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Employment Notes

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"...the determination of whether an individual is an employee or an independent contractor, goes far beyond the stated words of any given contract."

EMPLOYEE VS. INDEPENDENT CONTRACTOR: UNDERSTANDING THE DIFFERENCE IS VITAL TO YOUR BUSINESS

John-Edward Hyde

Undoubtedly, employees are your company's greatest resource. However, they can also represent the company's greatest liability, given statutory requirements and obligations, insurance premiums and even damages for wrongful dismissal upon the cessation of working relationships. Thus, it is no wonder some companies have looked to alternative arrangements with their people, in an effort to minimize costs and potential liabilities. To this end, independent contractor relationships are often considered.

It is important to remember however, that the determination of whether an individual is an employee or an independent contractor, goes far beyond the stated words of any given contract. In other words, even if the contract states that the employee agrees he/she is an independent contractor, the arrangement will be scrutinized by courts and decision-makers, should a conflict ever arise. Arguably, the wording of the contract can carry very little weight in light of the true relationship of the individual to the company. Further, unless the individual is in a position to create business activities truly independent of the company with services provided to numerous consumers, such individuals may be deemed employees for the purposes of the *Income Tax Act*, *Employment Insurance Act*, Canada Pension Plan, *Employer Health Tax* and workers' compensation. It is therefore extremely important for every company to assess its relationship with any independent contractors and carefully manage new and existing relationships which are put in place.

Employees vs. Independent Contractors: Determining the Difference

As noted above, decision-makers look beyond the strict terms of the agreement to consider the actual relationship between the parties. To this end, an assessment is generally made as to whether the relationship between a company and an individual is a **"contract of service"** or, a **"contract for service"**. It is said, an "employee" is hired under a contract of service, whereas a "self-employed individual" or independent contractor, is hired under a contract for service. The courts have used a number of tests to determine whether an individual would be considered an "employee" or an "independent contractor". To this end, an individual could be considered to be an employee, irrespective of the contractual relationship [i.e. the existence of an independent contractor agreement] if he or she falls within such definition under any one of the following tests:

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"The courts have used a number of tests to determine whether an individual would be considered an 'employee' or an 'independent contractor'."

John-Edward Hyde provides legal services to clients in both provincially and federally regulated industries. He advises management on all aspects of employment and labour law matters including representation before administrative tribunals, collective agreement negotiation, arbitrations and human rights.

John also assists clients in providing strategic legal and human resources advice on labour and employment matters arising out of complex mergers, acquisitions and the sale of businesses. John's background is in operations and human resources management. This experience provides him with the unique opportunity to assist clients in the formulation of practical legal solutions, specifically tailored to their needs.

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Control Test

To what extent does the employer control the activities of the employee?

This is considered to be an inflexible test that is not really appropriate for contemporary employment structures and is not necessarily to be determinative of the issue, particularly with regard to professionals or highly skilled employees who are not subject to much scrutiny or supervision. Nevertheless, less control is more likely point to an independent contractor relationship.

Fourfold Test

Four indicia of a contract of service (employment relationship):

1. the company has power of selection of its employee;
2. the company has control over payment of wages or other remuneration;
3. the company has a right of control over the method of doing the work;
4. the company has a right of suspension or dismissal.

Where these criteria are largely met, the individual will likely be determined to be an employee.

Integration or Organization Test

Was the work of the individual an integral part of the business/company or was the work merely an accessory to the business/company?

This test is appropriately applied from the perspective of the individual, not the company. In other words, the question is not whether the individual's work was integral to the business of the company but whether the work that the individual was doing is focused towards the individual's own business or towards the business of the company. Functional integration should not be overlooked however, as most labour boards consider this test to determine whether an individual has a right to be treated as an employee for labour relations purposes, irrespective of his/her otherwise apparent independent contractor status. This is important given that such individual may have the right to seek union representation or rather, to unionize your company.

Economic Reality or Entrepreneur Test

- What was the degree of control exercised by the business/company?
- Who had ownership of the tools used in the business?
- Was there a chance of profit for the individual?
- Was there a risk of loss to the individual?

Specific Result Test

Was the individual contracted to do work for a specific project or for a determined goal, as opposed to an individual who is contracted to provide services that is at the disposal of the employer?

Although each case turns on its own facts, and arguably, the assessment of whether someone is an independent contractor or an employee can sometimes be equated to establishing a point on a continuum between two extremes, there exist a number of questions which are extremely useful in making such determination. For ease of reference, these questions (and answers) are set out within the chart on the following page:

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QUESTION	EMPLOYEE	INDEPENDENT CONTRACTOR
Control Test		
What kind of control did the employer have over the individual?	More	Less
Was the person subject to company policy and discipline?	Yes	No
Did the person have fixed office hours (determined by the employer)?	Yes	No
Did the person have to clear vacation time with the employer?	Yes	No
Who decided how the work would be done (specific method)? Where the work would be done?	Employer	Individual
Did the person have an office within the company?	Yes	No
Did the person have staff/secretarial support within the company?	Yes	No
Did the person use company letterhead, etc?	Yes	No
Was the person required to attend company/ department meetings?	Yes	No
Was the person permitted to hire other workers to do the work or to delegate responsibilities?	No	Yes
Was the person permitted to work for other companies?	No	Yes
Did the employer have a right to set dress code and conduct codes for him?	Yes	No
Did the person have to "report" to anyone? Who did the person "report" to?	Department Head, Manger, Supervisor, etc.	President, Vice-President
Did the person contribute to company pension/ insurance, etc.	Yes	No
Did the company have a "fund" available for him or his "department" which the person has no say in determining the amount?	Yes	No
Did the person have work regularly assigned to him?	Yes	No

QUESTION	EMPLOYEE	INDEPENDENT CONTRACTOR
Fourfold Test		
Did the employer have the right to select another "employee" for the job that the person was doing?	Yes	No
Did the employer have a right to dismiss for cause?	Yes	No
Integration or Organization Test		
From the perspective of the individual, was the work that the person was doing an integrated part of the true nature of the business of the company or was it accessory	Integrated	Accessory
Economic Reality or Entrepreneur Test		
Who had control of the work? (go back to control test)	Employer	Individual
Who had ownership of the tools of the work?	Employer	Individual
Was there a chance of profit?	No	Yes
Was there an incentive/bonus/commission scheme whereby the person could earn more remuneration?	No	Yes
Was there a risk of loss?	No	Yes
Was there a chance that the person would not be remunerated if a certain thing was not done or that the person would suffer a loss (usually monetary) if something was not done properly?	No	Yes
Specific Result Test		
Was the person expected or required to do work on an ongoing basis personally i.e. were his services at the disposal of the employer?	Yes	No
Was the person expected to accomplish a specific job/task/project?	No	Yes

Result

If you have independent contractors or think you might want to, it is absolutely necessary to carefully plan this approach with a labour and employment lawyer. Failure to pay strict attention to your company's relationships with independent contractors, not only now, but on an on-going basis, can be extremely costly. ■

EMPLOYMENT NOTES

"A recent arbitration decision... demonstrates the dilemma faced by both employers and employees in determining the appropriate balance between work and family obligations..."

Elizabeth Forster represents employers, trade unions and employees. She has been involved in hearings before the Ontario Labour Relations Board, grievance arbitrations, collective agreement negotiations, Human Rights cases, and prosecutions under Occupational Health and Safety Act.

Elizabeth's work also includes wrongful dismissal actions, actions for breach of fiduciary duties and other employment and employee issues as well as labour-related actions. She advises clients on employment contracts, employment policies, non-competition and confidentiality agreements and employee pension and benefit-related issues.

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LEGISLATION UPDATE

Elizabeth Forster and Maria Kotsopoulos

Labour Mobility Act, 2009

On December 15, 2009, the *Labour Mobility Act, 2009* received Royal assent. The *Act* is designed to facilitate the ability of construction workers to work in other provinces without impairment.

The *Act* requires Ontario regulatory bodies to recognize the certification of construction workers by any other reciprocating province without any additional testing or training for examinations. Every regulatory authority has been given the period of 12 months to make amend or revoke its rules to conform to the legislation.

The legislation is part of a cross-Canada initiative to improve labour mobility throughout the country.

The Director of Apprenticeship will now have the authority to issue a certificate of qualification to a worker who holds an equivalent document for the same trade or occupation in another province or territory of Canada.

Bill 168

Bill 168, an Act to amend the *Occupational Health & Safety Act* with respect to violence and harassment in the workplace and other matters, received royal assent on December 15, 2009 and comes into force in June 2010. The changes to the *Occupational Health & Safety Act* arising from the passage of this Bill will require all employers to review their current policies to include violence and harassment in the workplace policies. As such, in addition to any existing policies related to harassment in the context of the *Human Rights Code*, employers will be required to deal specifically with violence and harassment issues which do not necessarily arise under the *Human Rights Code*.

Bill 139

Bill 139, an Act to amend the *Employment Standards Act, 2000* in relation to temporary help agencies and certain other matters, became effective November 6, 2009. The amendments significantly alter the relationship between temporary help agencies and agency employees by removing certain restrictions regarding permanent positions being offered to agency employees, adding provisions providing protection from reprisal, and dealing with the provision of notice upon termination in certain instances.

Bill 210

Bill 210, an Act to amend the *Employment Standards Act, 2000* will come into effect on March 22, 2010. The amendments provide protection to foreign workers employed as live in care givers by prohibiting the charging of recruitment fees.

Minimum Wage

Effective March 31, 2010 the minimum wage in Ontario will increase to $10.25 per hour. ■

WHAT CONSTITUTES FAMILY STATUS DISCRIMINATION?

Maria Kotsopoulos

Human rights legislation provides that individuals are entitled to be free from discrimination in employment, contract and services, based on certain enumerated grounds, family status being one of them. Family status is defined in Ontario's *Human Rights Code* as the status of being in a parent and child relationship. A recent arbitration decision is one of a number of recent

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"...not every conflict between a work obligation and a parental obligation must be accommodated by an employer."

Maria Kotsopoulos practices with Blaney's Labour and Employment Group in all areas of labour, employment and human rights law.

Maria advocates on behalf of employers, not for profit organizations, trade unions, and employees, and has been involved in matters before the Superior Court of Justice, the Federal Court, the Labour Board, the Human Rights Tribunal, the Workplace Safety and Insurance Appeals Tribunal, and other tribunals.

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decisions dealing with the issue of what constitutes family status discrimination in employment. This case demonstrates the dilemma faced by both employers and employees in determining the appropriate balance between work and family obligations and illustrates the type of conflicts between work and parenting obligations that rise to the level of discrimination for which accommodation must be considered by an employer. Finally, the case illustrates that an individualized review of the conflict must be undertaken by an employer to ensure compliance with human rights requirements.

In *IBEW, Local 636 vs. Power Stream Inc.*, an arbitrator was asked to determine if a change to work schedule unfairly discriminated against four bargaining unit employees on the ground of family status. In this case, employees were historically given the option of working one of two shift schedules under the collective agreement: a 10 hour/4 days per week schedule or an 8 hour/5 days per week schedule. As part of negotiations for a new collective agreement, the employer eliminated the employees' ability to choose between these two options and required the Union to choose one of the schedules. The Union asked its membership to vote and the majority of the Union's members selected working the 10 hour/4 day per week schedule. The change was then implemented by the employer. The four grievors' parental obligations differed and were impacted in varying degrees by the change to their work schedule.

With respect to three of these employees the evidence at the hearing revealed that they could no longer take their children to or from school on workdays, increasing the burden on their partners, and that they were not able to attend extra-curricular activities with their children as they had before.

The fourth employee's situation was more complicated due to the fact that he and his former partner had negotiated a joint custody agreement following the end of their marriage. Under the joint custody agreement, his 2 children lived with him on alternate weeks. Prior to the separation, this employee worked a 4-day 10 hour per day schedule, but switched to the 5-8 hour shifts to enable him to arrange for his children's care and deal with driving to and from daycare to pick them up.

This employee asked to continue to work the 8 hour shift schedule. This request was refused and the employee was then required to alter the joint custody arrangement. The children were transferred to a different school close to the mother's home and rather than live with each parent during alternate weeks, they stayed with their mother on weekdays and with their father only on weekends.

Four grievances were filed by the Union alleging that the employer's refusal to accommodate these varying parenting responsibilities constituted discrimination on the basis of family status.

The Arbitrator reviewed the change to the work schedule, the respective conflict that arose in each case between the work schedule and each employee's parenting obligations, as well as the steps taken by each employee to deal with the change. In the case of the first three employees, the Arbitrator determined that the new schedule did not seriously interfere with substantial parental obligations. In the case of the latter employee, however, the Arbitrator held that the employer had discriminated against the employee and that the employer did not determine whether the request for accommodation of his parenting responsibilities could be accommodated.

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"...the Arbitrator concluded that it was reasonable to expect spouses/parents to work together to split parenting duties so as to accommodate their workplace duties..."

The Arbitrator discussed the duty of a parent to ensure appropriate care, health and safety of their children, but in the context of the fact that not every conflict between a work obligation and a parental obligation must be accommodated by an employer. In this regard, not every conflict of this nature will give rise to a finding of discrimination. In this case, the Arbitrator concluded that it was reasonable to expect spouses/parents to work together to split parenting duties so as to accommodate their workplace duties and that it was a "fact of life" that parents' work schedules may conflict with parents' ability to attend their children's extra-curricular activities.

In the context of the fourth employee's custody arrangement with his former partner, however, the Arbitrator determined that the change to the work schedule of the employee "materially disrupted [the] carefully crafted arrangement" by requiring the children to change school, and alter the prior custody arrangements. The Arbitrator continued:

> The crafting of a custody sharing arrangement is a delicate matter which is to be encouraged. Such agreements are reached in circumstances in which children are subject to extra sensitivity and vulnerability. It is reasonable to conclude that a change in a workplace rule which forces parents to alter a carefully constructed custody agreement to their detriment in order to accommodate that workplace rule may be found to be discriminatory under s.5. I do not think it is an answer to the allegation of discrimination in these circumstances to suggest that the grievor should have moved…or hired private nanny care. He arranged his life to accommodate the previous schedule and he should not have been required to accommodate the new schedule in the manner suggested to deal with his substantial parental obligations without an inquiry as to whether the Employer could accommodate him. I therefore find and declare that by imposing the new four hour shift schedule…, the Employer violated s.5 of the HRC. I would note that the Employer is still protected from such a finding as it is not required to accommodate the grievor if that accommodation would result in undue hardship to the Employer. In this case undue hardship is not being claimed.

In conclusion, whereas "ordinary family obligations" are not covered by the right to be free from discrimination in employment on the basis of family status, a "serious interference" with "substantial parental obligations" may result in a finding of discrimination, where the employer has not adequately and directly assessed appropriate accommodation based on an individualized review of whether it is in fact possible to accommodate the employee short of undue hardship. ■

PRIVACY IN THE TIME OF A PANDEMIC

The Office of the Privacy Commissioner of Canada has developed a guidance document entitled "Privacy in the Time of a Pandemic". The document clarifies the application of privacy laws during a pandemic such as H1N1. You can find the guidance document on the Commissioner's website at www.priv.gc.ca. ■

EXPECT THE BEST

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