

Criteria eases a bit on **consultant vs. employee**, according to this guest expert*.

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Judge's ruling on case may be precedent — by Doug Greenhow, chartered accountant, © 2008

Deciding whether a particular worker is an employee or independent contractor has been a source of continuing dispute and litigation for many years.

Consider Joe. He vacuums furnaces and ducts in homes and gets his work from another business called Dun-Rite. Dun-Rite finds the customers and then sets up appointments for Joe and other workers like him. Once appointments are made, Dun-Rite turns over responsibility for dealing with the customer to Joe. They also supply the vacuum equipment and make a truck available to travel to the work site. Joe collects from the customer and then receives a percentage of the fee for his work.

Is Joe an employee of Dun-Rite or an independent contractor? The tax department argued Joe and other workers like him were employees and assessed Dun-Rite for Canada Pension Plan (CPP) and Employment Insurance (EI) premiums. The combined employee/employer cost of CPP and EI currently equals 14% of gross earnings, to a maximum of \$5,800/year per worker.

The taxpayer appealed the decision and the Tax Court agreed, deciding the workers were independent contractors. The judge in the case provided an excellent summary of the recent case law on this issue, and the decision will likely become a precedent for future worker status cases.

Courts look to intention of the parties

The traditional tests to determine worker status are based on an old case called Wiebe which has been cited in dozens of other cases over the years. Wiebe set out the main factors to decide status - control over the work; who owns the tools necessary to do the work; the chance of profit; and the risk of loss. The tests are fine in theory, but very subjective and difficult to apply in practice. This has led to ongoing uncertainty about whether or not somebody is an employee or contractor in any particular set of facts.

The courts have become increasingly frustrated with these tests and have instead recently begun to focus on the joint intention of the parties. Several appeal court decisions have consistently ruled that workers thought to be employees by the government were actually independent contractors based on the intention of the parties.

If the Wiebe tests do not definitively point to a conclusion about worker status, the courts will now consider the shared intent of both parties as an important factor. If intent is not explicitly stated, the Wiebe tests are instead used as a guideline to figure out that intent. This represents a significant shift in how the issue of employee versus contractor is to be decided.

Should you be a Contractor?

The distinction between an employee and independent contractor has many important implications.

As mentioned earlier, an employee is required to pay CPP and EI premiums. The employer is also required to pay CPP, EI, Workplace Safety Insurance Board (WSIB) and Health Tax premiums based on gross pay. On top of that, the employer is obligated to provide vacation and statutory holiday pay, severance pay, and other benefits. They may also provide health, life and disability insurance, sick pay and pension benefits.

On the flip side, an independent contractor assumes the responsibility for paying income tax and CPP on their own earnings, and has no EI coverage or other benefits generally available to employees. WSIB premiums may be payable by the either the contractor or the principal. Obviously, from the employer's perspective, independent contractor status may offer significant savings in benefit costs.

As a worker, independent contractor status might appeal to you if you are not concerned about job security and benefits. In exchange for accepting this status, you might also be able to negotiate a better pay rate to compensate for lost benefits the employer would otherwise have to pay, plus you will save the cost of EI. But if you want to have EI protection in the event of termination, sickness or maternity, and receive other benefits, you are likely better off negotiating for employment status.

Put it in writing

If you are not clearly an employee and both parties have a shared intent to create independent contractor status, you would be wise to clearly document that intent in writing. As we discussed earlier, the courts will normally respect such an agreement if it truly reflects the relationship between the parties, and it will also prevent the potential for future disagreements in the event of a dispute or termination of the contract.

If you choose the independent contractor route, you should invoice for your services and you will also generally be required to charge GST on your services and make remittances to the government. ❖

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