

Employer-Employee Relationships

This guide replaces the following bulletins:

- How to Identify an Employer-Employee Relationship
- Placement Agencies and their Workers – How to Identify an Employer-Employee Relationship
- Commissioned Real Estate Salespersons – How to Identify an Employer-Employee Relationship
- Truck Owner Operator – How to Identify an Employer-Employee Relationship

This publication provides general information. It is not exhaustive and does not replace the law found in the Employer Health Tax Act and related regulations.

Employers are required to pay Employer Health Tax (EHT) on remuneration paid to employees who report for work at a permanent establishment in Ontario and employees who do not report for work at a permanent establishment but who are paid from or through the employer's permanent establishment in Ontario. Employee is defined to include officers, directors and former employees.

Although the terms **employer** and **employee** are defined in the Employer Health Tax Act (EHT Act), the act does not define the circumstances under which an employer-employee relationship exists. To determine whether an employer-employee relationship exists, many factors have to be taken into consideration, including the terms and conditions of the worker's employment and common law principles.

Ontario previously accepted federal Canada Pension Plan (CPP) and Employment Insurance (EI) rulings regarding the employment status of workers that were issued either in the current or the four immediately preceding years and applied them only to the hirers and the workers named in the rulings. As announced in the 2012 Ontario Budget, Ontario will continue to use federal rulings to assist in determining whether an employer-employee relationship exists but it will not be bound by these rulings for EHT purposes. This change in administrative practice will apply to EHT assessments issued after March 27, 2012 and will apply to all taxation years open to assessment or reassessment under the EHT Act.

The fact that an individual may be employed on a part-time or casual basis has no effect on whether the individual is considered to be an employee or a self-employed individual for EHT purposes. The key question is whether or not the person is engaged to perform services as a person in business on his or her own account, or as an employee.

Common law principles

Given that the EHT Act does not define the circumstances under which an employer-employee relationship exists, it is necessary to refer to common law principles established and reinforced by court decisions to establish whether a worker is an employee hired under a contract of service or is self-employed under a contract for services.

A contract of service, or employer-employee relationship, generally exists when a worker agrees to work for an employer, on a full-time or part-time basis, for a specified or indeterminate period of time, in return for wages or a salary. The employer has the right to decide where, when and how the work is to be done.

A contract for services, or business relationship, generally exists when a self-employed worker agrees to perform a specific task for a payer in return for payment. The worker is in business in his or her own right and provides services to other businesses as an independent contractor. The worker is not normally required to perform the services personally.

To determine the legal relationship between the parties, Ontario examines and analyzes the terms and conditions of the worker's employment as they relate to the following four factors: control, ownership of tools, chance of profit/risk of loss and integration. It is important to note that there is no set formula as to the application of these and other factors. The relevant weight of each factor will depend on the particular facts and circumstances of each case.

Ontario also considers the intent of the parties as evidenced in the terms of a written contract and the mutual understanding of the parties at the time of entering into the contractual relationship. Such contracts will only be given weight if they accurately reflect the relationship between the parties.

Control

The control test is used to determine whether a person is in a position to direct or require not only what work is to be done, but also how it is to be done. Generally, in an employer-employee relationship, the payer controls, directly or indirectly, the way the work is to be done and the work methods used. The payer assigns specific tasks that define the real framework within which the work is to be done. The payer exercises control if he or she has the right to hire or fire, and decide where, when and how the work will be done. If such is the case, then the payer clearly exercises control over the worker, who may then be considered to be an employee for EHT purposes.

It is not necessary that control actually be exercised, only that it can be exercised.

The control test may not be determinative when examining the employment of professionals who, because of their expertise and specialized training, may need less direction and supervision. A professional who is subject to limited control and supervision may still be an employee based on other factors.

Indicators that the worker may be an employee:

- The worker
 - receives training or direction from the payer on how to do the work
 - has to perform the services personally; the worker cannot hire others to do the work
 - requires permission to work for other payers while working for this payer
 - is required to devote his or her full time and attention to this payer.
- The payer has the right to
 - direct, scrutinize, and effectively control many elements of how and when the work is performed
 - plan the work to be done and determine what jobs the worker will do
 - instruct the worker on how to perform the work
 - control the number of hours worked
 - set standards for quality and quantity of work
 - prepare performance reports or evaluations
 - impose disciplinary measures
 - determine where the work is done
 - approve contracts negotiated by the worker
 - ultimately determine and control the method and amount of pay
 - require the worker to comply with its instructions or policies including safety standards.

Ownership of tools

In an employer-employee relationship, the employer generally supplies the equipment and tools required by the employee and covers the costs related to their use such as repairs, insurance, transport, rental, and operation.

In considering the equipment and tools owned and supplied by the worker, what is relevant is the significance of the investment in the rental or purchase of tools and equipment along with the related costs of replacement, repair, and insurance.

Ownership of the tools, however, is not always a determining factor. The fact that a worker uses his or her own equipment when performing the work is not sufficient to conclude that the person is

self-employed, as all factors must be considered. It is customary for workers in certain occupations, such as mechanics, carpenters and photographers, to be required to supply their own tools even if they are full-time employees.

Indicators that the worker may be an employee:

- The worker
 - supplies the tools and equipment and the payer reimburses the worker.
- The payer
 - supplies most of the tools and equipment required by the worker
 - is responsible for repair, maintenance, and insurance costs
 - retains the right of use over tools and equipment provided to the worker.

Chance of profit and risk of loss

Generally, if an employer-employee relationship exists, the employer assumes the chance of profit and risk of loss. The employer also generally covers operating costs, which may include office expenses, employee wages and benefits, insurance premiums, and delivery and shipping costs. The employee assumes little or no financial risk and is entitled to his or her full salary or wages regardless of the financial position of the business.

Indicators that the worker may be an employee:

- The worker
 - is not normally in a position to realize a business profit or loss; overtime, bonuses, and fixed commissions are not considered business profits
 - is not able to profit from subcontracting the work
 - is entitled to benefit plans which are normally only offered to employees such as registered pension plans, and employee health and dental insurance plans
 - is entitled to additional remuneration such as vacation pay, sick pay, or bonuses
 - is entitled to severance pay on termination of the contract
 - is not usually responsible for any operating expenses
 - is reimbursed for travelling expenses, professional memberships, uniforms or other work-related expenses
 - may quit the job without obligation
 - is not financially liable if he or she does not fulfill the obligations of the contract.

- The payer
 - supplies the workplace and covers all operating costs
 - pays for worker training
 - assumes the cost of damages caused by its employees
 - holds liability insurance covering worker faults
 - risks losses due to bad debts, calculation errors, theft of merchandise and/or guarantees on materials and labour.

Integration

The integration or organization test examines whether the tasks performed by an individual form an integral part of the business as opposed to merely being accessory to the business.

The test will also determine whether the individual is in business in his or her own right and provides services to other businesses as an independent contractor. An employee is not perceived as operating his or her own business, but rather as being an integral and necessary part of the payer's business.

Indicators that the worker may be an employee:

- The worker
 - is hired on a full-time or part-time basis for a specified or indeterminate period of time rather than a specific task
 - is financially dependent on the payer
 - has few or no other clients, is not actively seeking other clients or is not free to seek other clients
 - does not have a business license
 - does not have a business telephone line, website or e-mail address
 - may be identified with the payer's business in any of the following ways
 - by appearing on the payer's organization charts or website
 - using the payer's letterhead and forms
 - using an e-mail address associated with the payer
 - wearing the payer's uniform
 - using tools or equipment painted with the payer's colours or logo.

- The payer
 - Advertises for new customers, maintains a customer list, and assigns the worker to a territory or to its customers.

Sector-specific indicators

In addition to the factors and indicators listed above, the following are some of the additional sector-specific indicators that the ministry may consider in order to determine whether an employer-employee relationship exists between the agency and the worker. This list is not exhaustive and not all of the following indicators may be present in every situation. All facts pertaining to the working relationship need to be considered.

Placement or employment agencies and their workers

Where a worker is hired by an agency and placed on assignment with one of the agency's clients, there is often an employer-employee relationship between the agency and the worker. In most placement agency situations, direction and control over the day-to-day work is left to the client, but the ultimate control over the worker remains with the agency. As the agency has the right to hire or fire, and decide where and when the work is to be done, the agency is considered to be the employer for EHT purposes.

The term **professional specialist** refers to a worker who does not require strict instructions from the agency or the contracting client as to how to perform the task assigned, such as an engineer, draughtsperson, surveyor, doctor, technician or computer consultant. Professional specialists may be employees of the agency or self-employed. As with other workers, Ontario will examine and analyze the terms and conditions of employment to determine whether an employer-employee relationship exists between the parties.

Indicators that the worker may be an employee of the agency:

- The client requires the agency's approval for subsequent hiring of the same worker.
- The agency
 - makes the decisions of hiring, paying and terminating the worker
 - determines how much the worker is to be paid
 - monitors the performance of the worker
 - provides the worker with training and development
 - requires the worker to comply with its instructions or policies
 - is responsible for disciplining the worker
 - pays the worker regardless of whether the agency is paid by the client

- pays additional remuneration such as vacation pay, sick pay, or bonus for high performance
- pays liability insurance for the worker
- is liable for damages caused by the worker it has placed
- reimburses the worker for expenses.

Commissioned real estate agents

In general, real estate transactions are conducted by registrants under the Real Estate and Business Brokers Act who act as real estate brokers (brokers) or real estate salespersons (agents). The ministry does not have a generic industry position on whether an employer-employee relationship exists between a broker and an agent.

Indicators that the agent may be an employee:

- The agent
 - is paid a combination of salary/wage and commission
 - receives advances on commissions earned
 - is entitled to a guaranteed wage minimum
 - is not required to pay a fee or amount to cover administrative costs or pays an amount that is less than market value
 - must account to the broker for his or her activities on a daily or weekly basis (e.g., report on objectives, holiday reports, and work schedules; all of which have been requested by the real estate broker)
 - is subject to sales quotas (e.g., minimum listing requirements or dollar volume of sales).
- The broker
 - reserves the right to reject any listing deemed unsatisfactory and/or commission rates below a certain threshold
 - covers the cost of advertising the listings
 - provides office space, administrative services, stationery, etc, at a cost to the agent that is below market value
 - retains a percentage of the agent's sales to cover the administrative costs and only requires payment for these services when there is a sale

- requires a minimum commitment from the agent in terms of hours devoted to the business
 - requires the agent to perform specific tasks, such as answering telephone calls during a specific period at the broker's office
 - retains the listings in the event of termination of the relationship between the broker and the agent.
- If the agent is absent from work (e.g., on vacation)
 - his/her listings are redistributed to other agents during the absence
 - the broker sets the guidelines regarding work redistribution
 - the broker determines how the compensation arrangements with the other agent will be effected.

Truck owner operator

For the purpose of transporting its goods, a business may have its own fleet of trucks or require the services of a trucking company. A trucking company that hauls goods is required to obtain an operating licence from the Ontario Ministry of Transportation. A trucking company may hire drivers to haul goods in company-owned trucks (in-house fleet) or may hire owner-operators (individuals who have their own trucks). Owner-operators may work under the operating licence of the trucking company, or have their own operating licences. Whether owner-operators are employees of the trucking company or independent contractors will depend on the particular facts of the situation.

Indicators that the owner-operator may be an employee:

- The owner-operator
 - is required to work scheduled hours
 - is expected to perform duties other than that of hauling goods
 - works a probationary period
 - is required to finance the truck through the trucking company's sources
 - is required to lease-to-own a truck from the trucking company and to sell/return the truck back to the trucking company upon termination of the contract/relationship
 - is required to lease a truck under a lease-to-own agreement that in any way affects the right of control arising from ownership
 - is required to purchase supplies and services such as truck maintenance from vendors selected by the trucking company

- is compensated by the trucking company for operating expenses such as maintenance and repair, insurance and deductible, licence, gas, etc.
 - is entitled to a guaranteed compensation minimum
 - is not able to negotiate rate per trip or rate per kilometre
 - provides his or her services exclusively to the trucking company
 - is required to wear a uniform
 - is not incorporated.
- The owner-operator's truck
 - is available for use by a back-up driver
 - is painted in the trucking company's logo and colours (other than the requirement to show the operating licence holder's name).

Workers engaged in construction

Construction workers may be employees or independent contractors. It is possible for a worker to be considered an employee under one contract or agreement but self-employed under another contract or agreement. The fact that a construction worker may move from site to site and from payer to payer is not sufficient to conclude that the worker is self-employed.

Indicators that the worker may be an employee:

- The more continuous and exclusive the working relationship, the more it indicates an employer-employee relationship exists.
- Generally, an employer can decide to fire an employee, and an employee may quit the job without obligation.
- The worker
 - is not able to provide his or her services to different payers at the same time
 - is not required to redo substandard or improperly completed work at his or her own expense
 - is not subject to a real risk of financial loss due to investments in tools and equipment or liability for expenses such as materials, salary, repairs, and maintenance costs on equipment, as well as other business expenses
 - does not have a business license

- does not maintain a separate bank account for the business or negotiate business loans or a line of credit
 - does not have accounts with suppliers and clients.
- The payer
 - pays by the hour, day, week, or month as opposed to a negotiated price per job
 - supplies construction material such as wood, drywall, or shingles
 - supplies the larger hand tools and equipment required by the worker to complete his or her duties. The fact that a worker is required to supply his or her own hand tools does not indicate the worker is self-employed.

Payments to corporations

If you contract for the services of an individual who operates through a corporation such as a personal services business, you may be required to pay EHT on payments you make to the individual's corporation if:

- it is reasonable to consider that the payments are made in consideration for services rendered, and
- if not for the existence of the corporation, the individual could reasonably be regarded as your employee.

Request for written interpretations

To request a ruling as to the status of a worker for Canada Pension Plan or Employment Insurance Act purposes, please contact the Canada Revenue Agency at 1 800 959-2221 or visit its website at **cra.gc.ca**.

To obtain a written interpretation on a specific situation not addressed in this publication, please send your request in writing to:

Ministry of Finance
Advisory Services, Employer Health Tax
33 King Street West, 3rd Floor
Oshawa ON L1H 8H5

Related publications

Other publications providing further details on this topic include:

- **Permanent Establishment**
- **Remuneration**

For more information

Visit **ontario.ca/eh** or contact the Ministry of Finance at 1 866 ONT-TAXS (1 866 668-8297) or 1 800 263-7776 for teletypewriter (TTY).

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