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### **Employment Law for Mariners: Severance Pay for “Dependent” Contractors?**

When a marine professional is terminated, they most often fit into one of two categories: employee, or independent contractor. It is common knowledge that when an employee is fired without good cause, they are entitled to either working notice, or pay in lieu of that working notice (ie. severance pay). Adequate notice, or pay in lieu of, can be expensive: as much as one month for every year of service, up to about 24 months. An independent contractor, on the other hand, is not entitled to either notice of their termination, or pay in lieu of, unless their written contract says they are.

Many people do not know however that there is a legal relationship half-way between an employee and an independent contractor, called a “dependent contractor”, that has many of the hallmarks of an independent contractor but where the worker is entitled to reasonable notice of termination of their work, or severance. In this *Legal Net*, we will review the differences between an employee and an independent contractor, what makes a worker a “dependent contractor”, and why both workers and employers are wise to understand this emerging category of worker/employer relationship, or be stung by the significant financial consequences of failing to do so.

### **The Benefits/Costs of being an Employee v. Independent Contractor**

Why do workers and employers care if the worker is an employee or an independent contractor? An “employer” is, for the purposes of this article, anyone who hires a person/company to do work. The reasons are commonly known, but are worth refreshing.

From the worker’s perspective, the primary advantage of being an independent contractor is the income tax savings. Many contractors, right or wrong, have (or find) enough expenses to deduct against their income that their taxable income is significantly lower than an employee doing a similar job, which as a result, means lower income tax. The cost to the worker of being an independent contractor is primarily that unless they have a contract that states their entitlement to vacation pay, sick time, and notice of termination (or pay in lieu of), the worker has no protection from simply being pushed overboard, figuratively speaking, by an unhappy employer.

From the employer’s perspective, the advantages of having a worker that is an independent contractor are numerous. If the relationship is *truly an independent contractor relationship*, the employer does not need to remit EI, WCB and CPP premiums, nor do they have to remit income tax for the worker. This simplifies the employer’s responsibilities and paperwork significantly. While the employer may have

to remit HST on account of the value of the work done by the independent contractor, the HST paid by the employer is typically recouped. An employer also does not have to pay vacation or overtime pay to a contractor. Lastly, a huge benefit in a *truly independent contractor relationship*, is that the employer need not give reasonable notice for the termination of (or pay in lieu of) the contractor's services. The down-side to the employer of having an independent contractor is relatively benign, most notably of which is that a contractor does not have the same legal obligations to the employer to avoid divided work loyalties (they can work for more than one employer at a time).

I have added emphasis to the phrase "*truly independent contractor relationship*" above, because government authorities such as WCB (WorkSafe), Canada Revenue Agency and B.C. Employment Standards all have stringent tests for who is *truly an "independent contractor"*, versus who is a worker that is merely dressed-up as a contractor to give the worker and the employer the advantage of avoiding the more onerous legal responsibilities of an employee/employer relationship. Each of WCB, CRA and the ESB however can strip away any disguise and penalize employers for trying to pass-off their relationship with an employee as one with an "independent contractor". Beware.

### **What makes an Employee v. an Independent Contractor:**

As mentioned immediately above, there are risks to employers having workers masquerade as independent contractors, when they are really employees. There are a number of factors that can determine whether or not a worker fits into the typical categories of employee or independent contractor. Some of these factors are:

- **Control:** A worker that is subject to a high degree of oversight and control is more likely an employee than an independent contractor. If the employer can dictate when and how the job is completed, they have a higher degree of control. For example, "*Fix my engine. I don't care how you do it, just get it done right*" is a low degree of control. "*Show up at 8am, and do what I say until 4pm*" is a higher degree of control.
- **Tools:** Workers that supply their own tools are often contractors rather than employees. Tools can be hand-tools, machinery, charts, and even particular knowledge in a specialized area. Employees, on the other hand, do not typically own the tools that are used to complete their job, although they may have a great deal of expertise.
- **Risk of profit/loss:** Employees do not typically have a risk of profit or loss. An employee typically gets paid regardless of how successful the job was. A contractor on the other hand, may profit from being paid the same amount to get a job done if they can do it in a shorter period of time.
- **Contract wording:** The worker and employer may have a written agreement that states the worker is an independent contractor (and is to remit his own WCB, EI and

taxes) and this contract can be somewhat helpful, but will not determine the result if other factors point to the worker being an employee.

No single factor above determines whether a worker is an employee or an independent contractor. Each case must be reviewed separately, and judged on its own facts.

### **What makes a worker a Dependent Contractor?**

Now, allow me to introduce a new character, the rabid-mutt or Frankenstein of employment law, the “dependent contractor”. To the worker, the status of dependent contractor means having all the powers of an independent contractor (flexibility in tax deductions, divided loyalties to employers), and the enormous power of requiring reasonable notice of termination of their services. To the employer, the dependent contractor remains attractive because the employer may skirt the responsibility of making WCB, EI and tax deductions, but the surprising horror exists that, if the worker is truly a dependent contractor, they are obliged to give the worker reasonable notice of termination of their services, or pay in lieu of. In some cases, this can result in the employer being sued for 24 months of the worker’s lost profits.

What then makes a dependent contractor? Like determining whether a worker is an employee or an independent contractor, no single factor will determine the result, but the following factors will be considered by a court if asked by a contractor “*Am I entitled to notice (or pay in lieu of) for termination of my services?*”:

- **Length of relationship:** The longer or more permanent the relationship between the worker and the employer, the more likely the worker will be found a dependent contractor. Dependent contractor relationships are often 10 – 15 years or more in length.
- **Exclusivity:** How exclusive is the relationship between the worker and the employer? If the worker is only allowed, or able (because of the number of hours he must devote to the job) to work for the employer, there is a high likelihood that he will be classified as a dependent contractor.
- **Reliance:** Reliance, by both the employer and contractor, is an important factor. Where the employer’s business could not operate but for the contractor’s efforts, or where the contractor would have little or no work/income but for the employer, the likelihood that the worker will be found to be a dependent contractor is higher.
- **Worker as a Corporation:** the law does not disqualify a worker from being a dependent contractor simply because they operate through a corporation.

## **What are the benefits of being a Dependent Contractor?**

The dependent contractor relationship is ideal for the worker. They gain the benefit of an increased likelihood for making profit, income tax deductions, and greater control over their activities, while receiving the protection of required notice or severance pay when being terminated. Workers are wise not to overlook this category of legal relationship when their services are terminated, and employers are wise to protect (and defend) against such claims if they are unwarranted. What remains open for clarification at law is whether wages owed to a marine “dependent contractor” who works on a vessel has a *maritime lien* over the vessel for monies owed for terminating their contract without proper notice. Such a lien carries with it significant powers including arrest of a vessel and its cargo. Future issues of the *Legal Net* will address that emerging issue.

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