

## You say subcontractor; the CRA says employee

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The Canada Revenue Agency (CRA) has become increasingly interested in independent contractors and whether they are, in fact, employees. Many individuals prefer to be treated as independent contractors, enabling them to deduct a wider range of expenses from their income than employees. In addition, many companies also prefer this treatment as they avoid payroll, withholding and reporting responsibilities, as well as benefits expenses, the employer portion of the Canada Pension Plan (CPP) and Employment Insurance (EI) remittances, and potential liability related to Worker's Compensation Board issues.

However, whether an individual is an employee or a contractor is not a question of choice but a question of fact. And yet, making such a determination is not perfectly clear, as represented by a series of court cases on this issue. In a relatively recent case, the court concluded that the intent of the individual and the company must be one of the factors that is considered in determining the status of the individual.

The CRA itself does not mention intent at all in their guide "*RC-4110 – Employee or Self-Employed?*" The guide, which does not carry the force of law, states that the following factors must be considered together in determining whether a worker is an employee or an independent contractor:

1. **The level of control** — does the individual work independently and without supervision or is the worker a subordinate who follows the direction of the company?
2. Does the worker own and **provide their own tools** or are they provided to the worker?
3. **Can the worker subcontract work** or do they have no ability to hire and send replacements?
4. To what degree does the worker take on **financial risk**? For example, is the worker hired for a specific job? Does he/she advertise services and perform substantial work at his/her own workspace, thereby incurring expenses, or is the relationship continuous where the worker is not responsible for any operating expenses?
5. What is the **degree of responsibility for investment and management** held by the worker? Does the worker have a capital investment and a business presence?
6. **Can the worker realize a profit or incur a loss?**

Should a subcontractor be deemed an employee by the CRA, the outcome can be severe, including the following:

1. Penalties of 10% on income tax, CPP and EI which are not withheld on the first failure to withhold, with the penalty potentially increasing to 20% for repeated offences, as well as non-deductible interest on the amounts owing.
2. Both the employee and the employer's portion of CPP and EI plus penalties and interest.
3. Late filing penalties on the failure to file T4 Statement of EI forms.

In summary, businesses should evaluate both the intent of the relationship and the terms and conditions of the work performed, which should be in writing, when determining whether a worker is an employee or a contractor. Businesses should also have documentation available to support that determination before the CRA comes knocking.