

## **A. HUMAN RESOURCES AS A COMPETITIVE ADVANTAGE**

Whether you are a Chief Executive Officer (CEO), a Human Resources Manager, a member of the company's senior management team, or an entrepreneur, you know the value of a good team. In fact, having the right people on your team is arguably more critical to your business than having the right corporate or business strategy, at least according to Jim Collins, author of the latest best selling management text *Good to Great*. "... The executives who ignited the transformations from good to great did not first figure out where to drive the bus and then get people to take it there. No, they *first* got the right people *on* the bus (and the wrong people *off* the bus), and *then* figured out where to drive it."

The purpose of this Grey Book Primer is to take a closer look at the employment relationship itself, i.e. the gateway to the "bus". We examine the operational niceties of how to get the right people *on* and the wrong people *off* the bus in our companion Grey Books in this Series: See "[Hiring & the Law: Tips for Getting the Right People on the Bus](#)" and "[Dismissal & the Law: Strategies for Getting the Wrong People off the Bus](#)".

## **B. DEFINING THE EMPLOYMENT RELATIONSHIP**

The employment relationship is unique among contracts because of its *personal* character, i.e. its legal status as *intuitu personae*. As such, it cannot be assigned or transferred. Defining the relationship is not as easy as it might appear. An employment relationship is typically said to exist whenever the following three elements are present: (a) one person works for another; (b) receives compensation for that work; and (c) is subject to the control of that other, i.e. of the employer. That is where the simplicity ends.

The lines between employee, independent contractor and intermediate relationships become blurred very quickly beyond that point, with significant legal consequences for the unwary employer. In many cases, working relationships which may not at first sight appear to be *employment* relationships (e.g., individuals hired under contract as consultants or contractors) might, indeed, in fact and in law, be deemed by regulatory authorities and the courts to be *employment* relationships. And the consequences of such a finding, if unexpected, can be costly for SMEs. Getting it right - and understanding the risks - up front, is your best mitigation strategy.

## **C. EMPLOYEE OR CONTRACTOR: WHY DOES IT MATTER?**

Differentiating between different categories of work-related relationships such as employees, independent contractors and intermediate relationships is becoming increasingly critical as our economy diversifies and globalizes, and as the work force becomes increasingly specialized and mobile. This leads most companies - public and private, start-up and mature - in every sector of the economy to adopt different resourcing strategies for recruitment, development and retention of personnel, staff and outside consultants, i.e. for "getting the right people *on* the bus", to assist them in competing effectively and strategically in their chosen market segments. These alternative working relationships are most pronounced in the IT consulting and professional services markets, but can be found in any industry or sector, including the public service.

### ***Employer-Employee Relationship***

Essentially, if an individual's relationship with the business/employer is that of an *employee-employer* in the eyes of the law, the employer will be obligated to make source and payroll deductions and to remit these to the appropriate authorities, including the Canada Revenue Agency (income tax), C.P.P., Employment Insurance, WSIB, etc.. Further, the employer will be responsible for compliance with all employment-related legislation (e.g., *Employment Standards Act*, OHSA, etc.) in relation to the employee, including termination pay and severance obligations, and will assume the risk of vicarious liability for the employee's acts or omissions, including negligence, executed by them in the ordinary course of the employer's business. These costs, and risks, are assumed thousands of times every day by employers across the country. If the employer, for whatever reason, fails to deduct and remit, it can face significant assessments, interest and penalties, even criminal liability in some cases. This most often happens, for example, where the employer believes the individual to be an independent contractor or outside consultant when, in fact, he or she is an employee.

## **Independent Contractors & Consultants**

Independent contractors, on the other hand, are typically “self-employed” or employed by their own personal services corporations, other enterprises or personnel agencies. If they are true independent contractors, they are *not* employees, and the employer is not, therefore, bound to make source or other payroll deductions, or to assume any of the other costs or liabilities most often associated with employees. Independent contractors can include consultants, associates, subcontractors and the like. The tipping point is how they are retained, managed, paid and terminated.

The law has developed a number of “tests” to determine whether an individual is or is not an employee, including tests related to control, integration, organization, enterprise, etc.. There is no single test applied by government authorities or the courts. It is a matter of weighing the various factors against each other to determine, in the final analysis, who the individual is *really* working for: herself, as a self-employed business person, or the employer?

## **D. THE EMPLOYMENT CONTRACT**

Every employment relationship is a form of *contract*. But not every contract is a *written* contract. Many employment relationships have no written agreement at all. This can be risky; but it happens to be the way a lot of businesses operate. The difficulty with this type of arrangement typically arises at the end of the relationship when the parties are attempting to sort out their rights and obligations. The best protection an employer can have in these cases is a well-drafted employment agreement; and the best time to get that is *before* the job begins. Trying to impose or enforce an employment agreement on an employee after the job begins is difficult practically, and risky legally.

But not all written employment agreements need be daunting. Simple *Letters of Offer*, accepted by signature of the employee, can suffice for most lower level clerical or administrative jobs. For middle management and professional occupations, a slightly more sophisticated employment agreement, including confidentiality, intellectual property and non-competition/non-solicitation clauses, among others, may be in order. Comprehensive employment agreements are typically found only at senior management, executive and professional levels in the IT, pharmaceutical and other select industries. Balancing formality and relationship building is typically the tipping point here.

Not only the length or complexity of employment agreements will vary with the status of the individual, but the content will vary as well. Practically every well-written employment agreement will include a description of the employee’s duties (role & responsibilities), his or her remuneration and benefits, vacation leave, confidentiality and termination clauses, corporate policies, and selected boilerplate clauses. Depending on the level or status of the employee, it may also include place and hours of work, probation clause and overtime provisions (at the lower end), or non-competition/non-solicitation, intellectual property and “golden parachute” clauses (at the upper end).

## **E. THE INDEPENDENT CONTRACTOR AGREEMENT**

The independent contract agreement also takes many forms. Depending on its purpose, it can take the form of a *Sales Agency Agreement*, an *Associate Agreement*, a *Subcontractor Agreement*, or any number of other forms. The common thread is that each of these individuals or enterprises is in business for themselves, are not exclusively dependent on the employer/contractor for their livelihood, control their own hours and engagements, and are free to transact business with other customers or clients. They are responsible for their own statutory remittances, and are typically free to assign or subcontract the work to third parties (with or without the consent of the employer).

Our goal in this Grey Book has been to introduce business managers and entrepreneurs to the legal dimensions of the employment relationship, i.e. the *gateway* to the “bus”. In our companion Grey Books we show you how to get the right people *on* the bus and the wrong people *off* the bus while mitigating your legal and business risks.

The above summary of employment relationships is intended as a basic introduction for entrepreneurs, business executives, officers and directors. It is not intended as legal advice. Consult your solicitors if you have any specific questions.

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