

## FTR Quarterly

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## Featured Articles

### **Tips on Avoiding Probationary Period Pitfalls**

By: Mireille Khoraych

*All too often, employers presume an employee is not entitled to notice of termination (or pay in lieu) if the employee is terminated during a probationary period. But this is not always the case.*

In some cases, an employee's probationary period goes beyond the time specified in the applicable minimum standards legislation – and in these situations, statutory termination entitlements can continue to apply, regardless of the fact that the employee is terminated during that employer's contractual probationary period.

For example, in Ontario, only employees with less than three months' service are excluded from applicable termination provisions of the *Employment Standards Act, 2000*. Thus, an employee who has been employed for three months or more is entitled to advance notice of termination or pay in lieu, *even if the termination occurs during the probationary period*.

Here are five key issues to keep in mind when utilizing probationary employment periods in your workplace:

- **Clarity.** Ensure your offer of employment clearly identifies:
  - The length of the probationary period
  - The purpose of the probationary period (e.g. to assess the employee's suitability / performance)
  - The period of notice (or pay in lieu) an employee will be entitled to, if any, if terminated during the probationary period.
- **Timing.** Probationary periods usually range from three to six months, with longer periods reserved for more skilled/specialized work.
- **Termination.** In order to rely on an employee's unsuccessful performance during the probationary period as the reason for termination, the termination must take place before the expiry of the probationary period.
- **Extensions of the probationary period.** It is possible to extend the length of the probationary period if the employee is not yet meeting expectations; however, the extension should be set out in writing, clearly stating the period of extension.
- **Employer conduct.** Even though an employment contract may provide that the employer can terminate the employee "for any reason" during the probationary period, there is still an obligation to act in good faith and in a non-

discriminatory manner.

If you would like assistance in implementing your probationary employment program, please contact your [regular Hicks Morley lawyer](#).

## 10 Signs You're in an Employment Relationship (No Matter What the "Independent Contractor" Agreement Says!)

By: [Siobhan O'Brien](#)

*So you think you've got an independent contractor agreement? It may be time to think again...*

Generally, when courts and tribunals review independent contractor arrangements, they are sceptical: if independent contractor status (and the avoidance of statutory obligations) could be established simply by the self-declaration of "independence" by any employee, the purpose of those statutory obligations could be easily frustrated.

While a working relationship may be structured to create the appearance of an independent contractor relationship, the courts, other decision-makers and relevant regulators such as the Canada Revenue Agency will look past the form of the relationship, and examine the substance.

### The Test for Determining an Individual's "Status"

Whether an individual working for you is an independent contractor or an employee is a fact-based – and often hotly contested – question. The leading case on the assessment of "status" is the decision of the Supreme Court of Canada in *Sagaz Industries Canada Inc.* In *Sagaz*, the Court held that no single test determines this issue. Instead, the parties' total relationship is reviewed to discern whether the individual is simply part of an organization's business, or whether the individual is really "in business on his or her own account." The Court outlined various factors to be considered, and the weight given to each of these factors will vary from case to case:

- the level of control the employer has over the individual's activities
- whether the individual provides his or her own equipment
- whether the individual hires his or her own helpers
- the degree of financial risk taken by the individual
- the degree of responsibility for investment and management held by the individual
- the individual's opportunity for profit in the performance of their tasks.

### 10 Signs of an Employment Relationship

Here are some of the key signs that may indicate an employment relationship, regardless of whether you have a signed independent contractor agreement:

1. The individual has not incorporated a company that will provide the services. *Incorporation demonstrates the individual's clear intention to be treated as a business, rather than as an individual employee.*
2. The existing contract between you and the individual is ambiguous as to whether it is an employment or independent contractor relationship. *The contract should expressly identify that it is an independent contractor agreement.*
3. The contract fails to state that the individual is responsible for all taxes and statutory remittances required for the services being provided.
4. The employer and the individual agree that the individual will exclusively provide services to the employer, thereby preventing the individual from providing services for another company for the duration of the contract. *The contract should indicate the individual is not required to work exclusively for the company during the term of the contract. Be aware that exclusivity will not be determined on a "snapshot" basis only at the time a conflict arises. Rather, the level*

*of exclusivity for the entire duration of the relationship will be considered. For a detailed description of a recent case discussing this point, see [Court of Appeal Rejects Use of “Snapshot” Approach to Determine Exclusivity in Contractor Relationships](#).*

5. The individual will be reimbursed for expenses in the course of providing the services. *The company should not reimburse the individual for expenses incurred as it would for employees. If there is a potential for significant travel or other large expenses, these could be listed in the contract to indicate the individual may charge the company for such expenses in addition to the individual's fee.*
6. The individual is provided with employment benefits, such as health and dental benefits, pension or group RRSP plans, which are available to company employees – and is subject to employment-related policies such as vacation or sick leave policies.
7. The individual is prohibited from contracting out the work or hiring his or her own helpers to assist.
8. The company provides the individual with equipment like laptops or cell phones. *To the extent possible, the individual should provide their own equipment.*
9. The individual is integrated into the business of the company. *To the extent possible, the individual should not be integrated into all activities of the company; rather, the individual should be provided with project-based work whenever possible.*
10. The individual's hours of work are controlled by the company. *To the extent possible, the individual should control their own hours of work.*

## Risks & Common Pitfalls to Avoid

An employer that mischaracterizes its relationship runs the risk of running afoul of the Canada Revenue Agency. Where this occurs, the employer will be liable to pay (with interest) the CPP and EI remittances that were expected of it. It may also be required to pay (with interest) amounts equal to the employee's CPP and EI deductions that were overlooked. Finally, it risks exposure to fines for non-compliance with the various statutory schemes. This can be as much as 10% of the amounts that should have been withheld, plus interest.

There is also the risk, particularly if the relationship does not evolve positively, that the “independent contractor” will retroactively claim they were an employee and therefore entitled to the rights and benefits that come with employment, such as vacation pay, statutory leaves or termination pay. For an example of a case involving a contractor suing for wrongful dismissal once the relationship came to an end, see Hicks Morley's publication on [Tetra Consulting v. Continental Bank, 2015 ONSC 4610, Court Awards Consultant 8 Months' Notice for 2 Years of Service](#).

As described above, no one factor is on its own conclusive of the relationship between the parties – and every workplace, and working arrangement, must be assessed on a case-by-case basis. However, while not conclusive on their own, the above *indicia* are potential red flags that may signal a particular employment arrangement is problematic – and that your organization could be at risk of liability as an employer. If you have any concerns about some or all of these factors for your workplace arrangements, please contact your [regular Hicks Morley lawyer](#) for further guidance.

## Firm Overview

