

# NOT SO INDEPENDENT: WHAT BUSINESSES NEED TO KNOW ABOUT TERMINATING “DEPENDENT” CONTRACTORS

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Getting rid of an underperforming contractor may not be as easy as expected. Despite their title, the law does not treat all contractors the same. Truly independent contractors are considered self-employed – and they are not subject to employment standards legislation. They may provide services to businesses through a client-based relationship, but the law does not consider them to be their employees. Employees are individuals who provide labour or services directly to an employer.

So called “dependent” contractors are neither – they fall on the spectrum between independent contractors and employees. They may not be directly on payroll, and their agreement may state they are not an employee, but the law treats them much more like an employee. Due to this employee-like relationship, dependent contractors have certain rights and entitlements.

Businesses should be aware of the legal factors that classify a person as an independent contractor or a dependent contractor due to these rights and entitlements. On termination, as will be discussed in this article, if a contractor is considered in law to be a dependent contractor, they are entitled to reasonable notice as if they were an employee.

## How do you determine if a contractor is dependent?

There is no one conclusive test that can be universally applied to determine if a contractor is a dependent contractor. Rather, the task is to holistically consider the circumstances to determine the nature of the relationship – to determine if the person who has been engaged to perform services is doing so as a person in business on their own account.<sup>[1]</sup>

While there is no “test”, the general factors considered fall under the following categories:<sup>[2]</sup>

1. Level of worker control;
2. Ownership of equipment and tools;
3. Profit/loss opportunity; and
4. Business integration.

Under these categories, there are a number of additional factors to consider. Worker control, for example, relates to the company's power to select or not select the worker, control over the method of work, and right of suspension or dismissal. It also relates to factors such as the payment of wages, the exclusive nature of the relationship, the worker's economic dependence on the company, and whether the worker could hire their own helpers. Ownership of tools depends on the services, but similarly considers whether the worker or the company holds more of the control over how the execution of services.

The contractor's profit/loss opportunity, on the other hand, looks to factors such as the degree of financial risk taken by the worker and the worker's responsibility for investment and management. Business integration takes a broader look at the relationship, asking whether the worker is a crucial element of the company's business, whether the activity of the worker represents the company's business, and whether the parties rely on each other or closely coordinate conduct. It may also involve considering the permanency and length of the relationship.

This is a flexible analysis where some factors may be more important than others, and some may not be present at all.<sup>[3]</sup> What is important is how they all fit together to frame the total relationship of the business and the contractor.

### **What if the contractor is a company?**

Hiring a company is generally less risky than hiring the individual contractor directly. The risk of a finding of "dependent" contractor can remain, surprisingly, even when the contractor's services are provided through a corporation. While people may incorporate and provide consulting services through that corporation, the factors above can still be present to deem them "dependent". Much like how the title of "contractor" is not determinative, neither are the technical details of the party signing the contract. The important consideration is the nature of the relationship.

### **What reasonable notice are they entitled?**

If a court or tribunal deems them to be a dependent contractor, the amount of notice they are entitled to on termination follows the general common law reasonable notice guidelines. This depends on the *Bardal* factors: age, character of employment, tenure, and availability of similar employment.<sup>[4]</sup> Often, this is measured at one month per year of service, to a maximum of around 18-24 months unless there are extenuating circumstances to justify going beyond the normal range.<sup>[5]</sup> However, the application of the above factors maintains this as a very contextual analysis.

For dependent contractors, the basis for any amount owed during the notice period is on the contractor's entire compensation, potentially including a portion of the commission or incentive amounts anticipated, if

applicable.<sup>[6]</sup> For such incentive amounts, there must be proof of what amount the contractor would have been earned during the notice period. Ultimately, the test for the proper amount is a holistic assessment of the evidence and relevant contingencies.<sup>[7]</sup>

### Takeaway

A business must always consider there is risk in hiring an individual (or corporation) under an “independent” contractor model when for all intents and purposes the transaction looks more like an employment relationship than a true independent agreement between businesses. Ensuring contractual safeguards are put in place in advance can help to reduce the risk of later adverse outcomes should the contractor have a change of heart and try to assert that they are an employee entitled to employee protections. With planning and adequate documentation, the potential for disputes can be greatly reduced and the likelihood of costly disputes avoided.

[1] [ps2id id='1' target='']/*Liebreich v Farmers of North America*, 2019 BCSC 1074 at para 61 [*Liebreich*].

[2] [ps2id id='2' target='']/*Lightstream Telecommunications Inc v Telecon Inc*, 2018 BCSC 1940 at para 125.

[3] [ps2id id='3' target='']/*Ibid* at para 62.

[4] [ps2id id='4' target='']/*Bardal v Globe & Mail Ltd*, 1960 CanLII 294, 24 DLR (2d) 140 (Ont HC) as reaffirmed by the SCC in *Keays v Honda Canada Inc*, 2008 SCC 39.

[5] [ps2id id='5' target='']/*Ansari v British Columbia Hydro & Power Authority*, 1986 CanLII 1023, 2 BCLR (2d) 33 (SC).

[6] [ps2id id='6' target='']/*TCF Ventures Corp v Cambie Malone's Corp*, 2017 BCCA 129.

[7] [ps2id id='7' target='']/*Ibid* at para 37.

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### A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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