

Has independence had its day?

While dependent contractors are not fully-fledged employees, they're entitled to reasonable notice – which can surprise companies

The difference at law between an employee and an independent contractor is as night is to day, or black to white.

In employment law, the results of being an employee are opposite to those of being an independent contractor. One is either an employee or an independent contractor; one cannot be both simultaneously in a single service-rendering position. A worker is one or the other. There remains, however, a large and increasingly populated grey area, where the status of the worker could go either way depending on the presence, or lack of, certain factors.

Fortunately, there is emerging law that changes things.

Employers often see great advantage in having certain services performed by workers to, or for whom, they owe few rights and duties; it gives the employer greater freedom. Employees can be cumbersome, they are owed many rights and duties. There is employment standards legislation which sets out a huge array of employee rights, such as minimum paid vacation, paid leaves, minimum termination provisions, and more. There are also the human rights code, privacy legislation, employment insurance, Canada Pension



EMPLOYMENT ISSUES

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Plan, Revenue Canada, workers' compensation, private health and insurance benefits, and, ultimately, common law.

Not only do employees need significant administrative capacity to hire, maintain and terminate the employments of employees, the entire relationship is complicated with ever-changing technical-legal issues beyond the capacity of most employers to administer.

So, enter the independent contractor, the low maintenance alternative to employees. There is no legislation like that for employees that specifically defines the rights of a true independent contractor; nor are there any employer duties to true independent contractors in regard to employment insurance, workers' compensation, Canada Pension Plan, Revenue Canada, or such.

Usually, termination of the arrangement can be any period of time agreed to, without regard to

standards set out in employment legislation or common law, and is typically short, under 30 days.

Employers, wishing to save themselves the trouble of all the rights and duties owed to employees, have taken to hiring workers they call "independent contractors." A written agreement specifically defines the worker as independent contractor.

Problem solved, right?

Not necessarily. In this space is emerging a legal entity known as the "dependent contractor." A dependent contractor is not a full-fledged employee for all purposes, but is entitled to reasonable notice where an independent contractor would not be.

As the dependent contractor emerges, it is becoming clear that a worker can acquire some of the core rights of employment, yet stay firmly entrenched in the middle of the grey area, being neither an in-

dependent contractor nor an employee. The B.C. Human Rights Code seems to have anticipated this result. It defines the term "employment" to include the relationship of principal and agent, if a substantial part of the agent's services relate to

free consent. Everything seemed straight-forward. The relationship lasted 12 years.

The relationship ended badly. The worker sued. The court found that the worker was neither an employee nor an independent contractor. He was a dependent contractor. This was based on the length and financial dependence of the relationship. Accordingly, the dependent contractor was owed reasonable notice of termination. The agreement stipulated only 30 days notice. But the court ruled that, even though the parties agreed to 30 days, it was so much less notice than reasonable notice, that the 30 day clause was struck out as unconscionable, and, in its place, reasonable notice, in this case nine months notice, was inserted.

You can imagine the surprise of the employer.

Even clear, unambiguous worker agreements entered into freely are not certain. The longer some worker relationships continue, the more likely to create a dependent contractor. So employers beware. ■

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Independent contractors

have employment discrimination rights under the human rights code

the affairs of one principal.

Employers are often surprised to learn that independent contractors have employment discrimination rights under the code.

A recent case illustrates the power of the dependent contractor. There was a written agreement that thoroughly defined the worker as an independent contractor. The worker was required to purchase and maintain his own fleet of trucks, and hire and pay his own employees to perform the services. The agreement provided termination of the services on 30 days notice. The agreement was clear and unambiguous, entered into by