

Contractors in spotlight with legislative changes

Alberta, Ontario look to clarify definitions

BY SARAH DOBSON

LEGISLATIVE CHANGES announced — or expected — in Alberta and Ontario could have a major impact on the contractor model popular with many individuals and employers, say experts.

Through its Fair and Family-Friendly Workplaces Act, Alberta has changed the definition of employee to include dependent contractors who work for one employer. The change, which takes effect Jan. 1, 2018, is part of the Labour Relations Code and will allow contractors to unionize and bargain collectively.

In Ontario, the government introduced the Fair Workplaces, Better Jobs Act in June hoping to amend the province's Employment Standards Act and Labour Relations Act. One change would prohibit employers from misclassifying employees as independent contractors or treating "an employee of the employer as if the person were not an employee."

And if there is a dispute, it's up to the employer to prove the person is not an employee.

What's behind the changes?

There are a number of factors behind the changes, such as a new NDP government in Alberta and concerns about "precarious" work-

ers in a changing economy, said Aly Bandali, CEO of Professional Contractor Solutions in Calgary.

"Employers (have been) using this business strategy of bringing in these individuals as independent contractors where they should all have been an employee of the organization, but the only reason they did that was to avoid the significant payroll burden that might come with that. So those situations are what's spurring a lot of the legislation in Ontario and Alberta."

There is recognition that a number of relationships that used to be employment relationships are now being characterized as contractor relationships, for various reasons, "not least of which may be some tax savings on the part of the contractor," said Chris Lane, a partner at the Edmonton office of McLennan Ross.

That may have led government to say: "Perhaps we should extend some benefits that ordinarily would go to employees to these folks," he said. "I think there was a feeling these people have some vulnerability because they have these very long relationships and, therefore, that vulnerability deserves some protection."

But when it comes to independent

contractors, they're often treated as a large, homogeneous set, with no appreciation for the nuances or diversity of those within, said Graham Smith, an independent contractor and member of the Association of Professional Canadian Consultants in Calgary.

"The topic du jour has definitely been along the lines of precarious work, which is a term that's been broadly applied, ranging from everyone to Uber drivers and those engaged in the gig economy to those (who) are high-skilled, high-trained, in-demand professionals," he said. "It's a little bit of a big-tent effort in trying to wrap arms and minds around something that is more than one issue. It's a complex thing."

Potential impacts

The concern is that the government is maybe not being as forward-looking or as helpful as it could be, said Smith.

"There's a need to protect those who are in vulnerable positions and those who do need support and need to have some additional oversight or assistance in terms of making sure their rights are protected and that they're not being taken advantage of. We've seen that in the past — misclassifications, concerns

around where employers have used the independent contractor label to maybe (avoid) some of their responsibilities," he said.

"There's also a concern that by trying to enforce protections or cling to old ways of working or potentially 1960s-style approaches to labour, that's not going to position the Canadian economy for success in the future."

For independent contractors, that means unpredictability on both sides of the equation, as employers may not have complete visibility into how to engage with a contractor, and contractors may not have complete visibility or certainty in terms of how they may be treated by the Canada Revenue Agency (CRA) or a third party, said Smith.

"Those risks are the things that ultimately introduce friction to that relationship," he said.

"There are also disincentives for corporations or for potential clients to look for contractors and, in particular, Canadian contractors to meet their needs. So, unfortunately, it ends up having the unintended impact of having the opposite impact of what it's intended to do, which is rather than create and protect jobs, it actually drives them away."

In Ontario, enforcement of em-

ployment standards puts the onus solely on an employer to prove the independent contractor is not dependent, said Bandali.

“That’s a significant switch for employers because now they face the risk, the financial risks, and then you start coupling that with reputation and publicity, legal costs — it starts to become significant.”

There are four major criteria used to assess if someone is an independent contractor: control of the work, the risk of loss of profit, ownership of tools, and the individual’s integration into the organization, he said.

“Based on those four major criteria, most contractors fall into a dependent category.”

The introduction of “dependent contractor” adds another layer of complexity, said Smith.

“The reality is that there isn’t probably a way that it can be clarified in terms of who is a true independent

contractor versus someone who has another form of relationship... what’s missing is a clear, consistent application of those standards, as opposed to adding more complexity.”

The provision relating to who is a dependent contractor has been entrenched in the Canada Labour Code legislation for a long time, but there has been significant litigation around the issue, according to Lane.

“The factors to be looked at are quite voluminous in terms of really how dependent that person is on the other party they’re contracting with. So I expect there to be a fair amount of litigation over that.”

Employers used to be able to say they hired an independent contractor and any tax risk was up to these individuals, said Bandali. But common law cases have seen employers successfully sued for severance and pay in lieu of notice — so now the risk falls to the employer.

And with the introduction of dependent contractors in Alberta, it’s not naive to think some groups in construction, oil and gas, agriculture or the public sector won’t unionize, because those industries have unions already, he said.

If dependent contractors can now be unionized, the contracts they have with their work suppliers will end once a collective agreement comes into effect, said Lane.

“Of course, unions want to add value to their members, and so you would expect that certain of the terms and conditions the (dependent contractors) were working under before unionization will become more favourable to the (dependent contractors) — including financial things such as pay and benefits and non-financial rights, which nevertheless may impose extra overhead on their ‘employers.’”

Going forward, employers need

to take care when it comes to using contractors, said Bandali. For example, using a third-party staffing agency to manage the contractors is not a safe harbour.

“They’re facing increasing scrutiny as well,” he said.

HR needs to take more responsibility when it comes to the management or forecasting of the risk associated with independent contractors, said Bandali.

There are safe ways to do it, he said. If a contractor pays the right amount of taxes but maintains the benefit of being a privately held corporation — so is still entitled to the business deductions and tax benefits of being an incorporated entity — that’s what makes him safe from the CRA and less likely to be seen as dependent contractor.

“The evolution of independent contracting is changing, and organizations need to see that,” said Bandali.