



INDUSTRIAL WORKERS OF THE WORLD

VANCOUVER GENERAL MEMBERSHIP BRANCH

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Employee or Independent Contractor?

This Employment Standards Factsheet is also available in a [printable pdf format](#)

Who is considered an employee?

Section 1 of the *Employment Standards Act* (the Act) defines an employee as follows:

Employee includes:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall.

The Act applies to those persons who are employees, but it does not apply to persons who are independent contractors. A person who is an independent contractor is considered to be self-employed.

Just because someone is called an independent contractor does not mean that he or she is one.

Persons working in an employment relationship are employees for the purposes of the Act, regardless of whether they are employed on a part-time, full-time, temporary, or permanent basis.

Determining who is an employee within the meaning of the Act is based on various tests that have been developed by the courts, the Employment Standards Branch and the Employment Standards Tribunal.

These tests include:

Control — Is the person under the direction and control of another regarding the time, place, and way in which the work is done? Is the person hired, given instruction, supervised, controlled or subject to discipline? Did the person answer a help wanted ad, was told what to do, how to do it, and when to do it? Did the person have to do the work him or herself, or could that person give the

work to another to do? Does the person perform work normally or previously performed by an employee?

The greater the degree of control, the greater the likelihood of the person being found to be an employee.

Ownership of tools — Does the person use tools, space, supplies and equipment owned by someone else? If so, this would indicate an employment relationship. However, it is recognized that some employers require employees to provide their own tools or vehicles.

Chance of profit — Does the person have a chance of profit? If their income is always the difference between the cost of providing the service, and the price charged for the service, the worker may be someone other than an employee.

Risk of loss — Is the person at risk of losing money if the cost of doing a job is more than the price charged for it? If not, this would indicate an employment relationship.

Payment — Does the person receive payments of regular amounts at set intervals? Does the person receive payments regardless of customer satisfaction or customer payment? If so, this would indicate an employment relationship.

In general, the degree to which the party who pays for the service provided controls the supply of material and tools, and retains direction and control of the activities, increases the likelihood that the Director will find the relationship to be one of employer/employee.

Common Misunderstandings

A common misunderstanding is that one or a combination of the following factors establish an independent contractor relationship:

Agreement: A person who signs an independent contractor agreement is not necessarily an independent contractor. It is not what you say you are, but the reality of the work relationship that determines if you are an employee or not. In addition, any agreement to waive employment standards entitlements is prohibited by the Act.

Charges GST: GST filing numbers are provided upon request, and the requester may or may not be in a lawful position to charge GST.

No Deduction for Income Tax, EI or CPP: It may be that the employer is simply breaking two laws by not complying with the Income Tax Act and the Employment Standards Act.

Person sets own hours and is not actively supervised: The business may simply be informally run with an emphasis on getting results rather than operating under strict rules of attendance and control.

Works for several businesses: A person may be “moonlighting.”

Submits a bill for labour provided: It may be nothing more than a record of hours worked; in effect, a time card.

Drives his or her own vehicle/provides own tools: It may be a condition of employment that a person provides a vehicle so as to perform the work. In some sectors employees are expected to provide a set of tools for their use at work.

Payment by commission or other forms of pay incentive do not necessarily indicate a chance of profit or risk of loss; these are simply ways of tying pay to productivity.

Volunteers

Volunteers are persons who choose to provide services for non-profit organizations or charities for which they do not expect compensation. In a profit-based organization, any person allowed, directly or indirectly, to perform work normally done by employees is considered to be an employee, not a volunteer.

Examples:

1) A drywall business hired a worker as a painter. The company had the worker sign a written agreement in which the worker declared himself to be an independent contractor. The company bought the paint, and supplied the brushes, the ladders and other equipment. The company paid the worker an hourly rate. The company told the worker what to do, when to do it and decided if it was done satisfactorily. The worker did not have a business license.

It was decided that the worker was an employee because:

- He performed work normally done by an employee.
- The work was integrated into the company's business.
- The company had direction and control over the worker.
- The worker had no chance of profit.
- The written agreement had been signed as a way to collect unpaid earnings.

2) A sales person who sold products on behalf of one business, operated with limited supervision in the territory assigned to him. He was paid on a commission basis and did not have statutory deductions taken from his earnings. He used his own vehicle, and from time to time his own computer for business purposes.

The occasional use of personally owned computer programs and the failure to take statutory deductions from earnings indicate the person is an independent contractor. However, the degree of control, the lack of chance of profit, and the integration of the person into the business resulted in a finding that the person was an employee.