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# Workplace Relationships



## Accessibility and Convenience

**Lancaster, Brooks & Welch LLP** have offices in both St. Catharines and Welland which are conveniently located in the downtown core.

Regular office hours are Monday to Friday from 8:30am to 5:00pm.

We are happy to make appointments at other times to satisfy our clients' needs.

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*The economy has forced employers and employees alike to rethink the way they conduct business. Traditionally, firms have maintained a set workforce on a continuous basis to complete required work. Employers may not now need a permanent workforce and are seeking services of people other than as "employees" to reduce costs. In response, individuals are willing to work as independent contractors. As a result, this explosion of non-traditional employment relationships has become legally complex.*

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## Characterizing the Relationship

The starting point of any work relationship involves an analysis of how one should characterize and structure the relationship between the individual and the company. This can be a complicated process. Just characterizing the relationship as one of employer/employee or independent contractor is not enough. It is the substance of the relationship, its terms and conditions and the conduct of the parties that determine the analysis.

## Elements of the employer/employee relationship

Regardless of the type of contract agreed to (verbal, written, fixed or indefinite term), the elements characteristic of the employer/employee relationship are consistent.

- The employer has the authority to select an individual for employment
- The employer has the ability to determine the payment of wages or other remuneration, including hours of work
- The employer has the right to control the employee with respect to the type, manner and timing of work; a) training is often provided by the company; b) the company owns and provides the supplies, tools and materials
- The employer has the right to suspend or discipline the employee
- The employee participates in company benefits and pension plans
- The company carries the risk of financial loss

The list is not exhaustive, but the presence of some or all of these factors will generally indicate an employer/employee relationship has been established.

The primary benefit to the employee of the employment contract is the protection provided by minimum standards or statutory rights and obligations imposed by law through employment standards legislation, (i.e. CPP and EI) and the development of common law principles.

## Independent contractors

Self-employed is a term used to describe people who are in business for themselves, commonly referred to as an independent contractor or a consultant.

In contrast with the employer/employee contract, the self-employed person enters into a contract for services, usually for a definite period,

and the duties owed by the independent contractor are limited in nature. Subject to the particular contract, independent contractors generally owe no obligations of confidentiality or loyalty to those receiving the services, except a general duty of good faith.

Although no one factor determines the nature of the relationship, the following non-exhaustive list of factors is indicative of an independent contractor arrangement:

- The individual is responsible for their own training, licensing, accreditations
- There is no exclusivity of employment
- The individual provides their own tools, supplies and materials
- The individual sets their own hourly rate
- The individual invoices the company for work performed
- The individual manages their own income tax and insurance
- The individual carries the risk of financial loss
- The individual is responsible for expenses incurred in performance of the work
- There is generally no restriction on hours of work or vacation time
- There is minimal supervision or control over the individual's activities

## Advantages and disadvantages of the independent contractor relationship

For the hiring company, there are a number of benefits in having an independent contractor. The company is not compelled to make employer's contributions to CPP and EI, and is unlikely to provide group benefits and statutory entitlements such as vacation or overtime pay and notice/severance pay. This results in a financial saving in terms of personnel and administrative time.

Hiring an independent contractor also allows the company to maintain a more flexible workforce. It can hire highly-specialized staff for short-term projects. However, these services are often more expensive as hourly fees can be greater than those of regular full-time employees.

The company will owe no notice or severance obligations to the individual and may terminate the relationship without cause or reasonable notice, subject to specific terms of the agreement. However, the company will not have as much control over an independent contractor. It does not have the right to closely monitor the work or discipline the worker. The contractor does not owe the company any fiduciary responsibilities, and the company will not have the right to restrict their ability to work for competitors. The contractor has



the freedom to decide whom to work for, and when and how to work. The most attractive ingredient is increased freedom to contract with all the risks and rewards. Generally speaking, the independent contractor is free to contract with other entities during the course of the contract. Statistically, the independent contractor is paid 20% to 40% more per hour than employees performing the same work. This is in part because the hiring party makes considerable savings by foregoing contributions to employment and worker safety insurances and health benefits as well as other mandatory tax deductions for the common employee.

There are no salary tax deductions. This means the independent contractor can keep money longer without having to turn it over to Revenue Canada, resulting in improved cash flow. The contractor is entitled to business-related tax deductions which must be viewed as reasonable in amount and an expense ordinarily incurred by the specific business being conducted. Common deductions include office rent, travel, entertainment and meal expenses, marketing and promotional expenses, equipment and insurance costs. In comparison, an employee's work-related deductions are severely limited.

However there is little or no job security afforded to the independent contractor. Ingrained in the employer/employee relationship is the assurance that the employee is paid as long as employed, even if business is slow. An independent contractor must promote his/her business and generate the work to earn a living.

The contractor will not qualify for benefits nor benefit from any statutory rights such as overtime, vacation and notice or severance pay. Nor are they eligible for employment insurance benefits.

Finally, the independent contractor bears the risk of loss. Generally, they are personally responsible for all debts and liabilities that arise during the course of business depending on the manner in which his/her business is arranged.

### Legal formalities involved in establishing an independent contractor relationship

In some instances, the independent contractor may have to obtain a license to carry on business from a municipality, the Province of Ontario or the Government of Canada. Municipal licenses may be required by electricians, plumbers, taxi cab drivers, etc. An example of those activities requiring registration or a license under provincial law, include employment agencies, motor vehicle dealers and real estate brokers.

Municipalities also have the legal right to establish rules on what types of activities can be carried out in particular areas because of zoning by-laws such as residential, commercial and industrial designations.



Generally speaking, the municipality will permit an individual to carry on a small business at their home so long as it is used primarily as a residence and the business does not negatively affect neighbours.

### Business name registration

If an independent contractor decides to carry on business under a name or style other than his/her own name, it must be registered with the Ministry of Government and Consumer Services. Registration is generally for a period of five years and may be renewed. An amended registration needs to be filed whenever any change takes place in the information therein.

### The incorrect characterization and ensuing costs

Regardless of what the parties intended at the time they entered into an agreement, if it is found the relationship can be characterized as an employer/employee relationship as opposed to an independent contractor, there can be considerable consequences to the hiring company. Various pieces of legislation, including the *Labour Relations Act*, the *Employment Insurance Act*, *Canada Pension Plan Act*, *Employment Standards Act*, *Workplace Safety and Insurance Act*, *Income Tax Act* and *Employer Health Tax Act*, make provision for the consequences and penalties to be applied where an employer has failed to meet its obligations.

Generally speaking, Revenue Canada will assess the company for unpaid Canada Pension Plan contributions and Employment Insurance premiums – both the employer's and the employee's shares – as well as income tax which should have been withheld going back up to six years, plus

## Employment Law Department

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interest and penalties up to 20% of the amount that should have been withheld and remitted.

For the individual worker, this situation may give rise to termination of employment because the company does not want to pay the additional expenses involved in the employer/employee relationship.

### Practical considerations: is a written agreement required?

As always, a signed agreement between parties may assist in determining whether the individual is a "contract employee" or an "independent contractor". However, an agreement or contract in writing that defines the relationship is not enough. Each administrative tribunal and court will apply its own criteria to make the determination based on all available facts. The benefits to such an agreement are numerous and assist the parties in clearly defining their roles, duties and responsibilities including any arising from a breach of such contract.

### Employment law evolution: the intermediate worker

Assuming that the relationship does not fit squarely within a "true" employer/employee model, a number of Canadian courts have recognized an intermediate or hybrid class of workers. There are several types of working relationships that exist on a type of continuum. This intermediate category will usually be found to exist where elements of both employer/employee and the independent contractor relationship exists. The courts will consider a variety of factors such as the duration and permanency of the relationship, the degree of reliance or closeness of the relationship and the degree of exclusivity. None of these factors are by themselves conclusive and there is no requirement that each be present in order to classify the relationship as hybrid in nature.

The Ontario Court of Appeal has confirmed that if there is no agreement between the parties with respect to rights and entitlements triggered by termination of the relationship, the intermediate employee may be entitled to reasonable notice of termination. Some courts have confirmed that these individuals will owe a duty of fidelity to the company.

### Conclusion

The increased need for a more flexible workforce has forced many individuals to review and seek alternatives to traditional means of earning a living. In deciding which route to take,

you are advised to be aware of all the advantages and disadvantages of each method of employment. You should seek the assistance of legal counsel and an accountant to determine which is best suited to your objectives. When starting a new relationship, ensure there is a common understanding of all rights and obligations arising therefrom. Consider the use of a written agreement clearly stating the nature of the relationship and the parties' respective obligations should it terminate. This will ensure both parties receive what they bargained for.

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## Employment Law Department

**Leanne E. Standryk:** Ms. Standryk is the senior partner of the Firm's Labour, Employment and Sports Law Department. She acts for a variety of employers in the private, charitable, not for profit and public sector. She is experienced in the full range of employment and labour issues including employment contract negotiation, terminations, workplace restructuring, labour relations, collective bargaining, wrongful dismissal, workplace privacy issues, occupational health and safety, human rights and human resource policy development, etc. In addition to her negotiation and counsel experience, Leanne provides assistance to our Corporate lawyers regarding labour and employment matters that arise during the purchase and sale of a business. Leanne also acts for several sports organizations regarding contract negotiation, athlete appeals and risk management. She has experience before the SDRCC and has acted as a panel member regarding appeals in amateur sport.

**Civita M. Gauley:** Vita is a Partner at Lancaster, Brooks & Welch. She was called to the Bar in 2012 and is a member of the Labour & Employment team. Through her focus on detail, positive outlook, motivation and energy, Vita offers her clients great skills and experience.

**Emily V. Keene:** Emily is a proud Niagara resident, having moved to the region at a young age. Emily was called to the Ontario Bar in June 2014 and joined Lancaster, Brooks & Welch. Emily is committed to providing excellent legal services, including understanding the legal issues clients face, offering proactive approaches for resolution, and advocating with strong legal writing and communication skills.

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