

# CLIENT ALERT

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## HIRING YOUR WORKFORCE IN ONTARIO

by Eric Kay

Familiarizing yourself with and abiding by Ontario employment law are key to successfully recruiting, hiring and managing your workforce and employer liability. And those keys are applicable whether you are an existing employer in Ontario or entering into Ontario as a new place of business. Understanding the legal issues and requirements of hiring your workforce is the second step.

Some employers may be tempted to use an “easy strategy” of independent contractor arrangements in place of employment relationships. American employers in particular may be nervous about operating without “at-will” employment of their workforce. But adopting this approach could in fact backfire and have adverse legal consequences if contractors are in fact found to be employees.

Workers rather than employees may be referenced in this article because employers in some cases have obligations not just to employees but also to dependent and independent contractors in the workplace, including under some employment-related legislation.

### Does federal or provincial law govern the employment relationship?

The *Employment Standards Act, 2000* (“ESA”) sets out minimum employment standards for provincially regulated workplaces in Ontario. The *Canada Labour Code* sets out the minimum standards for federally regulated workplaces in Ontario.

There are a number of other statutes affecting the employment relationship in provincially regulated workplaces in Ontario, but the most important are:

- *Accessibility for Ontarians with Disabilities Act, 2005*
- *Employers and Employees Act*
- *Employment Insurance Act*
- *Employment Protection for Foreign Nationals Act, 2009*
- *Employment Standards Act, 2000*
- *Human Rights Code (Ontario)*
- *Labour Relations Act, 1995*
- *Occupational Health and Safety Act, 1990*
- *Pay Equity Act, 1990*
- *Pay Transparency Act, 2018 and*
- *Workplace Safety and Insurance Act, 1997.*

There are a number of other statutes affecting the employment relationship in federally regulated workplaces in Ontario, but the most important are:

- *Canadian Human Rights Act*
- *Employment Equity Act*
- *Employment Insurance Act, and*
- *Personal Information Protection and Electronic Documents Act.*

### **Who does this legislation cover, including categories of workers?**

Depending on the circumstances, independent contractors, dependent contractors, consultants, interns, employees of affiliates, employees from temporary agencies and third-party employees can be considered employees or workers for some common law or statutory purposes.

The definition of “employee” and “worker” varies among the relevant legislation. The *Labour Relations Act, 1995*, for instance, explicitly includes “dependent contractor” in the definition of “employee”. The *Occupational Health and Safety Act* defines “worker” to include self-employed individuals, independent contractors and temporary workers.

### **Employee / Contractor Misclassification**

A person may be classified as an independent contractor at common law, but because of economic dependence on and control by the entity for which the services are performed, legally qualify as a dependent contractor.

A person may also be classified as a dependent contractor notwithstanding that he or she conducts business through a corporation and hires others to assist in the performance of the work. The usual distinction between a dependent contractor as compared to an independent contractor is that a dependent contractor is entitled to reasonable notice of termination of the agreement.

Different employment related legislation (i.e., tax and safety) may treat dependent or independent contractors as employees or workers subject to particular legislation.

Though the distinction between independent contractors and employees has not been fully clarified, misclassification of an employee can result in **ESA** problems for an employer. First, if there is a question about whether someone is an employee or an independent contractor, a “reverse onus” is now triggered, meaning the burden is now on the employer to prove that the person is an independent contractor and not an employee under the **ESA**. Second, if a person is misclassified, that is the individual is treated as an independent contractor when they are in practice an employee, the Ministry of Labour may commence a prosecution against that employer. The “reverse onus” provision does not apply in a Ministry of Labour prosecution.

## **Contracts of Employment**

### **Must an employment contract be in writing?**

While preferable for the protection of both parties, an employment contract need not be in writing. To be enforceable, an employment contract simply requires the requisite elements of any contract: an offer made with the intent to create legal relations, acceptance of that offer, consideration, capacity, and legality. Where a written contract of employment has been contemplated but not signed, the contractual agreement will be enforceable if the conduct of the parties shows that their clear intent was to enter into a binding contract. In many cases contracts are part oral, part written, and part implied by the common law.

### **Are any terms implied into employment contracts?**

Employment contracts can be oral or written and may include express and implied terms. It is implied in every contract of employment that an employer will provide the employee with reasonable notice in the event of termination, except in the event of just cause. Other examples of implied terms are that employees will perform their duties with reasonable skill and diligence, and that they have a duty of loyalty to their employer. Usually only senior employees would owe a fiduciary duty to their employers.

### **Are mandatory arbitration agreements enforceable?**

Section 7(1) of the *Arbitrations Act*, 1991 states:

“If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.”

Ontario courts have held that the language of section 7(1) of the *Arbitrations Act*, 1991 is mandatory and requires the court to stay a proceeding when there is an agreement to arbitrate and the dispute is properly within the mandate of the arbitrator. It is for the arbitrator to determine in the first instance whether a matter in dispute is subject to arbitration.

The court may refuse to stay the proceeding in the following cases: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is not valid; (3) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law; (4) the motion was brought with undue delay; and (5) the matter is a proper one for default or summary judgement.

With respect to (3), certain rights under the *ESA* cannot be made subject to arbitration. Attempting to do so may invalidate some or all of the provisions of an employment agreement.

### **How can employers make changes to existing employment agreements?**

Any amendment or renegotiation of the employment agreement must usually be agreed to by both parties and must be founded upon new consideration. An employee can make unilateral changes to certain terms of employment if that is permitted under the contract of employment or with sufficient notice of the proposed change to the employee. Continued employment is not valid consideration for a mutually agreed variation. If a material change to an employment agreement is made unilaterally, without reasonable notice and the employee does not consent, the employee may bring an action for constructive dismissal or claim damages for breach of contract.

### **Key Take-Aways**

When employers obtain the necessary employment law advice about recruiting, hiring and managing their workforce in Ontario, they will be better prepared from a business perspective and at less risk from a legal perspective. A key step is properly hiring, classifying and documenting each working relationship.

Employment law is constantly evolving in Ontario, so please contact **Eric Kay** at [ekay@dickinsonwright.com](mailto:ekay@dickinsonwright.com) to discuss your general employment law needs or to obtain advice with respect to any particular employment law issue or problem with respect to hiring your workforce.

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