

## Bermuda introduces guidance on independent contractors

The continuing development of the gig economy and the increased use of remote working following the pandemic has presented challenges for determining the true nature of working relationships. This determination is critical for businesses. Misclassification of workers as independent contractors or consultants can lead to significant consequences.

Properly classifying workers is critical in determining whether a worker will be entitled to the benefits and protections of the Employment Act 2000 ("EA 2000") and to certain other obligatory benefits like health insurance or pensions.

In February 2023, the Ministry of Economy and Labour published guidance on the difference between employees and independent contractors. At the time of writing, this guidance could be found [here](#).

The guidance is careful to note that there is no definitive test applicable in all workplaces to determine whether an individual is an independent contractor. However, the guidance sets out 12 indicators to consider when hiring employees and contractors.

### The Guidance: 12 indicators of an employment relationship

The 12 indicators described in the guidance are as follows:

1. Contract type: An independent contractor will work under a contract for service, which engages an individual for a set fee to complete a specific project or provide specific advice.
2. Continuity of work: An independent contractor will typically work for a specific period or task, and has the option to subcontract the job.
3. Control over work: An independent contractor has control over the work and has more freedom to determine how, when, where and by whom the work is performed.
4. Remuneration: An independent contractor can be paid at intervals, at the end of a project or for specific service provided. They will typically set their own fees via quotes

or proposals and will submit invoices on completion of work.

5. Control over tools and equipment: An independent contractor will typically provide their own tools or bear the cost of the necessary tools.
6. Integration in the business: An independent contractor's services are typically not integral to the everyday operations of the business.
7. Training from the business: An independent contractor is unlikely to receive training from the client or customer. The guidance caveats this with instances where training in specific systems is required.
8. Share in profit & loss: An independent contractor may incur greater financial risk, through investments into equipment and financial liability for failure to fulfil contractual obligations.
9. Market competition: An independent contractor is generally freer to work for multiple clients and to market their services to competitors of clients at the same time.
10. Responsibility for benefits: An independent contractor is responsible for their own statutory obligations (including payroll tax, insurance, pensions etc.)
11. Business registration: An independent contractor is self-employed and must register with the government as sole proprietor.
12. Termination: An independent contractor is responsible for fulfilling the obligations of the contract to complete the agreed service and may terminate the services in accordance with the contract.

The extent to which a worker is independent will generally depend on the level of control exercised by the business over the worker and the services the worker provides.

No individual factor will be determinative, but generally, the more control the worker has over the service they provide, the more likely they are properly classified as an independent contractor.

## The common law position

Unsurprisingly, the guidance reflects the English common law position. To determine whether a relationship is one of employer-employee or contractor, courts will generally refer to the factors that originated in *Ready Mixed Concrete (South East) Limited v The Minister of Pensions and National Insurance* [1968] 2 QB 497 and *Market Investigations v Minister of Social Security* [1969] 2 QB 173. These factors are:

- i. who provides and maintains tools and equipment used;
- ii. whether the person hires their own help;
- iii. the degree of financial risk incurred;
- iv. the degree of investment in and management of the business;
- v. whether the individual has an opportunity to profit from their performance;
- vi. whether the person is paid a fixed wage/salary; and
- vii. whether the person is paid holiday or sickness leave.

## In practice

The new guidance provides some clarity as to how businesses should approach the classification of workers, but the application of the 12 indicators to particular circumstances will be more art than science. Classification challenges presented by modern working arrangements have been addressed through legislation in other jurisdictions. For example, the UK has responded with legislation establishing a third category of "workers" who are entitled to more limited employment rights and protections.

There is currently no such third category under Bermuda law and new entrants to Bermuda should be cautious in applying classification principles from other jurisdictions.

While the Bermuda guidance provides a good starting point for businesses considering hiring options, it is not exhaustive.

Businesses should be cautious when entering consulting or contractor arrangements in order to minimize costs. It is particularly important for businesses with remote workers or businesses that are establishing offices in Bermuda to seek legal counsel when entering into employment or consultancy arrangements.

Walkers' employment team can help to ensure your contracts correctly reflect the requirements of the business and decrease the risk of significant unintended liabilities.

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## Further information

Walkers practises six laws from an international network of ten offices across the Americas, Asia and Europe. For more information, please get in touch with your usual contact at Walkers or any of contacts in your region.



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