



## ARE YOU REALLY AN INDEPENDENT CONSULTANT? 21 KEY FACTORS

The consequences of failing to establish an enforceable independent consulting relationship, and instead being treated as an employee, are potentially disastrous. Consultants found to be employees may not be able to deduct reasonable business expenses. Clients of consultants found to be employers may be penalized for failing to deduct and remit source deductions and other contributions and become subject to applicable employment standards relating to, among other things, statutory and common law termination compensation.

Courts and regulators will examine all facts forming the "four corners" of the business relationship. No hard rules or "bright-line" tests exist.

Set out below is a list of 21 "key factors" which courts and regulators may examine in determining whether the parties have created an employment or consulting relationship.

This publication has been designed for our firm's consulting clients as a general educational tool in the preparation of their standard consulting agreements.

| <b>FACTORS...</b> | <b>EMPLOYEES...</b>   | <b>CONSULTANTS...</b>   |
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| <b>HIRING</b>     | Employees are hired by employers to provide services and generally do not provide services through a corporate vehicle.                 | Consultants are required to hire their own labour and supply services directly to their clients. Consultants may be incorporated and/or register a business/style name. |
| <b>PAYMENT</b>    | Employees are usually paid at regular intervals (via cheque or direct deposit) on a fixed or hourly basis.                              | Consultants are typically paid upon submission of invoices and expense reports.   |
| <b>EXPENSES</b>   | Employees are not required to incur employment-related expenses on their own behalf and will typically be reimbursed by their employer. | Consultants often incur their own expenses (without reimbursement) and bear the risk of profits/losses.   |

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| <b>HOURS</b>                 | Employees are required to follow the work schedule established by the employer. Employees typically work exclusively for their employer.  | Consultants typically determine their own work schedule in completing the work product. In carrying on a business, Consultants may have multiple clients and widely market their services rather than provide services exclusively to one client on a long-term basis. |
| <b>WORK PRODUCT</b>          | Employees are required to create or perform the work product at the location and in the manner specified by the employer. Typically, the work product will be owned by the employer.    | Consultants often control the manner and location of the completion of the work product. Unless altered by contract, Consultants are usually the owners of any work product authored by them.  |
| <b>TOOLS &amp; EQUIPMENT</b> | Employees are generally not required to supply their own supplies and equipment.  | Consultants often supply their own tools and equipment and bear the economic risk of insuring and maintaining all such tools/equipment.  |
| <b>METHODOLOGY</b>           | Employees are required to follow the employer's methodologies in the completion of the work product.  | Consultants often completely control the methodologies involved in completing the work product.  |
| <b>SUPPORT SERVICES</b>      | Employees are not required to personally incur the costs of third party service providers to complete the employer's work product.  | Consultants typically bear the cost of all third party labour and services required to complete the work product.  |
| <b>DURATION</b>              | Employees are often hired for an indefinite term.   | Consultants often are retained for a specific project or purpose and/or a specific period of time.   |
| <b>BENEFITS</b>              | Employees are usually entitled to "employment benefits" including group medical, disability and life insurance coverage, stock option/share compensation programs and profit sharing or | Consultants do not participate in typical employment benefits and plans or periodic employee events and have no entitlements to sick pay, vacation pay, etc.   |

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|                           | other bonus plans.  |  |
| <b>DISCIPLINE</b>         | Employees are subject to employer disciplinary action including "for cause" termination of employment.  | Consultants are not subject to any disciplinary action except termination or penalty provisions under their specific consulting agreement.   |
| <b>POLICIES</b>           | Employees are subject to all policies of the employer governing the work environment.   | Consultants often are not subject to any existing policies applicable to employees (except where specified in their consulting agreements).  |
| <b>BUSINESS NUMBERS</b>   | Since they are not "carrying on a business", Employees are not required to obtain GST or other typical business numbers or permits.   | Consultants, whether incorporated or not, will typically be registered to collect and remit GST, PST, etc., based on the services that they provide and will obtain all applicable regulatory, tax and business numbers and permits. |
| <b>LEGAL DUTIES</b>       | Employees (especially senior employees) are subject to legal duties to remain loyal, to refrain from competing with their employer, to preserve all confidential information and to act generally in their employer's best interests. | Unless provided by contract, Consultants often will not be restricted by common law duties applicable to employees.  |
| <b>DOCUMENTATION</b>      | Employees are subject to source deductions, receive T4 slips and will receive a record of employment upon termination.  | Consultants do not receive T4 slips or any record of employment forms and are not subject to source deductions based on fees for services provided to their clients.   |
| <b>NATURE OF SERVICES</b> | Employees' services are often integral to the business of their employers.  | Consultants often provide services which are ancillary to the core business activities of their clients.   |
| <b>LEGAL PROTECTIONS</b>  | Employees are entitled to minimum protections under provincial employment standards legislation relating to vacation pay, termination pay, overtime pay, etc.   | Consultants do not have the benefit of statutory employment-related legislation and need to specifically protect their interests by contract.  |
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| <b>SET-OFF RIGHTS</b>  | Employees are generally not subject (under applicable employment standards legislation) to rights of set-off against wages due to them by their employers.  | Consultants may be subject to set-off claims against the fees owing to them by their clients (particularly where such rights are contained in their consulting agreement).  |
| <b>EXPOSURE</b>        | Employees are legal agents of their employers and will usually vicariously bind their employers for work-related errors and omissions arising within the scope of their employment.   | Unless provided by contract, Consultants often are not the "agents" of their clients and have no authority to bind their clients to third party obligations (although they can bind themselves to third parties).   |
| <b>NON-COMPETITION</b> | Employees are afforded greater flexibility by law to compete with their former employers as Canadian courts are reluctant to enforce broad non-competition and non-solicitation covenants against former employees.             | Where stipulated by contract, Consultants may be legally restricted by broad non-compete and non-solicit covenants following the termination of their projects or contracts. However, the enforceability of such restrictions will be subject to standards of "reasonableness" in light of the protection actually required by the client following the termination of the consulting relationship. |
| <b>TRANSFORMATIONS</b> | Employees who desire to "transform" themselves into Consultants may find their new consulting relationships more easily challenged in court especially where the primary facts and nature of the relationship have not changed. | Consultants who desire to "transform" themselves into employees typically will have less difficulty creating enforceable employment relationships.  |

*This publication is provided for informational purposes only and is not intended as legal or professional advice to any particular reader. Readers are cautioned to seek the professional advice of an experienced lawyer and/or accountant regarding their own specific circumstances.*