

Know Your Identity and Rights

- “Employee” and “Contractor or Self-employed Person”

To avoid misunderstanding or dispute, the relevant persons should understand clearly their mode of cooperation according to their intention and clarify their identities, whether the person is engaged as an employee or a contractor/self-employed person, before entering into a contract. This will help safeguard mutual rights and benefits

How to distinguish an “employee” from a “contractor or self-employed person”

➤ There is no one single conclusive test to distinguish an “employee” from a “contractor or self-employed person”. In differentiating these two identities, all relevant factors of the case should be taken into account. Moreover, there is no hard and fast rule as to how important a particular factor should be. The common important factors include:

- calculation of remuneration and scope of work
- control over work procedures
- ownership and provision of production tools and materials
- whether the person can hire other helpers
- bearing of financial risk over business (e.g. any prospect of profit or risk of loss)
- responsibilities in insurance and tax
- traditional structure and practices of the trade or profession concerned

➤ **Since the actual circumstances in each case are different, the final interpretation will rest with the court in case of a dispute.**

Important Points to Note for Employees

- An employee should identify who his employer is before entering into an employment contract. If necessary, before the commencement of employment, the employee may make a written request to the employer for written information on conditions of employment in accordance with the Employment Ordinance.
- An employer should not unilaterally change the status of his employee to a contractor or self-employed person. Otherwise, the employee may lodge a claim for remedies against his employer on the ground of unreasonable variation of the terms of the employment contract under the Employment Ordinance. Moreover, the employee may also make a claim for termination compensation against his employer on the ground of constructive dismissal under common law.
- **If an employee intends to change his status to a contractor or self-employed person, he must cautiously assess the pros and cons involved, including the employment rights and benefits that he may lose in such a change.**

Some differences in the rights and benefits enjoyed by an “employee” and a “contractor or self-employed person”

Rights and benefits	Employee	Contractor or Self-employed person
Entitled to basic protection under the Employment Ordinance. If engaged under a “continuous contract” ^{Note1} , also entitled to benefits such as paid annual leave, statutory holiday pay, sickness allowance, severance payment or long service payment etc.	✓	X
Entitled to protection under the Employees’ Compensation Ordinance, including sick leave and compensation arising from work injuries	✓	X ^{Note2}
Entitled to protection under the Mandatory Provident Fund Schemes Ordinance, including <i>employer’s contribution</i>	✓	X ^{Note3}

^{Note1} An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract.

^{Note2} A contractor or self-employed person should consider insuring himself against personal accidents at work.

^{Note3} A contractor or self-employed person should enroll in a Mandatory Provident Fund scheme and make contributions on his own.

Important Points to Note for Employers

- An employer should not unilaterally change the status of his employee to a contractor or self-employed person. Otherwise, the employee may lodge a claim for remedies against his employer on the ground of unreasonable variation of the terms of the employment contract under the Employment Ordinance. Moreover, the employee may also make a claim for termination compensation against his employer on the ground of constructive dismissal under common law.
- **An employer should cautiously assess the risks involved if he enters into a contract to engage someone as a contractor or self-employed person. If in essence there exists an employer-employee relationship, the employer is still required to fulfil his responsibilities under the relevant legislation even though his worker is called or has labelled himself as a contractor or self-employed person in the contract.** Appended below are two court cases for reference:-

Court Case 1

The Plaintiff alleged that the Defendant Company employed him as a woodworker. As the Defendant Company had not paid him wages for four months, the Plaintiff lodged claims against the Defendant Company for wage arrears and severance payment or long service payment upon termination of contract. The Defendant Company, however, alleged that the Plaintiff was an independent contractor rather than its employee. It only admitted that money was due to the Plaintiff for work done and refused to pay severance payment or long service payment.

The High Court ruled that the Plaintiff was an employee of the Defendant Company on the following grounds: The Defendant Company exercised control over the work quality of the Plaintiff; the Plaintiff could not control the cost or set the price based on considerations of profit or loss; the Plaintiff had never hired workers on his own, nor had he ever been told that he could do so; all materials and equipment were provided by the Defendant Company; and the Defendant Company filed tax returns in respect of the Plaintiff on numerous occasions. Moreover, the Judge did not accept

non-payment of sickness allowance, statutory holiday pay and annual leave pay as grounds of defence. Hence, the Defendant Company was ordered to pay arrears of wages and severance payment to the Plaintiff.

(For details, please refer to HCA 1418/96)

Court Case 2

The Claimant was a saleslady selling the products of the Defendant Company in the specific department stores arranged. In the beginning, both parties did not enter into any written contract. Later on, the Claimant signed a contract identifying herself as a self-employed person. Her remuneration was \$300 per day plus a commission based on daily sales. Each month, the Defendant Company would also make payment at 2.5% of the Claimant's earnings for her contributions to a Mandatory Provident Fund scheme (MPF scheme). Upon termination of contract, the Claimant lodged claims against the Defendant Company for wages in lieu of notice, annual leave pay, statutory holiday pay and severance payment. However, the Defendant Company denied any employment relationship with the Claimant.

The Labour Tribunal ruled in favour of the Claimant on a number of grounds, including: The Defendant Company paid the Claimant \$300 per day as basic salary; the Defendant Company was responsible for arranging the sale venues and providing the products, and it supervised the Claimant's attendance and work performance through the department stores concerned; the Claimant had to sell the products in accordance with the guidelines of the Defendant Company; and the Claimant did not have to make investment or bear any financial risks, nor was she allowed to hire helpers.




The Defendant Company appealed against the decision to the High Court but the appeal was dismissed. The Judge pointed out that although the Claimant refused to work at the location arranged by the Defendant Company, it was only an isolated incident which was not sufficient to override the Defendant Company's control over the Claimant as the employer. Besides, if the Defendant Company was not the employer, it was unreasonable that it would make an extra monthly payment at 2.5%

of the Claimant's commission for her MPF contributions. Furthermore, even though the Claimant signed a contract identifying herself as a self-employed person and kept customers' records and information in her custody, these arguments were not sufficient to reverse the verdict that both parties were bound by an employer-employee relationship when other factors were taken into consideration.

(For details, please refer to HCLA 11/2006)

This leaflet aims to highlight the differences between an “employee” and a “contractor or self-employed person”. It should be noted that the relevant ordinances and court judgements remain the sole authority for the interpretation of provisions of the law and the court cases mentioned.

Enquiries

-  2717 1771 (the hotline is handled by “1823 Citizen’s Easy Link”)
-  <http://www.labour.gov.hk>
-  Enquiry in person to offices of the Labour Relations Division of the Labour Department

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