EMPLOYERS STILL FALLING INTO INDEPENDENT CONTRACTOR TRAP

Obtaining services through the use of independent contractors, despite being more and more popular, continues to be a risky business strategy. The costs of having a so-called independent contractor deemed, after the fact, to be an employee can be tremendous.

Why Use Independent Contractors?

Companies are attracted to the concept of staffing with independent contractors because doing so provides more flexibility and reduced costs. Using independent contractors can provide greater freedom to increase and decrease staffing levels on demand.

It also results in reduced overhead costs such as lesser needs for office space and equipment. Other monetary attractions can include the elimination of benefits costs and common law severance pay requirements, and lower premiums for workers compensation and employment insurance and the Canada Pension Plan.

What's The Problem?

Incorrectly characterizing an employee as an independent contractor, however, exposes the employer to litigation for wrongful dismissal (as well as administrative complaints and investigations, retroactive payment of premiums, and monetary penalties).

Whether a worker is found to be an independent contractor or an employee will depend on the facts of the situation (and only to a minimal extent on the name the parties have given to the relationship).

Generally speaking, administrative and judicial bodies try to determine whether the individual is truly in business for him or herself. They review all aspects of the relationship such as who has effective control over the performance of the work, who owns the tools of the job, where the work is performed, how the billing and payment arrangements are set up, whether the person works exclusively for one company, and whether the person bears any risk of profit and loss.

Can't We Call Them Whatever We Want?

Administrative and judicial bodies generally do not care what the parties have called the relationship or whose idea it was to go down the independent contractor route. In fact, it is frequently the individual who insists on being treated as a contractor. That same individual often cries foul later on (once the relationship has been severed) when she finds out there are no E.I. benefits or severance pay to be had.

In the end, the employer can end up carrying a substantial monetary liability if it is too aggressive in characterizing its employees as contractors. The problem is that many employers fall into the trap of simply labeling employees as independent contractors and thinking that alone will protect them against employment-related liabilities.

Smithson
Employment Law Corporation
306-1500 Hardy Street, Kelowna, B.C. V1Y 8H2 | Phone: 778-478-0150 | Fax: 778-478-0155
www.smithsonlaw.ca

A Lesson Learned

A stark example of this error was played out recently in an Ontario courtroom. Gordon Braiden sued La-Z-Boy Canada Limited for wrongful dismissal after their 23 year relationship was terminated on 60 days notice.

Braiden had been hired as an employee in 1981 but had later been required to sign the company's independent sales and marketing consultant agreement. That agreement purported to alter his status to that of independent contractor and it contained a 60 day notice of termination clause.

Braiden's revised status as a commissioned sales agent, however, had resulted in very few changes to his relationship with La-Z-Boy. His compensation was unchanged as was the way in which he did his job.

He continued to be completely under La-Z-Boy's control, as they dictated his sales territory and promotional activities, required him to attend at trade shows, and prohibited him from selling competing product lines. He also continued to enjoy some of the same benefits as La-Z-Boy's employees, such as receiving a gift in recognition of his long period of service.

The company sought to rely upon the 60 day notice clause set out in the independent sales and marketing consultant agreement it had required Braiden to sign. The Ontario Court, however, found that due to the extent of control La-Z-Boy still exercised over Braiden's functions and activities, he was an employee rather than an independent contractor.

The Court saw the imposition of the purported independent contractor relationship as an effort on La-Z-Boy's part to avoid the obligation to give reasonable notice (as it would be required to do with an employee). Having found that Braiden was a 23 year employee prior to being terminated, the Court awarded him 18 months' pay in lieu of notice (for a whopping total of $139,000).

The moral of this tale is that an employee by any other name is still an employee. Employers seem reluctant to accept that obtaining services by way of an independent contractor relationship requires expertise in understanding what distinguishes these people from employees.

It cost La-Z-Boy $139,000 (plus legal costs) to learn this lesson. I'm certain they won't be the last company to pay dearly for falling into the independent contractor trap.

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