

# **Is the drone services operator I hired an independent contractor or employee of my business? Key reasons why the distinction matters**

**Kathryn McCulloch and Rachel Kattapuram**  
**May 25, 2018**

# Overview

1. What's the difference between an independent contractor and an employee?
2. What are the legal and financial implications if my drone operator is classified as an employee?
3. Practical tips

# Hiring a drone operator

- There is a high level of skill and regulatory compliance required to operate drones in Canada
- Drone operators are a cost-effective way of incorporating drones into a business
- Employers should ensure that drone operators are classified as **independent contractors** and not employees
  - Employers owe certain legal duties to their employees
  - Employees have specific legal rights that independent contractors do not have

# 1. What's the difference between an independent contractor and an employee?

# What's the difference between an independent contractor and an employee?

- The essential distinction is that an independent contractor performs his or her work independently or “as a person in business on his own account”

# Drone operator as independent contractor

- A drone services operator is more likely to be considered an independent contractor where:
  - level of control exercised by the business over the drone operator's activities is minimal;
  - drone operator provides his or her own equipment and hires his or her own subordinates;
  - drone operator assumes a meaningful degree of financial risk;
  - drone operator assumes a meaningful degree of responsibility for management and investment in his or her business; and
  - drone operator has a meaningful opportunity to profit in the performance of his or her own tasks.

## **2. What are the legal and financial implications if your drone operator is classified as an employee?**

# Rights of independent contractors

- There are significant legal and financial implications for a business if a drone operator is considered an employee rather than an independent contractor
- Independent contractors are not entitled to employment rights under the Ontario *Employment Standards Act, 2000*



# Rights of employees

- If drone operators are considered employees, they may be entitled to:
  - Minimum wage;
  - Overtime pay;
  - Public holiday pay;
  - EI and CPP contributions; and
  - Reasonable notice and severance in the case of dismissal without cause.
- Potential damages under the *Ontario Human Rights Code* and *Ontario Occupational Health and Safety Act* for human rights and health and safety violations that occurred in the course of employment
- If a drone operator causes an accident in the course of operating a drone for your business, your business may be held vicariously liable for the damages of third-parties

## 3. Practical tips

# Practical tips

- Drone Services Agreement – draft carefully to make clear that the drone operator is an independent contractor
- Drone operator should:
  - Issue invoices for his/her services;
  - Register for GST purposes; and
  - File income taxes as independent contractor.

# Practical tips

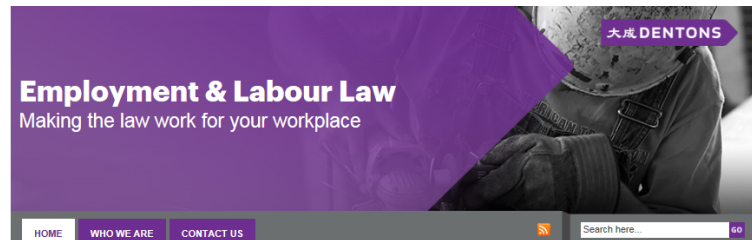
- The reality of the employment relationship should demonstrate that the drone operator is an independent contractor:
  - Degree of subordination between the business and drone operator is minimal;
  - Drone operator has significant autonomy over his/her work schedule and the manner which work is performed; and
  - Employer allows the drone operator to work for other businesses

# A note of caution

- Be careful not to misclassify drone operator who are actually employees as independent contractors
  - Drone services companies vs. “in-house” drone services operator
- The Ministry of Labour can impose serious penalties on businesses that mischaracterize employees as independent contractors to avoid providing employee benefits
- A recent amendment to the Ontario *Employment Standards Act, 2000* shifts the burden to employers to prove that an independent contractor is not an employee if a complaint is filed with the Ministry of Labour
  - May result in increased scrutiny on employers who attempt to misclassify employees as independent contractors

# Dentons Employment & Labour Law Blog

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## ESA Update: Ontario Government to Temporarily Reinstate Pre-Bill 148 Public Holiday Pay Formula Effective July 1, 2018



Posted on May 6th, 2018 By Pamela Chan Ebejer  
Categories: Employment Standards

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As you are aware, Bill 148 made substantial changes to the *Employment Standards Act, 2000* ("ESA") that took effect on January 1, 2018. Among those changes was a new formula for calculating public holiday pay. This new formula required employers to calculate public holiday pay based on the regular wages earned in the pay period before the public holiday, divided by the number of days the employee worked in that pay period.

In a surprising turn of events, the Ontario government announced on May 7, 2018 that it will be reviewing the public holiday provisions of the ESA. The Ministry of Labour will conduct this review in 2018 and interested parties can provide submissions on the Public Holiday Pay Review to [exemptions.review@ontario.ca](mailto:exemptions.review@ontario.ca).

More surprising—the government has also enacted a new regulation, Ontario Regulation 375/18, which reinstates, on an interim basis, the old public holiday pay formula for all employers. As a result, effective July 1, 2018, public holiday pay will be calculated under the old public holiday pay formula as follows:

Public holiday pay is equal to the total amount of the regular wages and vacation pay earned in the 4 weeks before the work week in which the public holiday occurred, divided by 20.

Ontario Regulation 375/18 is a temporary measure while the Public Holiday Pay Review occurs, which means the public holiday pay formula could change again after the Public Holiday Pay Review is complete.

To read Ontario Regulation 375/18, click here: <https://www.ontario.ca/laws/regulation/r18375>.

For employers who have updated their public holiday policies to reflect the new formula under Bill 148, you will need to revisit these updated policies (or simply revert to your old public holiday policies) in preparation for July 1, 2018. Additionally, employers who have implemented the new public holiday pay formula into their human resources information systems or payroll systems will need to ensure these systems are changed back to the old public holiday pay formula come July 1, 2018.

English, Ontario

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Posted on Jan 30th, 2018 By Andy Pashalik  
Categories: Criminal Offences by Employees, Employment Standards, Human Rights

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Start: February 14, 2018, 12:00 PM EST  
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## Is the drone services operator I hired an independent contractor or employee of my business? Key reasons why the distinction matters



Posted on Mar 21st, 2018 By Kathryn McCulloch and Rachel Kattapuram  
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### I. INTRODUCTION

When it comes to hiring a drone operator, there is no shortage of work-for-hire subcontractors in Canada. Given the level of skill, technology and regulatory compliance required to operate drones, hiring a commercial drone operator is often the most cost-effective method of incorporating drones into your business.

However, when hiring a drone operator, businesses should be careful to ensure that they are characterized as "independent contractors" – not as "employees". The main reason that a business should not unwittingly allow a drone services operator to be considered an employee is because employers owe certain legal duties to their employees, and employees have specific legal rights that independent contractors do not.

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## Drone thought leaders speaker series – Advances in the drone industry



Posted on Feb 28th, 2018 By Kathryn McCulloch  
Categories: Events

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Drones – or "unmanned aerial vehicles" – are advancing at a blistering pace. Technological improvements have made drones safer, more accessible, user-friendly and cheaper. Taking to the skies resolves logistical problems, allows for the delivering of goods, permits the collection of mass data and will soon permit passenger travel. These developments represent a paradigm shift in many industries, including: transportation, media and entertainment, mining, agriculture, insurance and logistics.

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Join us as we consider a wide-range of topics including:

- Regulatory insights – what regulations are expected to change and when?
- Using drones in your business – how can it be done safely and efficiently?

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## Hiring a drone services provider? Key liability risks for your business



Posted on Feb 9th, 2018 By Kathryn McCulloch  
Categories: Articles

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Businesses that contract for drone services are not necessarily shielded from liability if the drone operator breaks the law. In many ways, the purchaser of drone services is a passive participant in the flight and the drone operator's actions. The prudent business owner contracting for drone services should consider the various sources of potential liability. Below, we provide some strategies for businesses to manage these risks.

### NON-COMPLIANCE WITH THE CANADIAN AVIATION REGULATIONS

First and foremost, a drone services provider must comply with drone regulations. In general, the *Canadian Aviation Regulations* (CARs) prescribe offences for conducting drone operations that violates principles of aviation safety.

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