

WHEN DO INDEPENDENT CONTRACTORS BECOME EMPLOYEES?

The term 'employee' is defined in both the *Labour Relations Act of 1995*, the *Basic Conditions of Employment Act of 1997* and other labour related legislation. However, the term 'independent contractors' is not defined in any legislation. In general terms, an independent contractor is someone who independently renders specified services, or produces specified products or results, to a number of clients. Essentially, it is someone who runs a business of one sort or another.

It is critical to distinguish between employees and independent contractors since:

- Only employees are protected by the provisions of the LRA , BCEA and other labour related legislation against, for example, unfair dismissal, unfair discrimination and exploitation. This means, amongst others, that whereas the contract with an independent contractor can be ended as provided for in the contract between the parties, employees can only be dismissed if the substantive and procedural requirements for a fair dismissal have been met;
- Also, only employees are entitled to the basic conditions of employment as stipulated in the BCEA, e.g. annual leave, sick leave and maternity leave, while the deduction of UIF, and the corresponding pay-over to the Department of Labour, is also only relevant to employees;
- Employers of employees are liable for any unlawful acts committed by their employees in the course and scope of their duties (e.g. accidents that injure others) whereas no such liability rests in respect of actions of independent contractors;
- While employers are obligated to deduct income tax from the remuneration of their employees, true independent contractors are responsible to personally pay their own income tax directly to the SARS.

Whether a person is truly an independent contractor, as opposed to an employee, would depend on the circumstances and facts of a specific relationship. S 200A of the LRA and s 83A of the BCEA provides a list of factors which, if any one or more of the factors are present in any specific relationship, creates a presumption, until the contrary is proved by the employer, that the person rendering services is in fact an employee. The presumption is only applicable to individuals who are not part of senior management (i.e. cannot hire and fire) and earn less than the *earnings threshold*, which is currently set at R 149 736.00. Where a person earns in excess of the earnings threshold, or is a senior manager, the factors listed in the sections nevertheless remain relevant and should still be considered in determining the true status of the work relationship created between the parties, although no automatic presumption will be created.

In the case of a person earning less than the *earnings threshold*, and who does not form part of senior management, the person will be presumed, until the contrary is proved by the employer, to be an employee of the person to whom services are rendered, where one or more of the following factors are present:

- the manner in which the person works is subject to the control or direction of the person to whom services are rendered;
- the person's hours of work are subject to the control or direction of the person to whom services are rendered;
- in the case of a person who renders services to an organisation, the person forms part of that organisation;
- the person has worked for the person to whom services are rendered for an average of at least 40 hours per month over the last three months;
- the person is economically dependant on the person to whom services are rendered;
- the person is provided with tools of trade or work equipment by the person to whom services are rendered;
- the person only works for, or renders services to, one person.

In the case of senior managerial employees, or individuals who earn in excess of the *earnings threshold*, the following *additional* factors are usually taken into account to determine someone's employment status, although no automatic presumption is created:

- the object of the contract between the parties is for the person to render personal services;
- the person to whom services are rendered may choose when to make use of the services of the person;
- the person is obligated to perform lawful commands and instructions of the person to whom services are rendered;
- the contract between the parties terminates on the death of the person who renders the services;
- the person to whom services are rendered provides training to the person in respect of business's methods etc;
- the person receives fixed payments from the person to whom services are rendered over defined consistent periods, regardless of output or results provided;
- the person belongs to the organisation's pension fund or medical aid scheme (or qualifies for any other type of benefit).

In determining whether a person is an employee our courts and the CCMA are more interested in the factual nature of the relationship between parties, than the specific label attached to the relationship by the contract. Should an employer treat a person as an independent contractor under circumstances where the person is in reality an employee, the employer is placed at risk since it is not providing the employee with those benefits employees are legally entitled to. Furthermore, no income tax will be deducted from the person's remuneration, exposing the employer to tax problems. Further, on termination of the person's services the employer might face a claim of unfair dismissal since it in all probability would not have followed the correct legal procedures in terminating the person's services.

Employers, to minimize their risk, would therefore be well advised to make sure that they are properly informed about the exact legal nature of the relationship with those rendering services to them.

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