

Calling someone an independent contractor ‘a huge area of exposure for employers’

Recent news about HR startup Deel puts spotlight on how to classify workers properly



By [John Dujay](#)

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Organizations who hope to pay someone to do a specific job on a piece-meal basis often consider engaging an independent contractor.



For the person doing the work, it's an opportunity to set your own hours and get paid without any deductions. For the employer, things such as EI, CPP and vacation or holiday pay don't have to be accounted for.

But what happens if the relationship goes sour, and the independent contractor suddenly believes that there was an employment relationship?

"I would say this is a huge area of exposure for Canadian employers in particular. The CRA takes a dim view of independent contractor relationships because it reduces the tax base right off the bat, because truly independent contractors pay less taxes than employees; they have the ability to write off certain expenses against their income," says David Whitten, partner Whitten and Lublin Toronto

"There's a possibility that the CRA will audit the relationship and conclude that in fact, a person was an employee."

What's the Deal?

Recently, business startup Deel was put in the spotlight as a [Business Insider article](#) uncovered the 2,000-person company had classified the majority of its workers as contractors and not employees.

Seventeen current and former workers said they were unhappy with the company and how they were categorized by Deel, which operates in more than 150 countries as an HR software provider.

CEO Alex Bouaziz even said he was in the same category, but "here in Canada, that wouldn't fly," says Whitten.

When asked by *Canadian HR Reporter*, a Deel spokesperson said the company was not prepared to comment but did point to a [blog posting about its hiring process](#):

"When given the choice between contractor and employee for roles in countries where we offer the option, our team members choose to be a contractor more often because of the flexibility. The

contractor model gives people more freedom to work where they want, how they want, travel and be nomadic, and provide services or engage in work with others as they wish.”

One Ontario employer paid a stiff penalty after a [court ruled a contractor was instead an employee](#).

‘Lines get blurred’

While the Deel situation seems to be unique, it’s not uncommon that disputes arise during a business relationship.

“It does happen that employees — people who are like employees — sometimes want to have some of the benefits that go along with being an independent contractor and an employer goes along with it, without really thinking about what is the true nature of this relationship between me and this individual or company,” says Joan Young, partner, litigation and dispute resolution at McMillan in Vancouver.

“I think that’s where things run into problems. It’s not the situation where you’ve hired somebody for a one-off project to come in, for example, and set up an IT system; they come in for a few weeks, do it, leave. It’s where you have the longer term relationships that the lines get blurred and you start to run into legal troubles with differentiating between the true employee and contractor, independent or otherwise,” says Young.

While at first, the contractor relationship is solid, as time pass, things can evolve, says Kristen Shaw, associate, employment and labour relations, also at McMillan in Vancouver.

“As the relationship goes on, over time they can become closer, more intertwined and that can shift without agreements being amended to reflect that relationship. It can also be something that maybe that they were an independent contractor in the circumstances when they first signed an agreement but over time, based on the nature of the relationship between the parties, that changes.”

When a person complains to the employment standards branch, it’s the employer who faces a big risk, says Whitten.

“What you could regard as an independent contractor, maybe it was a lengthy period of time, you paid them no deductions, and then later, subsequently, there’s an audit and that person’s gone; now, you may find yourself holding the bag for potentially what ought to have been deducted, so [it’s] a huge area of exposure from a tax perspective.”

‘Nature of their relationship’

But what is an independent contractor?

“It’s more than just a title, it’s about the nature of their relationship. An independent contractor is somebody who is providing services from either an individual or through a company to another business. So instead of an employee who is providing labour services to an employer, it’s a business-to-business relationship and it usually comes with a greater degree of independence in terms of the structure than the direction of that work,” says Shaw.

For organizations who do use these types of workers, it’s always key to get the exact nature of the work on paper, says Whitten.

“The first pro tip is have an agreement with your independent contractor, an actual contract. But within that contract, in order for it to be effective, you want it to have a termination provision in it so that defines it, has this expressly stated: how much notice of termination does somebody have to provide to the other party if they’re ending the relationship?”

And don’t approach the relationship in any way that the CRA could interpret it incorrectly and classify that person as an employee, says Young.

“When you think about an employee, they show up for work, they get paid for their time there, it’s not a profit-loss situation. Whereas an independent contractor, you’re able to expect that they they’re taking on some risk; they’re paying for the supplies they bring on to the job site themselves, they’re bringing their own equipment.”

“It’s not necessarily a single person, it could be any person who provides those services to the company, whereas an employee relationship, obviously, the company has written relationship with a single individual,” says Young.

For employers to keep away from the probing eye of various regulatory bodies, use the “duck test,” says Whitten.

“If it walks like a duck, and it quacks like a duck, it’s probably a duck because the Ministry of Labour, and the courts, and the CRA, all employ a duck test when it comes to assessing these types of relationships that have been classified or characterized as independent contractor, and the duck is an employee.”

“What they’ve said is, if the relationship for all intensive purposes, looks like employment, it walks like a duck,” he says. “It’s a substance over form argument.”

More expensive?

With economic pressures continuing to squeeze employees, these types of situations will keep happening, according to Young.

“We think we’re going to be seeing more of these issues coming up, where people think they’re being clever by half by not hiring somebody as an employee and making it out they’re an

independent contractor when they're really not. And maybe the tax department comes knocking or maybe somebody's injured on the job and there's the WCB claim, and then these issues come to the forefront."

"When the economy starts to slow down is another example of when you sometimes see more gig workers, people just being hired for one-off jobs and employers are trying to save money — but [it may cost them more in the long run](#)," says Young.

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