

PLACEMENT AGENCIES AND THEIR WORKERS HOW TO IDENTIFY AN "EMPLOYER-EMPLOYEE RELATIONSHIP"

Information Bulletin 3-00 (Revised)

February 2001

This publication is provided as a guide for the use of employers. It is not intended as a substitute for the *Employer Health Tax Act and Regulations*.

This bulletin explains how Ontario's Employer Health Tax (EHT) applies to placement agencies with regard to determining whether an "employer-employee relationship" exists between the agency and the worker.

General

Employers are required to pay EHT based on remuneration paid to employees who report for work at a permanent establishment of the employer in Ontario, and to employees who do not report for work at the employer's permanent establishment but who are paid from or through the employer's permanent establishment in Ontario.

In general, where a worker is hired by an agency and placed on assignment with a client, there is an employer-employee relationship between the agency and the worker. When the relationship is not clear, many factors must be taken into consideration in establishing whether the worker is an employee of the agency or is self-employed. In addition to considering the terms and conditions of the worker's employment, the Income Tax Related Programs (ITRP) Branch will consider rulings issued by Canada Revenue Agency (CRA) regarding the Canada Pension Plan and Employment Insurance, CRA's guidelines, and common law principles (based on precedents set by court decisions).

Canada Revenue Agency Employment Insurance (EI) and Canada Pension Plan (CPP) Rulings

A CRA ruling is an official decision that is issued by an authorized officer of CRA and can be requested by an employer or a worker. A ruling determines whether or not a worker is in pensionable employment (CPP) and/or insurable employment (EI). A ruling also indicates whether a worker is an employee or self-employed.

For EHT purposes, the Ministry will accept a CRA CPP/EI ruling regarding the employment status of a worker that has been issued either in the current or the four immediately preceding years. A ruling will be accepted by the Ministry only as it applies to the hirer and the worker(s) named in the ruling.

Canada Revenue Agency Guidelines

CRA has developed guidelines that apply to workers engaged by placement or employment agencies.

The Ministry will consider CRA's guidelines when examining the relationship between a placement agency and a professional specialist. The term "professional specialist" refers to an individual 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, draughtsman, surveyor, doctor, technician or computer consultant.

A professional specialist engaged under a contract for service by a placement agency for the sole purpose of performing services for a client of the agency is not considered to be an employee of the agency. If the agency pays the worker and the client directs and controls the worker, the agency is required to deduct CPP contributions and EI premiums for the worker but not income tax. Therefore, any payments made to the professional specialist by the agency are not subject to EHT.

Common Law Principles

Although the terms "employer" and "employee" are defined in the EHT Act, the Act does not define the circumstances in which an "employer-employee relationship" exists. It is necessary to establish whether the worker is hired under a contract of service or a contract for service.

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

A contract for service, or business relationship, generally exists when a worker agrees to perform specific work for a payer in return for payment. The self-employed worker is not normally required to perform the services personally.

In order to determine whether a worker is an employee under a contract of service or self-employed under a contract for service, reference must be made to the common law principles. The terms and conditions of the worker's employment are examined and analysed as they relate to the following four factors: (a) control, (b) ownership of tools, (c) chance of profit/risk of loss, and (d) integration. It is important to note that one factor alone is not conclusive in the determination.

a) Control Test

The "control test" is used to determine whether a person is in a position to order or require not only what work is to be done, but also how it is to be done. In an "employer-employee relationship", the employer generally controls, directly or indirectly, the way the work is to be done and the work methods.

In most placement agency situations, any direction and control over the day-to-day work is left to the client, although 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.

Some of the questions that the ministry may ask in order to evaluate control are:

- i) Does the agency make the decisions of hiring, paying and terminating the worker?
- ii) Does the agency monitor the performance of the worker?

- iii) Does the agency provide the worker with training and development?
- iv) Does the agency require the worker to comply with its instructions or policies?
- v) Is the agency responsible for disciplining the worker?
- vi) Does the agency determine how much the worker is to be paid?
- vii) Is the worker required to perform the services personally?

b) Ownership of Tools

In an “employer-employee relationship”, the employer generally supplies the equipment and tools required by the employee. In addition, the employer covers the following costs related to their use: repairs, insurance, transport, rental, and operation.

Some of the questions that the ministry may ask in order to evaluate this test are:

- i) Does the worker provide his or her own equipment and tools and cover the costs related to their use?
- ii) Does the agency provide the worker with office facilities or services?

c) Chance of Profit/Risk of Loss

Generally, if an “employer-employee relationship” exists, the employer alone assumes the risk of loss. The employer also generally covers operating costs, which may include 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 health of the business.

Some of the questions that the ministry may ask in order to evaluate this test are:

- i) Does the agency pay the worker regardless of whether the agency is paid by the client?
- ii) Does the agency pay any additional remuneration (e.g. vacation pay, sick pay, bonus for high performance)?
- iii) Does the agency pay liability insurance for the worker?
- iv) Is the agency liable for damages caused by the worker it has placed?
- v) Does the agency reimburse the worker for expenses that he or she incurs?

d) Integration or Organization Test

The “integration or organization test” examines whether the tasks performed by a worker form an integral part of the business (i.e. an “employer-employee relationship” exists). Integration must be considered from the point of view of the worker, not the agency. Where the worker integrates his or her activities with the commercial activities of the payer, an “employer-employee relationship” probably exists.

Some of the questions that the ministry may ask in order to evaluate this test are:

- i) Is the worker registered with more than one placement agency?
- ii) Is the worker's "business" registered with the Ministry of Consumer and Commercial Relations or with CRA for GST purposes?
- iii) Does the client require the agency's approval for subsequent hiring of the same worker?

Official Interpretations

Official interpretations as to whether an e-e relationship exists can only be obtained by having all of the facts of the situation examined in order to determine the substance of the relationship between the parties. Written interpretations can be obtained by writing to:

Ministry of Finance
Tax Advisory Services Branch
Employer Health Tax Section
33 King Street West
Oshawa, Ontario, L1H 8H5

Related Information Bulletins:

Other Information Bulletins providing further details on this topic include:

- 1-96 How to Identify an “Employer-Employee Relationship”
- 2-00 Commissioned Real Estate Salespersons -- How to Identify an
 “Employer-Employee Relationship”

General Enquiries

If you require further information concerning this bulletin, or want to obtain copies of other EHT bulletins, please contact your local Ministry of Finance Tax Office listed in the blue pages of your telephone directory, or any of the following:

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| Ministry's Information Centre | 1-800-263-7965 |
| TAX FAX | 1-877-482-9329 |
| Ministry's Website | http://www.trd.fin.gov.on.ca |

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