

Fighting employee misclassification in the Ontario trucking industry



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There are many advantages to contracting with owner operators instead of employee drivers. However, carriers that operate within Ontario only (i.e., no cross-border or extra-provincial transportation) may find that a recent change to the Ontario employment laws means that many owner operators (also referred to as independent contractors) could be reclassified as employees.

The Ontario Government refers to this issue as “Employee Misclassification,” which sets the tone for a shift by the Ontario Government from accepting the role of owner operators, or independent contractors in our industry, to mandating that truck drivers who meet certain legal requirements are misclassified employees. It is clear, too, that the policy intends to move away from the concept of ‘dependent contractors,’ which applied neatly to a category of owner operators.

Employee misclassification

First, it is important to understand that the mandate of the new legislation is intended to prohibit employers from misclassifying employees as “independent contractors.” The Ontario Government has explained: “This [mandate] is intended to address cases where employers improperly treat their employees as if they are self-employed and not entitled to the protections of the ESA.”

Reverse onus on the employer

What is key is that the onus is shifting to the employer to prove that its owner operators are not employees. In the event of a dispute over classification, the carrier is responsible for proving that the individual is *not* an employee instead of a more neutral approach where the employer simply proves that the owner operator is that – an independent contractor who owns and operates their own vehicle and their own independent business. The ‘mom and pop’ carriers of the past are gradually

being subsumed into a model where drivers are being classified employees of a carrier or broker. The lack of regulatory barriers differentiating carriers and brokers in Ontario (compared to the US) contributes to this shift in approach.

The new, pro-employee legislation is very different: if the employer cannot satisfy its burden, the owner operator will be considered an employee and entitled to his or her rights under the (Ontario) *Employment Act*. These rights are significant in cost and create a financial burden, and can force a carrier to change its business model.

Factors the adjudicator will consider when assessing whether an owner operator should be reclassified as an employee

Despite the change in legislation the assessment of whether an owner operator is an independent contractor is still difficult to pinpoint – there is no universal test. Instead, the adjudicator will look at the relationship as a whole. When the pro-employee onus shift is added to the adjudication, it becomes even more difficult to predict which factors will support classification as an owner-operator rather than employee.

Factors that indicate the worker is an employee:

Every case is fact-dependent, and this article is not meant to provide legal advice but simply to raise awareness. However, generally if the carrier decides:

- What the owner operator does;
 - How much the owner operator will be paid;
 - When the work needs to be completed by;
 - How and where the owner operator completes the work; and
 - The business provides the tools or equipment necessary for the job (which may extend to considering the terms of the lease agreement for the owner operator’s purchase of the tractor);
- then the owner operator may be found to be improperly classified, and reclassified as an employee.



Factors that indicate the worker is an independent contractor:

However, if the owner operator meets the following criteria:

- Owns and is responsible for some or all equipment used to do the job;
- Has a registered Licence Agreement to use the trademarked names of the carrier on the owner operator’s truck and clothes etc.;
- Is properly incorporated as a corporation in accordance with applicable provincial or federal laws, and is in good standing with all tax and other remittances;
- Makes profit, and has a risk of losing money from the work he or she does;
- Determines how and/or where the work is completed;
- He or she can subcontract some of the work;
- He or she is not required to remain available for only one carrier (which is difficult with hours of service limitations);
- The business can end the contract for services, but cannot discipline the worker;

then the owner operator may be found to be an independent contractor and not an employee.

Common misconceptions

A worker may still be considered an employee even if:

- The worker agrees (verbally or in writing) to be an independent contractor;
- The worker charges HST;
- The worker submits invoices;
- The worker uses their own vehicle for work purposes;
- The worker doesn’t have statutory deductions (e.g. tax, CPP, EI) taken from pay;

Penalties for misclassifying employees as owner operators

If a carrier is found guilty for misclassifying owner operators as non-employees the carrier can face significant financial repercussions. Employers that misclassify their employees could be subject to penalties including prosecution, public disclosure of a conviction, and monetary penalties.

If an adjudicator finds an employer has misclassified an employee, an employer can face financial consequences for the following:

- Tax consequences for unremitted taxes
- CPP
- EI
- Health taxes
- Government health insurance

If found to be an employee, the employee will claim to their rights as an employee under the ESA and the common law, such as:

- Pregnancy and Parental leave
- Vacation pay
- Statutory holidays
- Overtime pay
- Termination and severance pay

In conclusion, I recommend that carriers should use these legislative changes as an opportunity to review their contracts with owner operators and ensure that each owner operator complies with the factors that contribute to classification both for good governance of one’s business model, and to avoid the cost and penalties of employee misclassification. ^{PMTC}

ⁱ Proposed Changes to Ontario’s Employment and Labour Laws <https://news.ontario.ca/mol/en/2017/05/proposed-changes-to-ontarios-employment-and-labour-laws.html>



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