

The Changing Landscape of Independent and Dependent Contractor Relationships

Presentation by:
Craig Lawrence and Karina Pylypczuk
Dentons Canada LLP

25 October 2019

Agenda

- Independent Contractor vs. Employee vs. Dependent Contractor – what do they each mean?
- Case Law Update – determining which category a worker falls into
- Best Practices and Key Takeaways

Distinguishing Between the Three Categories

Independent Contractor

- Self-employed – provide services to customers through their own business.
- Independent contractors control who they work for, and how and when they work.
 - Provide their own tools, typically set their own hours of work subject to meeting project requirements, etc.

Independent Contractor

- Independent contractors are not covered by employment legislation.
- No entitlement to reasonable notice of termination – notice of termination of contract is dictated by the terms of the contract.
- Independent contractors are responsible for their own tax remittances and are not subject to normal payroll deductions.

Employee

- Employees work as part of their employer's business.
 - The employer is their “boss”.
 - They must follow employer's instructions on how and when to work.
- Employees are covered by the minimum standards under the applicable employment legislation (e.g. the *Employment Standards Act, 2000*).
 - E.g. minimum wage, hours of work, overtime pay, termination notice etc.

Employee

- Employees are entitled to reasonable notice of termination (absent limiting termination language in an employment contract).
- Employers make deductions from employees' pay e.g. income tax, CPP and EI.
- In most cases, employers contribute to workers' compensation programs.
- Employees also have the right to unionize.

Dependent Contractor

- Intermediate status between employee and independent contractor.
- Individual is technically self-employed, but there is a recognition that the contractor is economically dependent on a single work provider.

Dependent Contractor

- A finding that an individual is really a dependent contractor has significant impact:
 - Individual will now be entitled to common law reasonable notice of termination
 - Individual will be covered by labour legislation, meaning they are entitled to unionize
 - This occurs often in the construction industry where unions will argue that workers are really dependent contractors and should be a part of the bargaining unit.
- Finding does not result in the individual being covered by employment legislation or being subject to payroll deductions.

Why do the Classifications Matter?

- A business might prefer to use an independent contractor because they are potentially:
 - **Cheaper:** no minimum wage, overtime pay, etc. No CPP, EI or workers' compensation contributions. No entitlement to common law reasonable notice upon termination
 - **More flexible:** no maximum hours of work, less supervision, easier to terminate etc.

Why do the Classifications Matter?

- As noted previously, however, misclassification can have significant consequences.
 - Liability for unpaid wages, overtime pay, vacation pay, holiday pay or termination pay
 - Liability for unpaid income tax, CPP/EI contributions or workers' compensation premiums
 - A claim for wrongful dismissal damages following termination of employment
 - A unionization campaign

Why do the Classifications Matter?

- Misclassification of an entire class of employees or an entire workforce could result in a class action lawsuit.
- Example:
 - Ongoing class action claim in Ontario concerning workers selling energy contracts door-to-door.
 - Class of more than 7,000 workers.
 - Claim that class members were misclassified as independent contractors but are in fact employees.
 - Claim for unpaid wages under minimum standards legislation amounting to tens of millions of dollars.

Case Law Update

Legal Assessment on Employment/Contractor Status

Keenan v. Canac Kitchens, 2015 ONSC 1055

- The Plaintiffs, a husband and wife, both worked for the defendant as employees between 1983 to 1987
- In 1987, the Defendant notified the Plaintiffs that they would no longer be employees, but instead, would carry on their work as “independent contractors”
- Plaintiffs became responsible for paying installers but this payment was funded by the defendant
- The amount the defendant paid to the Plaintiffs was increased to reflect that their pay was no longer subject to income tax, Canada Pension Plan and Employment Insurance deductions
- Plaintiffs signed written agreement to confirm terms of new arrangement

Keenan v. Canac Kitchens – cont'd

- In 2009, Canac closed its operations and informed the plaintiffs that it no longer required their services
- Plaintiffs argued that they were dependent contractors and were entitled to reasonable notice at common law

HELD:

- Plaintiffs were dependent contractors
- Court awarded each plaintiff 26 months' pay in lieu of notice
- Court particularly noted the fact that the business arrangement was almost exclusively for the Canac's benefit

Thurston v. Ontario (Children's Lawyer), 2019 ONCA 640

- The Appellant, Barbara Thurston, worked for the Office of the Children's Lawyer (OCL) for 13 years through a series of fixed-term contracts.
- None of the contracts had a right of automatic renewal and Ms. Thurston was required to apply for reappointment as each contract expired.
- Ms. Thurston maintained a separate legal practice while she worked for OCL.
 - Over the 13 year period, the OCL work accounted for an average of 39.9% of her annual billings
- Following the OCL's notice that they would not be renewing Ms. Thurston's contract, Ms. Thurston brought a claim for wrongful dismissal and damages for reasonable notice of termination

Thurston v. Ontario (Children's Lawyer) – cont'd

- Motion Judge Held:
 - The fact that the relationship was continuous for 13 years without a break, coupled with the fact that an average of 39.9% of Mr. Thurston's billings came from OCL, was sufficient to "tip the balance" in favour of finding that Ms. Thurston was a dependent contractor.
- On appeal to the Ontario Court of Appeal:
 - Dependent contractor status is a non-employment relationship in which there is "a certain economic dependency, which may be demonstrated by a complete or near-complete exclusivity."
 - Near-complete exclusivity cannot be reduced to a specific number that determines dependent contractor status; additional factors may be relevant in determining economic dependency, but near-exclusivity necessarily requires substantially more than 50% of income

Thurston v. Ontario (Children's Lawyer) – cont'd

- In the case of Ms. Thurston:
 - 39.9% of billings cannot be said to constitute exclusivity or near-exclusivity.
- Consideration of other relevant factors:
 - Contract contemplated that Ms. Thurston could continue her private practice and confirmed that she did not work exclusively for OCL
 - There was no guarantee of work or number of files
 - OCL reserved the right to terminate the agreement at any time
 - Ms. Thurston had her own office, supplies, and staff
 - Ms. Thurston's private practice constituted the main source of her total income
- Therefore, Ms. Thurston was not a dependent contractor.

The Test for Classification

- There is no single test and different decision making bodies (i.e. Court versus Ontario Labour Relations Board) will rely on slightly different formulations, however, common factors include:
 - Control
 - Ownership of tools
 - Opportunity for profit or loss
 - Exclusivity
 - Integration
 - Intentions of the parties

Best Practices and Key Takeaways

How Can Employers Minimize their Risk?

- Do not rely on generalizations or labels to determine worker classification
 - Referring to a worker as an independent contractor, **even if they agree to the classification**, is not enough.
- Consider the positions and ensure it's suited to an independent contractor relationship:
 - Duration of contract
 - Scope
 - Control
 - Helpers
 - Tools
 - Profit or loss

Best Practices and Key Takeaways

- Consider requesting quotes or bids from service providers
- Avoid engaging former or current employees to perform their old duties as an independent contractor
- Draft an appropriate independent contractor agreement
 - Use correct terminology
 - Address key issues such as fees, expenses, GST/HST, insurance, indemnification
 - Avoid restrictive covenants
- Require documents from worker demonstrating proof of insurance, GST/HST number, etc.

Best Practices and Takeaways

- Pay the contractor on a project or flat fee basis, not through company payroll.
- Require invoices.
- Do no attempt to control the details of how the worker performs the work.
- Do not give the contractor a company job title.
- Deal with performance problems as contract modification or breach issues, not as disciplinary issues.

Thank you

大成 DENTONS

Dentons Canada LLP
77 King Street West
Suite 400
Toronto, Ontario M5K 0A1
Canada

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com

© 2019 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This document is not designed to provide legal or other advice and you should not take, or refrain from taking, action based on its content. We are providing information to you on the basis you agree to keep it confidential. If you give us confidential information but do not instruct or retain us, we may act for another client on any matter to which that confidential information may be relevant. Please see dentons.com for Legal Notices.