

EMPLOYEES OR INDEPENDENT CONTRACTORS?

In a highly regulated labour environment, the legal nature of any form of service relationship is paramount in clarifying the rights and obligations afforded to the parties in terms of statutory requirements. While an employee, under defined circumstances, is entitled to the protection of our labour law and the benefits it provides (such as vacation leave, sick leave, family responsibility leave, overtime and the right not to be unfairly dismissed), an independent contractor is not afforded such rights. It is therefore crucial to determine whether you are 'an employee' or an 'independent contractor'.

Differentiation between an employee and an independent contractor

The Labour Relations Act provides some assistance in defining certain circumstances in which an employment relationship (as opposed to an independent contractor scenario) is presumed to exist, until proven otherwise. Unfortunately there is no clear legislative definition that applies under every given circumstance. In essence, the existence of an employment relationship can only be ascertained with due consideration of the facts surrounding such relationship.

Guidelines from the Labour Relations Act

The Labour Relations Act provides as follows :

“Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

- a) The manner in which the person works is subject to the control or direction of another person;*
- b) The person's hours of work are subject to the control or direction of another person;*
- c) In the case of a person who works for an organisation, the person forms part of that organisation;*
- d) The person has worked for that other person for an average of at least 40 hours per month over the last three months;*
- e) The person is economically dependent on the other person for whom he or she works or renders services;*
- f) The person is provided with tools of trade or work equipment by the other person; or*
- g) The person only works for or renders services to one person.”*

It is important to note that the presumption above only applies to persons who earn less than the amount determined by the Minister in terms of the Basic Conditions of

Employment Act, currently R183,008 per annum.

The Labour Relations Act defines an “employee” as :

- a) *Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and*
- b) *Any other person who in any manner assists in carrying on or conducting the business of an employer.*

The legislation above is a clear example of our common law being formalised within a legislative framework. Historically, when faced with the question as to the precise nature of a service relationship, our courts have applied four tests to clarify such, namely the Control, Organisational, Dominant Impression and Economic Capacity Tests. It is clear that all four tests have been entrenched in the legislation above, and our Courts continue to apply them when faced with this question.

Substance of relationship trumps

It is imperative to note that any contract between parties purporting to define the relationship as either one of employment, or otherwise, does not necessarily result in the relationship actually being such. One cannot contract outside the law, and as such, when faced with a contract that purports to be an “employment” contract or an “independent contractor” arrangement, one is forced to assess the true nature of the relationship with reference to the four tests above, the regulatory framework and the facts integral to the relationship.

The principles outlined above were dealt with by the Labour Court in **Linda Erasmus Properties Enterprise (Pty) Ltd v Janine Breytell**. The Court had to deal specifically with the question of whether the relationship between a particular estate agent and agency constituted one of employment, or was, as the contract purported it to be, an “independent contractor” relationship. The Court found, after due consideration of the contract, the legislative framework and employment tests as detailed above, and perhaps most importantly, the actual facts surrounding the relationship, that in terms of the dominant impression test, the relationship was one of employment.

The Labour Relations Amendment Bill of 2012, although not yet enacted, provides further insight into the intention of the legislature with regards to this question. The Bill has the clear intention of strengthening employee rights, and granting such to those employees who had previously fallen within the cracks of the Labour Relations Act. By way of example, temporary employment service employees will ultimately be afforded the same basic employment rights as current employees and labour broking is seen as an obstacle to fundamental employee rights.

At present, there is no law which categorically defines every possible relationship in the realm between employee and independent contractor. There are legislative presumptions, multiple accepted tests, pending legislation and case law that assist in the determination of any given dispute surrounding the issue. Legislative changes and case law point in the direction of enlarging the employee pool, so to speak, but the true nature of the relationship, for the purposes of assigning rights and obligations in terms of our current legislation, can only be assessed with a proper enquiry into the facts surrounding the relationship.

Contact us at info@stbb.co.za or visit our website at www.stbb.co.za to make an appointment with an attorney in our Labour Law Department.

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