# Independent contractors: Riskier than ever

**In our gig economy, organizations are increasingly looking to meet staffing needs through temporary and freelance positions, hoping to avoid costly overtime and termination pay that could otherwise be owed to an "employee."**

**Sundeep Gokhale and Thomas Gorsky**
Legal View

Individual workers looking for flexibility, independence and tax-friendly income may also be attracted to temporary and freelance work, often as "independent contractors."

While this type of arrangement may seem like a win-win, misclassifying an "employee" as an "independent contractor" has always been risky for Canadian employers, exposing them to potential liability under employment standards legislation for unpaid wages, overtime pay, vacation and public holiday pay, and under the common law for reasonable notice of termination.

In Canada, these risks are now greater than ever.

### Independent contractors: The new frontier for class-action lawsuits

Historically, employment-related class-action litigation in Canada has been relatively uncommon. No longer.

On Jan. 2, 2019, the Court of Appeal for Ontario released its decision in *Heller v. Uber Technologies Inc.*, striking down a mandatory arbitration clause in Uber's service agreement with its independent contractor drivers.

The decision paves the way for a proposed class-action lawsuit in which drivers seek a declaration they are "employees" of Uber — not independent contractors — and are therefore governed by the provisions of the Employment Standards Act, 2000, (ESA). The drivers claim damages for alleged violations of the ESA of $400 million.

**A misclassification can result in a penalty of $1,000 for the third contravention in a three-year period.**

In 2016, the Ontario Superior Court in *Omarali v. Just Energy* (leave to appeal refused) certified a class action filed on behalf of about 7,000 sales agents hired as independent contractors to sell products door-to-door.

Similar to the proposed Uber class action, the claim alleges the independent contractors were, in fact, employees, entitled to the benefits and protections of the ESA, including minimum wage, overtime pay, vacation and public holiday pay.

In most cases, a class action will be settled before reaching court. However, settlement still comes with a cost.

### Amendments up the ante

Even if an organization does not engage a large number of independent contractors, exposing it to a potential class-action lawsuit, an independent contractor may still file a claim with the Ministry of Labour claiming she has been misclassified and is an employee for the purpose of the ESA.

A misclassification can result in a penalty of $250 for the first contravention, $500 for the second contravention in a three-year period and $1,000 for the third contravention in a three-year period.

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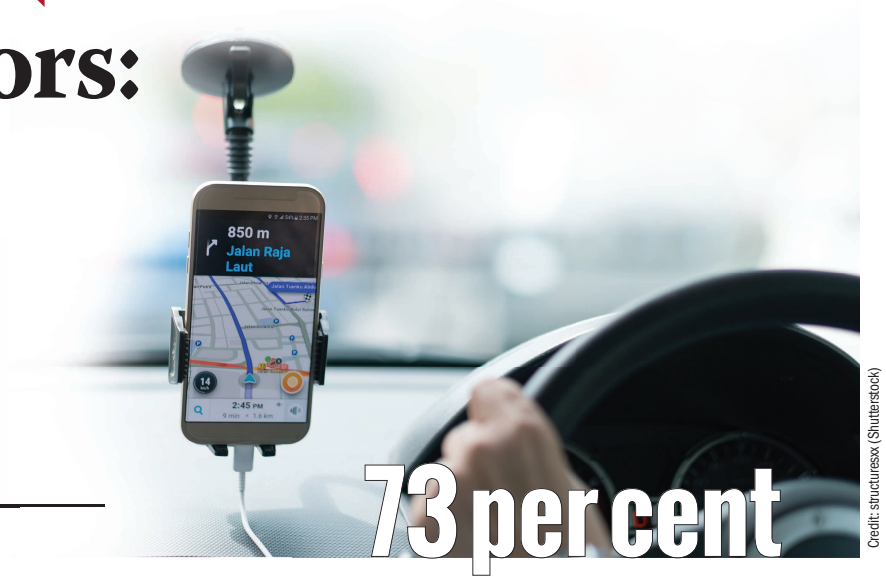


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**73 per cent**

Percentage of Canadian millennials who have had or anticipate having some form of gig job.

Source: TD Insurance

## Popular reasons for taking contract work

- autonomy and control **49%**
- extra money on the side **49%**
- work-life balance **42%**

## Downsides to the gig economy

- lack of medical, dental or disability benefits (**69%**)
- not getting paid when sick (**55%**)
- not earning enough (**41%**)

Source: BMO Wealth Management

## Notable cases

***Glimhagen v. GWR Resources Inc.*, 2017 CarswellBC 1238 (B.C. S.C.).**
Lars Glimhagen provided accounting and computer consulting services to GWR Resources as an independent contractor starting in 1989. He used the equipment and office space to complete assigned tasks, but also made money through an accounting business he had on the side. Around 1998, Glimhagen started managing GWR's office operations and also worked as a personal assistant to the CFO. In 2010, he became CFO and a formal employee. However, GWR terminated his employment without cause or notice in 2012. The court found that Glimhagen became a dependent contractor when he took on more tasks and became an integral part of GWR's operations in 1998 — the point at which his years of service started accumulating. Based on Glimhagen's 12 years of combined service as a dependent contractor and employee, the court awarded 12 months' reasonable notice.

***Quinte Children's Homes Inc. v. Minister of National Revenue*, 2015 CarswellNat 5264 (T.C.C. (Emp. Ins.).**
Quinte Children's Homes (QCH) hired Sara Fobear under a consulting services agreement. QCH paid Fobear for the hours she worked and reimbursed her for using her car for work. When Fobear began working full-time in 2012, she indicated on her tax return that she earned employment income, not business income. The Ministry of National Revenue found Fobear was engaged in insurable employment and QCH must make appropriate deductions and payments. QCH appealed and the court found that QCH intended for Fobear to be an independent contractor. While QCH gave Fobear a substantial amount of instruction on how to do her job, that was part of the regulated industry. QCH was "simply engaging workers to perform services in accordance with the law." QCH's lack of control over the actual assignment of work was the largest factor in determining Fobear was an independent contractor.

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# Liability for misclassification greater than ever

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In addition, a misclassified employee may have a claim for unpaid entitlements under employment standards legislation, including termination pay, minimum wage, overtime pay and vacation pay.

Equally significant for some employers is the fact the Ministry of Labour posts the names of offenders on its website — public shaming that may also be very costly.

### The employee versus independent contractor test

It is a common misconception that if a worker operates through an incorporated entity, this is sufficient to establish the worker is an independent contractor. This is incorrect.

Furthermore, that a worker is found to be an independent contractor under one statute (for example, the Income Tax Act) is not determinative for the purposes of employment standards.

The reason is that employment standards legislation is "benefit conferring," intended to ensure every employee receives certain minimum employment standards.

Employment adjudicators, therefore, apply a broad and generous interpretation to the meaning of "employee," regardless of how the term is defined or applied in other legislation.

When assessing whether a worker is an employee or independent contractor, Canadian adjudicators ask this baseline question: "Is this worker in business for his own account?"

If the answer is "yes," the worker will be considered an independent contractor.

To determine whether a worker is in business for his own account, six factors are considered:

**When assessing if a worker is an employee or independent contractor, adjudicators ask: "Is this worker in business for his own account?"**

- The level of control the entity has over the worker's activities.
- Whether the worker provides his own equipment.
- Whether the worker hires his own helpers.
- The degree of financial risk taken on by the worker.
- The degree of responsibility for investment and management held by the worker.
- The worker's opportunity to profit in the performance of his own tasks.

This is not an exhaustive list, nor is there a set formula for applying these factors. The weight of each factor will depend on the specific facts of the case.

When assessing "level of control," common factors include:

- Does the entity demand exclusive service or can the worker provide service to others?
- Was the worker hired for a limited scope project or duration?
- Can the worker refuse a project?
- Does the worker have the ability to subcontract the work?
- Does the worker set his own hours of work?
- Does the entity have the ability to discipline the worker?
- Does the entity have supervisory responsibilities over the worker?

When assessing "financial risk," common factors include:

- Does the worker bear financial risk associated with providing the services?
- Can the worker establish his rate of compensation?
- Would the worker's compensation be negatively impacted if work is performed poorly or takes longer to perform than initially anticipated?

### Transitioning from contractor to employee

To reduce the risk of liability, an organization may want to transition a worker's status from contractor to employee.

This can be accomplished with proper planning and agreement among the parties (but should not be attempted without legal counsel).

However, even after a transition has taken affect, if the employment is terminated, an employer may still have to recognize the worker's length of service as an independent contractor for the purpose of calculating any reasonable notice entitlement.

In the recent case of *Cormier v. 1772887 Ontario Limited c.o.b. as St. Joseph Communications*, Kelly Cormier had been "employed" with the defendant for eight years when her employment was terminated.

Prior to that, she worked with St. Joseph Communications as an "independent contractor." The court concluded Cormier's economic dependence on her employer and length of tenure rendered her a "dependent contractor" — a type of contractor between employee and independent contractor.

As such, her notice entitlement should be based on the total amount of time she had worked with the employer.

The court went on to state it would have reached the same conclusion even if Cormier had been an independent contractor rather than a dependent contractor:

"Even if I had concluded that Ms. Cormier was an independent contractor from 1994 to 2004, it would have been wrong in principle to ignore these years of their relationship in determining the reasonable notice period. The court should take all of the circumstances into account and in the immediate case, even if I had found Ms. Cormier to be an independent contractor, I would not have ignored these years of their relationship."

### Final thoughts

With recent legislative changes and new and burgeoning case law, the liability for misclassification is greater than ever.

Any organization that engages independent contractors, or is considering doing so, should carefully consider the associated risks and benefits, and seek the advice of experienced legal counsel.

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