

Condo Smarts

Headline: Employees or Contractors?

Topic: Hiring

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Dear Condo Smarts: Our strata corporation has extensive landscaping that requires a full time gardener. We have hired a man as our contractor for the past seven years, and have decided to put out new specifications so we can confirm we are getting good value for our services. Unfortunately our gardener took this personally and resigned on the spot, citing the hours of additional work he has given to us at no charge, and now he is claiming that we owe him for vacation pay for the past seven years. Our manager at the time advised it would be better to keep the man as a contractor so we didn't have to address the employee relationship issues. Everyone including the gardener agreed, but now it looks like it has come back to bite us. How do other strata corporations deal with workers as employees or contractors? There must be all types of relationships from caretakers, to managers, to service technicians, book keepers, maintenance personnel, and even casual in-house owners being hired for odd jobs. Where do we cross the line from contractor to employee? Karin P. West Vancouver

Dear Karin: The relationship between an employer and employee/contractor is set by a number of conditions through BC Employment Standards, through the ministry of Labour. There are a number of tests that are used in determining the status of your relationship that can be found on the Ministry of Labour website: "**Control** – Is the person under the direction and control of another regarding the time, place, and way in which the work is done? Is the person hired, given instruction, supervised, controlled or subject to discipline? Was the person told what to do, how to do it, and when to do it? Did the

person have to do the work him or herself, or could that person give the work to someone else to do? Does the person perform work normally or previously performed by an employee? The greater the degree of control, the greater the likelihood the person will be found to be an employee. **Ownership of tools** – Does the person use tools, space, supplies and equipment owned by someone else? If so, this would indicate an employment relationship. However, it is recognized that some employers require employees to provide their own tools or vehicles. **Chance of profit** – Does the person have a chance of profit? If their income is always the difference between the cost of providing the service and the price charged for the service, the worker may be someone other than an employee. **Risk of loss** – Is the person at risk of losing money if the cost of doing a job is more than the price charged for it? This may indicate a non-employment relationship. **Payment** – Is the person paid regular amounts at set intervals? Does the person get paid regardless of customer satisfaction or customer payment? These factors indicate an employment relationship. In general, the more the party who pays for the service provided controls the supply of material and tools and retains direction and control of the activities, the more likely it is that the Director will find the relationship to be one of the employer/employee. **Common misunderstandings** – One or more of the following factors is often wrongly believed to establish an independent contractor relationship: **Agreement** – The act of signing an independent contractor agreement does not necessarily create an independent contractor relationship. The actual work

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relationship determines if a person is an employee or independent contractor. Any agreement to waive employment standards entitlements is prohibited by the Act.

Charges GST: GST filing numbers are provided upon request, and the requester may or may not be in a lawful position to charge GST. **No Deduction for Income Tax, EI or CPP:** May indicate contraventions of the *Income Tax Act* and *Employment Insurance Act*. Or, if the employer received a ruling from Canada Revenue Agency (CRA) or Human Resource and Social Development Canada (HRSDC) that the employee is a contractor, it does not decide the Employment Standards issue. It may merely reflect the different purposes of those Acts.

Person sets own hours and is not actively supervised: The business may provide significant levels of flexibility to its employees. **Works for several businesses:** Many people work at more than one job.

Submits a bill for labour provided: It may be nothing more than a record of hours worked; in effect, a time card. **Drives his or her own vehicle/provides own tools:** It may be a condition of employment that a person provides a vehicle so as to perform the work. In some sectors employees are expected to provide their own tools.

Payment by commission or other forms of incentive pay do not necessarily indicate a chance of profit or risk of loss; these are simply ways of linking pay to productivity."

Maintaining an employee as a contractor just because both parties consent does not mean this is not an employee relationship. As Karin's strata has discovered, when the relationship becomes complicated or adversarial, the strata corporation is likely going to pay the price. With a properly defined job description, proper supervision and documentation, an employee relationship can be a great success, to the benefit of both parties. Also, remember there is no HST on employee salaries, so that may be a critical incentive in planning your budget and controlling your financial costs. If your strata has a full-time person as a contractor, make sure your strata has the right answers. Get legal advice from an experienced labour relations lawyer, and visit the Ministry of Labour website @: <http://www.labour.gov.bc.ca> and select the Interpretation Guidelines Manual available in a number of language translations.

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