

Classification of drivers as independent contractors

Heather C. Devine, Partner, Isaacs & Co., Barristers & Solicitors



If your company's business model includes contracting with independent contractors in Ontario for driving services, you should consider that on November 5, 2018, the Ontario Ministry of Labour recently ruled that a Dominos Pizza delivery driver, Mr. Juan Jose Lira Cervantes, was improperly classified by a franchisee as an independent contractor.

Mr. Cervantes was found to be properly classified as an employee, and, as an employee, he was entitled to payments for overtime, vacation, and holiday pay, and a top up to his hourly rate to bring him to minimum wage. The Dominos Pizza franchisee was also ordered to pay Mr. Cervantes these payments and benefits for a two-year period, the time limit for a claim.

Further, the franchisee was ordered to pay monies for reprisal, since the Employment Standards Officer ruled that the decision to refuse to assign further delivery work to Mr. Cervantes after it learned he had complained to the Ministry of Labour was, in fact, a decision to fire the driver for making a complaint. Dominos Pizza has advised that it will not appeal this decision.

This recent decision is very important because it clearly targets driving services, and it sets a local precedent for drivers to challenge their status as independent contractors to seek a lump sum payment for redress.

Stakes are high for misclassification

The stakes can be high for a company found to be an employer: the Dominos Pizza franchisee was ordered to pay Mr. Cervantes \$28,144.50 where \$17,539.60 was allocated for wages owed because Mr. Cervantes' wages were found to be below minimum wage, and the rest of the payment was allocated for vacation, overtime, holiday payments, benefits and the reprisal. Calculate this amount for a two-year period for a driver who provides independent contractor services to your company and the peril to your company becomes quite real.

Consider, too, that this decision, which is specific to the powers of the Ministry of Labour, does not address the additional consequences that a company in a similar position may suffer. There can be consequences for unremitted taxes, CPP, EI, health taxes or government health insurance, and

workers insurance premiums. Employees also have common law rights upon termination, which can be onerous.

Finally, as advertised by plaintiff law firm,s the company's assets may become the target of law suits by drivers, rather than limiting the liability to the independent contractor, which provides the driving services. One firm advertises online: *"The issue of whether the truck driver who you were involved in an accident with is an employee or an independent contractor of a trucking company is quite important for determining whether you have the right to sue, and potentially recover damages only from the truck driver himself or also from the trucking company."*¹

These repercussions justify that it is worthwhile to reassess a company's independent contractor agreements and the structure and operation of the company-independent contractor relationship on a regular basis to ensure it is current with the changes in laws, regulations and this latest Labour Ministry decision. If in doubt, consult a lawyer with expertise in this area, to provide an opinion whether your company can improve the likelihood that an adjudicator will agree that an independent contractor is, in fact, properly classified as such.

What can a company do to assess the propriety of its workers' classification?

Before I begin, the very point of this article is to highlight that the move in Ontario is to move away from accepting the classification of drivers as independent contractors, which means that no matter how you structure the relationship with independent contractors, there is a growing probability that they will be found to be properly classified as employees.²

There is no one single factor in Canada for determining whether a worker is an employee or independent contractor. An adjudicator will consider the relationship between the company and the worker as a whole to determine whether the worker is not an employee.

In this article, I'm not going to focus on the benefits of hiring independent contractors. Instead, I am focusing on what areas to consider when you evaluate your company's current independent contractor agreements and business model – and I provide a few tips to assist you with that consideration.

The goal is to provide a guideline to help you assess the appropriate considerations that may cause a court or decision maker to agree that the independent contractors are properly classified. Of course, this article is not intended to provide legal advice (the area is grey and fact-dependent, and a lawyer will consider your company's specific business model, agreements, and other evidence to provide legal advice), so use the following as a guideline, and contact a lawyer for a legal opinion regarding your drivers' status.

1. Ensure all independent contractors are incorporated companies.

The first consideration is to ensure that your company only contracts with drivers that are in turn contracted with or employed by another corporation. For clarity, I refer to your company as 'company' and the independent contractor's company as the 'corporation.' The corporation that contracts with your company must be properly incorporated in a province of Canada, or federally incorporated and should be in good standing.

In order to comply with this recommendation, you can ensure that for every independent contractor providing driving services, you demand, obtain and file an up-to-date Corporate Profile Report (which should be updated annually). This Report shows the Ontario Corporation Number; i.e. 1234567 Ontario Limited, and the Corporation Name. It will show the Corporation Type and the Corporation Status, which should state: "ACTIVE," and this Report will indicate whether the company (corporation) is in good standing. The corporation's registered address will be reported, and it will also show the identity and address of the officers and directors, but not the shareholders.

In Ontario, this information is within the jurisdiction of the Ministry of Consumer and Business Services. While contracting with a validly registered corporation in good standing is not the only consideration, it is a good first step to enable your company to show that it has contracted with another, different corporation for the provision of driving services, and that the driving services are provided by an independent contractor employed by or retained by that corporation.

You may even request that the corporation show you their agreement between the corporation and driver for your review and keep a file of that agreement along with the Corporate Profile Report and Independent Contractor Agreement, which I discuss below.

2. Invest in obtaining a clear, up-to-date agreement with all independent contractors and follow the terms of that Independent Contractor Agreement.

Once it is clear that services are being provided by a driver supplied by a validly incorporated corporation in good standing, the next important consideration is the

Independent Contractor Agreement. While an Agreement will not be conclusive proof that your company has contracted with independent contractors, since the relationship and operations are also considered, the absence of an agreement will be very unhelpful to making the case for proper classification. In short, procure an Independent Contractor Agreement.

The terms of the Agreement are very important, and cannot be covered entirely here. However, it is important to consider that the Independent Contractor Agreement should clearly state the difference between the company using the driving services and the corporation providing the driving services; describe the driving services provided by the independent contractor driver; and include information declaring that the corporation's employees and drivers are not employees of the company.

The parameters of the work should be included with a view to minimizing control over the independent contractor driver (as discussed below).

Further, if the independent contractors will wear the company's uniforms and/or use the company's registered trademarks, then your company should consider requiring the independent contractors to enter into a licence agreement for the use of the company's registered trademarks, and that licence agreement can be placed in the company's Trade-Marks Office file (held by the Canadian Trade-Mark Office) so that it is recorded. This extra step, if available to a company that has registered trademarks, may help the company to show that the independent contractor is a licensee and not an employee in uniform.³

All agreements with Independent Contractors should be validly executed by both parties, and kept in an accessible file. All parties should have a copy.

One issue that can be included in an agreement, in the event that an independent contractor is found to be entitled to pay in lieu of notice for termination, is to include a clause stating what the independent contractor would be entitled to as a payment in the event of termination. Payouts may be limited with the inclusion of the following provision:

"If the company terminates your independent contractor relationship without just cause, you will be entitled to only those payments and benefits required by the Employment Standards Act of Ontario as if you were an employee and will have no other claim at common law or otherwise in relation to your termination. You agree this provision is not an acknowledgement that you are an employee but simply a convenient manner to calculate your termination entitlements in the absence of just cause."

The benefit of such a clause is that it provides a contractual agreement of the amount to be paid upon termination, and does not require the adjudicator to devise an amount of their own accord which may be very favourable to the 'employee.'

3. Minimize the company's control over the independent contractor's work.

Once your company has an independently incorporated corporation to contract with, and an agreement that clearly states the relationship with the independent contractor, your company should ensure that its business model and operations reflect the terms of the agreement.

In considering the business model and operations, your company should consider the amount of control over the independent contractor's work. Quite simply: the more control a company has over the independent contractor, the more likely it is that the independent contractor will be found to be an employee.

Ask:

- Does the independent contractor hire their own employee drivers and then contract the services of those employees to your company?
- Can the independent contractor sub-contract the work?
- Does the independent contractor determine the timing and manner in which services are rendered?
- Do they carry separate and sufficient insurance?
- Does the Independent Contractor have a meaningful ability to profit or suffer a loss?

This latter consideration can be quite influential in favour of finding an independent contractor relationship, if the answer is yes.

4. Ensure that the independent contractor is not wholly dependent on your company.

This fourth consideration is closely related to the issue of control – even though all of the above considerations are met – if the independent contractor has only one client – your company, or has been prohibited from taking loads from other customers to hold themselves available for your company, an adjudicator may find the independent contractor to be an employee, or at best a 'dependent contractor'.

Another factor to consider is that Hours of Service restrictions limit the hours of work a driver can be available and/or drive. If your company, through its operational demands, becomes the single customer of an independent contractor, the actual nature of the operations can influence the adjudicator to conclude the lack of independence means that the driver is actually an employee.

In summary, if a driver has no other source of income and is dependent upon the company for an extended period of time, that driver may be found to be a dependent contractor or an employee.

5. Review the ownership of the equipment required to perform the work.


The nature of ownership of equipment by drivers can be quite complex. However, the key consideration often will be whether the independent contractor owns the 'tools' and equipment

he/she works with. The independent contractor has the right to use them and must repair, maintain and insure them himself. In our industry, the consideration of whether the independent contractor has ownership of the truck can include a consideration whether he or she holds title to the truck, or leases the truck from an unrelated third party, such as PENSKE, or another truck rental company. In some circumstances, the independent contractor drives a truck upon which the company holds the security interest, or the independent contractor drives a truck that he/she is lease-purchasing from the company. This is a complex legal area and it is best to carefully consider the facts of each scenario carefully, with a knowledgeable lawyer.

At the end of the day, the important consideration will be that in tandem with the above considerations, the terms defining the ownership of the equipment by the independent contractor must reflect the considerations that an adjudicator will consider when evaluating the proper classification of that driver, and there should be no conflict or contradictions between the Independent Contractor Agreement between the corporation and your company, compared to the agreement providing for lien rights, ownership, buy-back or other means of ownership and financing of the equipment.

Conclusion

This recent decision of the Labour Ministry reflects a trend towards designating workers as employees rather than independent contractors. Companies that seek to protect their ability to contract with independent contractors, and to shield themselves from the significant costs of improper classification, must obtain clear advice on the changing factors considered by adjudicators, implement those factors into contractual agreements and operations, and be extremely well organized in documenting the relationship between company and worker.

Unfortunately, even those who comply may fall victim to the employee friendly trend, and then will have only the contractual protections implemented into their agreements in the event of such a decision. 

Endnotes

¹ www.starrausten.com

² Ontario is cracking down on companies who misclassify workers as independent contractors which was part of Bill 148: Fair Workplaces, Better Jobs Act, 2017 which amended the Employment Standards Act which placed the burden on the company or employer to prove that the worker is not an employee.

³ Consideration of whether a company has registered trademarks, and the ability to record a licence agreement requires legal advice.

⁴ Why 'independent contractors may still be entitled to a payout on termination' by Ed Canning, Hamilton Spectator, September 20, 2015, www.thespec.com