

INDEPENDENT CONTRACTOR GUIDANCE PURSUANT TO THE EMPLOYMENT ACT 2000

PREAMBLE

The Employment Act 2000 provides for the Manager of Labour Relations to issue and publish guidance, which may be revised from time to time, on whether a [working] relationship more closely resembles that of an employee than an independent contractor. The purpose of this guidance is to assist in the determination of whether a person is an employee and, as a result, entitled to the protections afforded under the Employment Act 2000. This document contains guidance in this regard.

PURPOSE AND RELEVANCE

- The purpose of this document is to establish the basic framework of an employee-employer relationship and how this differs from an independent contractor work arrangement
- Prior to hiring an individual as an independent contractor, employers should consult this guidance document to assist in ensuring the decision making process does not fall foul of the relevant legislation.
- Persons hired as or presented with an independent contractor contract, should consult this guidance if they have any concerns that they are being incorrectly classified within the workplace or are being denied the protections afforded to an employee pursuant to the Employment Act 2000.
- This guidance will be referred to by the Labour Relations Section as part of their normal investigation and mediation processes.
- This guidance may be consulted by the Employment and Labour Relations Tribunal as part of their decision-making process.
- The presence of a duly executed independent contractor contract may not be a determining factor in ascertaining whether an individual is an independent contractor.
- This guidance will take effect on 1 April 2023.

LAW

Employment and Labour Code of Bermuda

INTRODUCTION

How people work, where people work, and the way in which people work continues to evolve making it evident that in some cases the line between employees and other types of workers, including independent contractors, has become blurred.

As business owners and employers seek creative ways to reduce the costs of doing business in Bermuda, employees are also exploring alternative ways of work which provide more flexibility and customization. Where both of these trends intersect, the working relationship becomes less clear, and in some cases employee benefits are being compromised.

This guidance is intended to be a resource with the goal of assisting employers in their assessment of whether they are hiring an independent contractor or an employee. Likewise, workers can refer to this guidance to assist with determining whether their working relationship more closely resembles that of an employee than an independent contractor. By providing clarity on the working relationship, this guidance also aims to 1) reduce the misclassification of workers, 2) decrease unclear employment situations and 3) lower the occurrence of disputes and Employment and Labour Relations Tribunal cases.

The creation of this guidance was a collaborative effort by the Ministry of Economy and Labour and the members of the Labour Advisory Council (LAC).

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Quick Reference: Are you an Independent Contractor *or* an Employee?

INDICATOR	EMPLOYEE	INDEPENDENT CONTRACTOR
Continuity of Work	Has an expectation of on-going work and a continuing relationship.	Generally works for a specific period, task or gives specific advice or works for the duration of a project.
Tools & Equipment	Usually does not provide their own tools and equipment.	Generally provides their own tools and equipment to complete the work
Integration	Performs tasks that are an integral part of the employer's business.	Generally performs services that are not integrated in the everyday operations.
Method of Payment	Paid wages by the hour or by a salary.	Fees are usually paid in intervals or at the end of a project or for specified services or advice.
Training	Training may be provided.	Normally does not receive any training from client on skills to do the work apart from business requirements.
Profit & Loss	There is no profit and loss incurred.	Has the opportunity to make a profit or has a risk of losing money from the work.
Contract Type	Works under a contract <i>of</i> service or contract <i>of</i> employment.	Works under a contract <i>for</i> service.
Control Over Work	The employer controls how the work is carried out, such as the location, how the work is done, and sets the work hours and work days.	Has control over the work and may determine how, when and where the work is performed, such as work days, hours of work.
Open Market Competition/ Number of Clients	Usually works for only one employer, but can work for more than one.	Can work for many businesses/clients at the same time.
Benefit Responsibility	The business is responsible for providing paid leave and contributing towards statutory obligations.	Responsible for their own statutory obligations and does not receive paid leave.
Business Registration	Works for someone else's business and not required to register with the government.	Self-employed and required to register with the government as a sole proprietor or firm
Termination	Can be terminated or can end their employment.	Responsible for completing the job as agreed and can be terminated according to the contract.

***Disclaimer** – As there is no conclusive test(s) or assessment(s) to determine if someone is an independent contractor, when determining a relationship, this guidance document should be used as a broad reference and should not be used as definitive for any scenario as each workplace scenario may be unique. In each case, it is very important to consider all the facts – no single fact or particular combination provides the answer. If in doubt, employers, employees, workers, and self-employed persons should consult legal experts to assist them in definitively determining their employment status. This guidance applies to all organisations, including, but not limited to private sector businesses, government and non-profits and should be considered in conjunction with the commentary that follows.

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Commentary on Indicators

Continuity of the Work

Employees usually have an expectation of ongoing work which is usually continuous whilst independent contractors are generally engaged for a specific task, specific advice or project. Employees are dependent upon the employer to provide the resources in order to get the job done and the employee must perform the services for which they were hired. While, on the other hand, independent contractors may have the option to hire someone else to get the job done.

Tools and Equipment

Employees typically use the employer's materials, tools and equipment and the employer is responsible for repair, maintenance and insurance-related costs. However, while some employees may need to use their own tools, the employer typically incurs the cost. If a person provides his/her own tools, this does not automatically make the person an independent contractor. For example, employees in Bermuda who work remotely, chefs, mechanics, electricians, carpenters and other tradespersons are often required to provide their own tools. In some organizations, independent contractors may not be allowed to use their own equipment, phones or premises due to computer/software security, internal controls, business confidentiality and personal information protection. Some occupations, such as taxi drivers, often rent a vehicle from a taxi owner. Such persons may well be considered independent contractors.

Remuneration & Method of Payment

Pay rates are agreed upon between the employer and the employee. Employees are paid regularly whether hourly wages, or a salary. Conversely, independent contractors can set their own fees, and may typically submit proposals, bids or may give quotes to get work. They may also submit an invoice to be paid and are often paid at intervals, at the end of a project or on a written agreed basis for specified work or specific advice.

Training

If the organisation provides a person with training on the requirements of how to do the job, this suggests that the person may be an employee as opposed to an independent contractor. Independent contractors typically require no training on the requirements of the job. Although there are some instances when independent contractors may receive training, this is usually limited to orientation/familiarization, system upgrades/changes, and training on bribery, money laundering, personal information protection, harassment/bullying or any similar requirements. An example in Bermuda of independent contractors who may receive training are real estate agents. These agents also obtain a license with a single broker, work with the broker for many years, are paid commissions by the broker and work flexible hours including from home.

Integration

The services provided by independent contractors are often not integrated into the normal operations of the organisation, but can be, particularly in the case of small businesses, charities and non-profits. These organisations may have individuals, entrepreneurs or small firms doing roles such as cleaning, IT, payroll, payroll taxes, human resources, work permit advertising and social media.

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Profit and Loss

Employees generally do not share in the profits or suffer losses incurred by the employer's business. Independent contractors may make a significant investment in the tools and equipment and can increase their profits and/or decrease their expenses such as unilaterally setting their fees for their services, offering their services to one or more businesses and being financially liable if they do not fulfill the obligations of the contract.

Significant Differences: Contract of Service vs Contract for Service

A contract *of* service otherwise known as a contract of employment is an agreement between an employer and an employee. In a contract *for* service, an independent contractor, or other self-employed person or vendor, is engaged for a fee or a set amount to carry out an assignment(s) or project(s), complete specified work or provide specific advice. Under the Employment Act 2000, all employees must have a written statement of employment. The absence of a written statement of employment does not automatically make a worker an independent contractor. Likewise, the presence of a duly executed independent contractor contract may not be a determining factor in ascertaining whether an individual is an independent contractor. Both are likely to depend upon what is actually done by the person in comparison with the agreement. However, independent contractors should have a written agreement setting out the terms *for* service.

Additionally, professionals, who are usually highly qualified individuals, who have undergone a significant period of education and training may have a contract *of* service with a statement of employment or a contract *for* service stating the parties' agreement. Under a contract *for* service, professionals working as independent contractors should be registered and responsible for his/her payroll tax, contributory pension, health insurance, personal pension and any other statutory requirement as a self-employed person.

Control Over Work

If the organisation has a right to direct and control how the work is done, this suggests that the person is an employee. Even if the organisation does not exercise this right, this does not automatically make the person an independent contractor. Instructions given by an employer to an employee may include how, when, or where to do the work, what tools or equipment to use, what assistants to hire to help with the work and where to purchase supplies and services. On the other hand, independent contractors may receive some instructions on how, when or where the work should be carried out, but they more often than not will have control over the work done, when the work is done and where the work is carried out including the option to subcontract some of the work.

Competition with others

If a person is required to ask permission to work for another organisation this may suggest that the person is an employee. Independent contractors often can work with one or more clients at the same time, advertise and market their services to the general public as well as competitors of their clients. In Bermuda, for many small or medium-sized family businesses or for competitive industries, some independent contractors are highly valued and therefore more integrated into the business and therefore will not work for competitors.

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Benefits

As employees work for an organisation, the organisation is responsible for providing paid leave and other benefits as well as contributing towards the employee's four statutory obligations – social insurance, payroll tax, health insurance, and private pension. If a person receives these benefits from the organisation, this indicates that they are an employee. However, even if a person does not receive these benefits, they could still be an employee.

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Other Factors to Consider

Gig or hustle hires form a significant part of Bermuda’s working population who may either work as an independent contractor out of necessity or by choice. However, issues can arise around the working relationship.

		PRIMARY INCOME	SUPPLEMENTAL INCOME
PREFERRED CHOICE	FREE AGENTS Derive their primary income from independent work and actively choose this working style <i>Example: A self-employed plumber or a chiropractor in private practice</i>	CASUAL EARNERS Use independent work to supplement their income and do so by choice. Some have traditional primary jobs, while others are students, retirees, or caregivers. <i>Example: A hobby crafter who sells scarves or a professor who gives paid speeches</i>	
	NECESSARY CHOICE	RELUCTANTS Derive their primary income from independent work but would prefer traditional jobs <i>Example: A short-term temporary worker who would prefer a more permanent job</i>	FINANCIALLY STRAPPED Do independent work to supplement their income but would prefer not to have to do side jobs to make ends meet <i>Example: A janitor who doubles as a housepainter on the weekends</i>

Examples of Independent Contractors and primary and supplemental income
Source: Mckinsey Global Institute, Independent Work: Choice, Necessity & the Gig Economy

As there is no definitive test(s) or assessment(s) to determine if someone is an independent contractor in Bermuda, the following are a few areas that highlight examples of independent contractors and the need to clarify and address the misclassification of workers within this space.

Agency Hires

Agency hires may or may not be an employee of the agency. For instance, some agency hires are independent contractors. The degree of control under which agency hires work is with the client the agency placed them with. An agency hire works through an agency which finds work for them.

An agency hire will either have a contract *for* services or a contract *of* service with the agency who finds them work. This work is often called 'temporary work', 'temping' or 'agency work'.¹

¹ <https://www.nidirect.gov.uk/articles/agency-workers#:~:text=to%20get%20help-What%20an%20agency%20worker%20is,%20or%20'agency%20work'>.

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Freelancers

Freelancers are independent contractors who create a career around offering defined, contracted services for individuals and businesses. For instance, freelancing is traditionally focused around creative professions like designers, writers, photographers, and developers, although this extends to non-creative professions such as bookkeepers and accountants.

The Gig or Hustle Economy

The gig or hustle economy is a free market system in which flexible jobs are commonplace and where businesses bring on independent contractors such as freelancers instead of employees, and in many cases, for short-term engagements. The gig economy has grown considerably in the global economy and in Bermuda.

Traditionally, examples of gig workers in the workforce have included both independent contractors and employees such as:

- Freelancers, agency hires, consultants;
- Independent contractors, other self-employed;
- Project-based employees; and
- Temporary, causal or part-time employees

*Examples of gig marketplaces - These businesses provide on-demand services and offer both seasonal and year-round jobs that make for popular supplementary and primary incomes. Gig marketplaces include companies like Uber, Lyft and Airbnb. In Bermuda, gig marketplaces include White Roof B&B, DropIt Delivery, Sargasso, Pronto, Hook, Pay-a-Kid, Hitch and more.

How to Make a Complaint

To seek further advice regarding this guidance or to make a complaint contact the Labour Relations Section, located at 23 Parliament Street, Hamilton in the old Magistrates' Court building.

The Labour Relations Section is open from Monday to Friday between 8:45am and 5:00pm.

Tel: 297-7716

Email: sstephens@gov.bm

Additionally, employment violations may be reported at bit.ly/employerviolations