

CONTRACT WORKERS AND THE LAW

By: Lauren M. Bernardi

Confusion over hiring contract workers is causing many costly legal errors for employers. The popularity of contract work stems in large part from the flexibility and the reduced costs it can offer. But the benefits of these methods may be more illusory than real -- in many cases they are legal time bombs ready to explode on unsuspecting employers.

Contract work can take several forms. You can hire employees on a temporary basis, either directly or through a temporary help agency, or you can hire independent contractors. Independent contractors provide services to your organization without being employees.

Independent Contractors

In an effort to reduce payroll costs, many managers have entered into independent relationships, often with former employees. Independent contractors like this arrangement as they are able to enjoy tax deductions to which they would not be entitled as employees. The organization benefits by reducing many of the costs associated with having employees, such as benefits and payroll taxes, like employment insurance and CPP.

Unfortunately, the parties to these arrangements are often unaware of one very important point -- the government and the courts don't care what you call your relationship. They look only to the true nature of the relationship and usually, they find it to be an employment relationship.

The test of whether you are in an employment or independent contractor relationship has sometimes been referred to as the "duck test." If a bird looks like a duck and acts like a duck, it's a duck. Likewise, if an individual looks like an employee and acts like an employee, he or she is an employee.

The consequences of inappropriately calling an employee an independent contractor can be quite significant. For example, you may have to:

- pay overtime and vacation pay that accrued during the term of the relationship
- provide notice of termination applicable to employees
- pay a fine of up to \$50,000 for not complying with the Employment Standards Act
- pay the full cost of any accident benefits to which an employee would have been entitled under the Workers' Compensation Act and possibly face a fine if the "independent contractor" has had an unreported accident
- pay the whole amount of CPP contributions that you should have deducted, plus interest and penalties
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Even true independent contractor relationships do not completely absolve you of obligations towards the contractor. In one case, a window washing company retained the services of an independent contractor to clean the upper windows on a high-rise condominium. In the first year, things proceeded smoothly. The second year, the contractor failed to properly secure his safety equipment and fell to his death. The window washing company was charged and convicted under the *Occupational Health and Safety Act* for failing to provide a safe work environment. The court stated that the Act applied to independent contractors and not just employees.

The courts have also held that independent contractors are entitled to protection under human rights laws and to notice of termination of the relationship, although the notice period may be shorter than it is for employees.

Fixed Term Employees

Fixed term contracts are another area of confusion.

The typical employment relationship is for an indefinite period of time. The flip side to this is an employment relationship with a defined end, such as six months or one year. It can also be project based, i.e., it ends when the employee completes a particular project. This is called a fixed term contract.

Unless you specify from the outset that you are creating a fixed term contract, you are deemed to have entered into an indefinite term contract.

The basic difference between the two is that unlike the indefinite term contract, when a fixed term contract ends, there is generally no obligation to provide notice of termination.

A fixed term contract employee is still entitled to the usual legal rights of employees. However, it is fairly customary for employers not to provide benefits (such as medical benefits and paid vacations) to fixed term employees but to provide a slightly higher salary to compensate for this lack of benefits.

Handled properly, these arrangements work well. They provide greater flexibility in hiring employees to meet peak work loads, without creating a continuing legal obligation. Mishandled, they can become costly mistakes.

An employee who works even *one day* past the end of the fixed term becomes an indefinite term employee and is entitled to all the associated rights, including the right to reasonable notice of termination.

Employers may also have to pay to the end of the fixed term of the contract, if it is terminated early. In one case, an employee who was hired to work under a five year contract was terminated after seven months. She sued for wrongful dismissal and the court awarded her notice to the end of the five year period!

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Using fixed term contract employees and independent contractors is an excellent way to gain flexibility and have your work performed on a just-in-time basis -- as long as you properly manage these relationships.

Managing Contract Workers

While using contract workers may seem fraught with difficulty, there are ways you can be proactive in preventing legal battles:

1. *Get it in writing* -- preferably in the form of a contract. This will help clarify the terms of your relationship and will force you to consider all of its implications.
2. *Get legal advice*. Do this before you enter into the relationship so that you can identify and address potential problems. It's far less expensive to get legal advice at this stage than to pay a lawyer when a legal battle arises.
3. *Analyze your motives*. The courts take a dim view of relationships that are created to defeat employment obligations.
4. *Make real changes to the relationship*. Succeeding in these new arrangements often requires a new set of rules. For example, if you really want to change an employee into an independent contractor you must be prepared to give up a great deal of control over the work done by that person.
5. *Conduct a cost benefit analysis*. While legal issues are important, the benefits arising from these relationships may outweigh concerns regarding potential legal problems.
6. *Monitor the development of your relationships*. What may start out as an independent contract arrangement may develop into an employment relationship over time. Similarly, you may unintentionally allow a fixed term contract to expire without considering whether or not you want to renew it.
7. *Keep your distance*. Do not integrate independent contractors into your workplace, such as by giving them business cards and office space, without considering how that will effect the nature of your relationship.

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About Bernardi Human Resource Law

At Bernardi Human Resource Law we know that today's response to your workplace challenges can become tomorrow's precedent. We think ahead and help you make the best decisions to meet your needs both now and in the future.

Balancing your legal obligations and business objectives can be hard. We act as your trusted advisors; not simply as lawyers but as an integral part of your management team. Through our practical advice, workshops and articles, we arm you with the knowledge and tools to address rapidly changing human resource issues.

Above all, we're on your side. We work with you to prevent costly problems and when litigation is necessary, we act as strong advocates to protect your interests.

Bernardi Human Resource Law: forward thinking at work™.

About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

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