



Little Black Book Of **EMPLOYMENT**

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Note From The Author:

It may be difficult to determine whether an individual is an employee or an independent contractor in the work setting.

Both independent contractors and employees have different rights and obligations.

Employees have certain rights protected by legislation, the Employment Standards Act, 2000, S.O. 2000, c. 41, whereas independent contractors are generally entitled to what they have negotiated in their contracts.

Whether you are an employer or you are working for an employer it is important to know whether you are an independent contractor or employee as this will determine your rights.

The questions and answers below shall highlight the distinctions between independent contractors and employees.

Question:

What is an employee?

Answer:

The Employment Standards Act defines who an employee is. The Act provides that, among other things, an employee is a person who performs work or supplies services to an employer for a wage.

Question:

What is an independent contractor?

Answer:

An independent contractor is typically a person who is in business for herself or himself but is providing services to an employer for a fixed sum.

Question:

Shouldn't my contract decide whether I am an employee or an independent contractor?

Answer:

A well drafted contract should indicate whether an individual is an employee or an independent contractor. However, just stating that an individual is one or the other is not enough. When courts are called upon to make a ruling on an employment dispute, they look to a number of factors to establish

whether a person is an employee or an independent contractor regardless as to what is stated in a contract.

Question:

What are some of the factors that would indicate that I am an employee?

Answer:

Control - Employers typically exercise a greater level of control regarding employees' work. Employees are often given instructions from their employers as to how to complete their work assignments and when they must be completed. Employers also generally provide employees with the tools, skills and materials needed to complete their work.

Question:

Can an Employer exercise a similar level of control over an independent contractor?

Answer:

Independent contractors are in business for themselves. They provide their services to an employer and in doing so they determine how best to complete their tasks. Employers do not exercise the same level of control over independent contractors. Independent contractors not only determine how best to complete their assignments

but also typically provide most or all of their own tools and equipment and apply their own judgment. Additionally, independent contractors, unless specifically limited by contract, can subcontract their work to other individuals whereas employees cannot.

Question:

Does my pay determine whether I am an employee or independent contractor?

Answer:

Pay - Employees are typically paid a fixed wage delivered at the end of a pay period (usually monthly or bi-monthly) whereas independent contractors typically provide the employer with invoices for services rendered and are paid subject to those. Additionally, employees typically have statutory deductions including Employment Insurance ("EI") and Canadian Pension Plan ("CPP") deductions made from their wages. Independent contractors generally bear the responsibility of making these payments on their own since they are independent businesses providing services to an employer. However, the courts have decided that where an employer and an individual have agreed that the individual makes its own EI and CPP contributions solely for tax

purposes, an employer-employee relationship may still exist.

Question:

Is there a difference in the way an employer can discipline an employee and an independent contractor?

Answer:

Discipline – An employer can discipline an employee in a number of ways. As an employee you can be subject to warnings, suspension and ultimately termination. However, an employer cannot discipline an independent contractor. If an independent contractor is in breach of his or her obligations the only recourse often left to the employer is termination of the contract for services.

Question:

As an employer am I liable for the actions of my employees and my independent contractors?

Answer:

Liability – Employees act as the agents of their employers. Therefore, an employer can be held vicariously liable for the acts or omissions of their employees that cause damage, loss or harm to another. Independent contractors, however, act as their own business and employers are not held to be vicariously liable for the actions of independent contractors.

Question:

What are my rights as an employee?

Answer:

Rights – Employees are entitled to certain benefits under the Employment Standards Act. These include the right to receive minimum wage for their services, overtime pay in accordance with the Act and vacation pay and pay for working on public holidays. Additionally, employees are entitled to certain benefits on termination including reasonable notice on termination or pay in lieu thereof when fired without cause, and severance pay in certain circumstances. Independent contractors are, however, not entitled to these benefits and are limited by the terms that they contracted for.

About The Author



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Amiri Dear is an Associate in the Employment Law and Civil Litigation Divisions of Hummingbird Lawyers LLP with a special interest in employment and real estate related litigation. Amiri was first called to the Barbados bar in 2006. He was later called to the Ontario bar after completing a Masters' degree in law at the University of Toronto in 2013,

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