

INDEPENDENT CONTRACTOR vs EMPLOYEE

INTRODUCTION

The Board must often make a determination on whether an individual is an employee within the meaning of the [Code](#). One of the questions arising in these determinations is whether or not an individual is an employee or an independent contractor. This becomes important in determining whether an individual is part of a bargaining unit (employee) or not (independent contractor).

This policy covers:

- statutory definitions;
- what is an independent contractor;
- the test to determine if a contractor is an employee; and
- common forms of contracting.

This policy does not address the question whether the true employer of employees is the contractor or someone higher in the contract chain. See: [[True Employer vs. Subcontractor, Chapter 24\(f\)\(ii\)](#)]. Nor does it deal with common employer declarations affecting subcontractors. See: [[Spin-offs, Chapter 26\(f\)](#)].

STATUTORY DEFINITIONS

The [Code](#) does not define independent contractors. It does define employee and employer.

1 In this Act,

(l) "employee" means a person employed to do work who is in receipt of or entitled to wages ...

(m) "employer" means a person who customarily or actually employs an employee;

These definitions are of little assistance in determining whether an individual is an employee or an independent contractor. The [Code](#) does define "wages."

(aa) "wages" includes any salary, pay, overtime pay and any other remuneration for work or services however computed or paid but does not include tips and other gratuities.

Section 12(3) of the [Code](#) gives the Board exclusive jurisdiction to determine whether:

- 12(3)(a) a person is an employer,
- (b) a person is an employee,
- (o) a person is included in or excluded from a unit.

Whether a person is an employee or an independent contractor involves an assessment of all the circumstances.

WHAT IS A INDEPENDENT CONTRACTOR?

Often the question of a person's employee status arises when an employer claims it uses the person or person's company as a **contractor**. The process of engaging another entity to do one's own work is called "contracting" or "subcontracting". A contract is normally signed with a contractor. The contract will state the terms, conditions and type of service provided by the contractor. Contracting is an accepted practice. In these cases, the Board must then determine if the person is an independent contractor or an employee.

An independent contractor may be an individual or a corporate entity. An independent contractor is a person carrying on an independent business. The main distinction between an independent contractor and an employee is whether or not the principal retains the power not only to direct what work is to be done but also to control the manner of doing the work. If a person can be overseen and directed as to the manner of doing their work such person is not an independent contractor.

TEST TO DETERMINE IF A CONTRACTOR IS AN EMPLOYEE.

In determining whether an employer-employee relationship exists in any given situation, the Board considers several factors. These factors measure the independence of the individual concerned. The main test used by the Board is the four-fold test applied by the Privy Council in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161. The four factors considered are:

- control;
- ownership of tools;
- chance of profit; and
- risk of loss.

This test determines if the contractor is **independent** in the work relationship with the contractor. The Board must review the contract signed by a subcontractor carefully. They must view how the relationship operates in practice to determine which description best fits the contracting party.