

NOT KNOWING THE DIFFERENCE CAN BE COSTLY

Independent Contractor or Employee?

Christine Wiseman

Gordon Braiden, a longtime employee of furniture maker La-Z-Boy Canada, was required to sign on as an independent contractor in order to retain his sales position with the company. Braiden was required to incorporate and begin charging and paying GST for his services, paying his own Employee Health Tax and WSIB premiums. His benefits and RSP contributions ceased. However, nothing else changed in terms of the requirements and restrictions of his position, remuneration, or day-to-day routine and performance expectations. The agreement that Braiden signed allowed La-Z-Boy to terminate his contract with 60 days' notice. When the company sought to enforce that provision, Braiden sued.

The Court found that due to the level of control that La-Z-Boy exercised over Braiden, and Braiden's vulnerability when the company threatened to end his tenure if he did not sign on as an independent contractor, he was an employee and not an independent contractor. And since he was deemed to be a 23-year employee before termination, the Court awarded Braiden 18 months' pay in lieu of notice, totaling \$139,000.00.

La-Z-Boy is appealing the decision, but the Court is sending a clear message that forcing employees to sign on as independent contractors without changing anything else in the relationship, solely to save the employer the cost of benefits, will not be condoned. La-Z-Boy's mistake was in not seeing the need for, or seeking out, advice on what truly distinguishes employees from independent contractors, and how they could realize the benefits of a 'true' independent contractor without having an independent contractor be deemed an employee.

The trend of obtaining services through independent contractors has steadily increased, owing to the appeal of the perceived flexibility and reduced expenses that utilizing independent contractors rather than employees can provide. However, the costs to an employer of having a so-called independent contractor deemed to be an employee can be substantial. The problem lies not in how a company defines its relationship with an independent contractor, but in the dynamics of that relationship - is the person truly in business for themselves or are they merely an employee by another name?

Recent court decisions confirm that the day-to-day interactions of the employer and worker are key considerations when determining the true nature of the relationship. The intention of the parties



becomes a factor only when those particulars do not provide a definitive answer. The circumstances to be looked at include the following:

- Who controls when, where and how work is carried out?
- Can work from other sources be undertaken?
- Who owns the tools used to carry out work?
- How are profits/loss dealt with (or is compensation fixed)?

By answering these questions, it often becomes clear that the label of 'independent contractor' has been erroneously used. In that event, the risk to an employer can include responsibility for statutory deductions and employment standards entitlements such as overtime, vacation, statutory holiday and termination pay. Additionally, an employer can expect to be liable for WSIB and Health Tax premiums (including interest and penalties associated with each), and damages for wrongful dismissal when the contract is terminated. Clearly, legal advice is advisable before putting such status changes in place.



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