

## **An employee or an independent contractor?**

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**The COVID-19 pandemic present challenges on important people issues and has drastically changed many workplace aspects. Businesses have responded by restructuring its workforce to save costs and remain agile.**

**T**his often means reducing employee headcounts and outsourcing work to independent contractors. In this article, we will discuss the common differences in legal responsibilities towards an employee vis-a-vis an independent contractor.

### **Differences in legal responsibilities**

In Hong Kong, a person may perform work for an entity as its (i) employee under a contract of employment or (ii) independent contractor under an independent contractor arrangement or service contract. The Employment Ordinance (Cap. 57) applies to employers and their employees who are engaged under contracts of employment. Employees are entitled to the rights and benefits such as paid statutory holidays and annual leave, severance or long service payments, sick pay, maternity/paternity leave, rest days, protection against dismissal, etc. that are provided under the Employment Ordinance. These statutory benefits are not available to independent contractors.

The organization's legal responsibilities and liabilities relating to an employee and an

independent contractor are very different. If the person is an employee, the employer is vicariously liable for the loss and harm resulting from the employee's negligence committed in the course of his or her employment. By contrast, the entity may not be liable for negligence committed by its independent contractor.

Other responsibilities of employers include the obligations to keep records of their employees, inform the Inland Revenue Department of the commencement and termination of employments, file annual salaries tax returns on employees' remuneration and take out insurance to cover liabilities for employees' work injuries.

### **How to tell the difference between an employee and an independent contractor?**

Where the entity or even both parties call the relationship as sub-contracting of services, disputes may arise when the service provider suffers injury in the workplace and finds out he is not covered by any statutory employee compensation insurance or when he is

dismissed by the entity and is not entitled to the statutory compensation under the Employment Ordinance. By then, he will often argue it is in fact an employment relationship.

In determining whether an individual is an employee or an independent contractor, it is necessary to consider the entire relationship by looking at all the facts and circumstances between the parties. Labelling the relationship as a sub-contracting is not conclusive. The Court will look behind the label and into the reality of the relationship in determining whether the person should be

classified as an employee and therefore entitled to the rights and benefits under the Employment Ordinance.

Unfortunately, there is no one single conclusive test to distinguish a contract of employment from a contract for service. Further, no exhaustive list of factors or strict rules govern the relative weight of each factor. The final interpretation will rest with the Court in case of a dispute. Nevertheless, the following table sets out several common features of the two types of relationships:

<b>Employee</b>	<b>Independent Contractor</b>
<ul style="list-style-type: none"> <li>➤ The entity directs the work as to what task is to be done and how to do it.</li> <li>➤ The worker is unable to delegate his work to others.</li> <li>➤ The worker is paid wages directly by the entity.</li> <li>➤ The work concerned is for the sole benefit of the entity.</li> <li>➤ There is a high degree of integration of the worker's services in the business.</li> <li>➤ The worker is not free to provide services to other organizations.</li> <li>➤ The entity provides and maintains the equipment for the worker.</li> <li>➤ The working hours or schedules are fixed by the entity.</li> <li>➤ The entity provides paid holidays to the worker.</li> <li>➤ The worker is treated as an employee for tax purposes.</li> </ul>	<ul style="list-style-type: none"> <li>➤ The worker is free to decide how to carry out the task to be performed.</li> <li>➤ The worker hires his own helpers and assistants to fulfil the requirements of the contract.</li> <li>➤ The worker is remunerated through a fee paid to him or to his nominated company often following the rendering of an invoice.</li> <li>➤ The worker works for his own profit.</li> <li>➤ The worker is not integrated into the entity.</li> <li>➤ The worker is free to provide services to other organizations.</li> <li>➤ The worker uses his own equipment.</li> <li>➤ The worker is given some flexibility as to when and how to perform the work.</li> <li>➤ The worker is not provided with any holiday.</li> <li>➤ The worker declares his tax as a non-employee.</li> </ul>

An entity should not unilaterally change the worker's status from an employee to a contractor without the worker's clear consent. Otherwise, the entity will remain liable as an employer and the worker may lodge a claim for remedies against the entity under the Employment Ordinance and common law.

### **Key takeaways**

An entity should carefully assess the risks involved before engaging an individual as its

independent contractor. It may be taken by surprise for having to bear unexpected liabilities if an employer-employee relationship really exists although the worker is named as a contractor, a self-employed person or a freelancer. In such case, the entity as the "employer" is still required to fulfil its responsibilities towards the worker under the Employment Ordinance and towards third parties such as victims suffering damage caused by negligence committed by the worker in workplace.

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