transportation companies and misclassification of employees
- The goal is to increase awareness regarding misclassification of employees and the requirements of the *Canada Labour Code*
- Inspections will be initiated with employers who may be misclassifying employees as independent contractors



# Labour Program Initiatives

- The timeline for inspections will allow employers to proactively make the required changes to ensure compliance with the *Code*
- Legislative changes that came into force in 2021 include fines and the public naming of employers that do not comply with obligations under the *Code*



# Labour Program Contact

For further questions and information:

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