Measuring the Level of Independence of Your Independent Contractors Beyond the Written Contract

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Introduction: Today's Independent Contractors

The economic crisis of 2008 generated an increased number of independent contractors ("ICs") on the market. The reasons were varied and notably included (i) the need for organizations to maintain headcounts as low as possible and to avoid long-term commitments; and (ii) the difficult employment market for those impacted by massive layoffs who then started to offer their services as ICs in order to survive. As a result, we are now facing a substantial number of ICs working within organizations in a plurality of roles, including in functions that are also performed by employees or that used to be performed by employees.

On another note, the "gig" economy (i.e. contracts for work and services happening online through applications or websites) is growing and is also generating its fair share of ICs. The "gig" economy involves an important number of millennials who are attracted to the online models and the freedom associated with these types of arrangements.

Needless to say, ICs do not enjoy employment benefits and job protection. They also do not generate the same amount of income taxes and statutory contributions for the Government.

While ICs are generally comfortable with the model during the relationship, enjoying lower tax rates and freedom, we are seeing a dramatic increase of employment claims coming from ICs after the end of said relationship. Thus, ICs are more and more claiming unpaid wages, overtime, public holiday pay and vacation pay after the end of their contract. They are also making wrongful dismissal and human rights claims. Often, they are unfortunately able to have their cake and eat it too.

We are also seeing an increased number of cases where tax agencies are pursuing organizations for their alleged failure to have withheld and remitted income taxes and statutory contributions for ICs. It is our opinion that tax agencies will now be pursuing

these cases more aggressively due to the shrinking active population and corresponding reduction of income tax revenues for the Government.

We have summarized the main questions and answers that may assist organizations with the review of their IC relationships and corresponding exposure.

The IC Relationship: Myths and Reality

1. Can I rely on the written Independent Contractor Agreement — the individual agreed to it and knew from the beginning? The IC Agreement is important but is not absolute. The determination of an IC versus employment relationship is mostly factual and the IC Agreement will only constitute a secondary element of the analysis. Although the individual might have agreed in the beginning and was very well aware of what he was agreeing to, a Court would mostly look at the circumstances leading to the execution of said agreement. If the agreement was imposed and its terms and conditions could not be negotiated, it is very likely that a Court would overlook said agreement and proceed to the analysis of the relationship from a factual standpoint. Furthermore, an individual who used to be an employee, but whom, at the organization's request, continued to provide his/her services as an independent contractor, may likely be qualified as an employee.

2. What is the most important factor? The absence of control exercised over the individual. The level of control is key in an employer-employee relationship. An independent contractor should be autonomous in the performance of the services. Each of the following elements could lead to an employment relationship determination, constituting clear control over the individual:

a. The individual receives precise and detailed instructions from the organization's representative and is closely supervised in the course of his/her work.

b. The individual must follow specific trainings, procedures and/or processes imposed by the organization to achieve the result.

c. The individual performs the same tasks as other employees of the organization, and in the same manner.

d. The individual's performance is evaluated and is subject to feedback.

e. The individual is subject to disciplinary measures.

An IC should only be given general requirements or standards for a finished product or result and should remain in control of the manner and process to achieve said result.

The accumulation of the following elements may also lead to the conclusion that the organization exercises a strong level of control over the individual:

a. The individual works from the organization's site.

b. The working schedule is imposed to the individual.

c. The individual must request vacations and advise the organization's representative when he/she takes a day off.

d. The individual cannot work for other clients.

3. What equipment can we supply to an IC? As less as possible. The following are examples of equipment which, if provided by the organization, could constitute an additional argument to support an employment relationship determination:

a. Access to company's email system and internal systems

b. Tools required to achieve the work

c. Car

d. Uniform or clothing

e. Smartphone, tablet or cellular phone

f. Laptop, computer, printer, scanner, etc.

g. Maintenance of the tools and equipment used by the contractor paid by the company

4. What other elements could lead to an employment relationship determination?

a. Any clothing or device with the company's logo imposed on the worker, notwithstanding who's paying for it.

b. Absence of opportunity for profit: no investment from the contractor, fixed rate of pay which does not allow the individual to increase his/her chance of profit by being more efficient.

c. Absence of risk of loss: the worker's actions may not create direct liability for the worker.

d. Integration of the worker within the organization (for example, works side-by-side with employees of the organization, has been working for a long period of time in the same role, is invited to company-sponsored events offered to employees).

e. Email address and business card identifying the contractor with the company.

f. The absence of invoicing. An IC should always invoice the company for the services.

g. The worker's state of vulnerability.

h. The worker's low expertise level.

5. What is the impact of the incorporation of the IC? The incorporation is an important element but is not absolute. If the organization forced the individual to become incorporated or paid or arranged for the incorporation, a Court could conclude to a

scheme and/or the exercise of control, and, as a result, to an employment relationship. On the other hand, if the IC was previously incorporated and used this incorporation with other clients, this element could strongly favour an IC relationship. Furthermore, if the IC requested an IC Agreement and requested to use its incorporation to enjoy more favourable tax rates, it is very likely that the Courts will conclude to an IC Agreement, especially in an employment claim context.

6. What is the impact of the fact that the IC employs other individuals to work on the account? This element would almost always lead to IC relationship since the Courts have concluded that one cannot be employer and employee at the same time.

As previously mentioned, organizations will have to be more vigilant with the use of IC agreements, especially when we consider the increasing number of employment claims made by independent contractors and government agencies on their behalf.

Although we have attempted to be as thorough as possible, each case must be assessed individually. Different industries may also have their specificity which must be taken into account.

By

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