



GLOBE AND MAIL

By Ann Kerr

Nov. 13, 2002



When is a Freelancer on Staff?

Both employers and people hired back on contract should make sure all of their legal bases are covered experts say.

Say you have a sudden surge in business or a new system to implement that your regular staff doesn't have the time or skill to handle. Who better to call in that a former employee, someone who can hit the ground running, get the job done, then move on?

That's just what many companies today are doing, say Toronto career consultant Lynne O'Connor, who was downsized out of her job when Murray Axmith and Associates Ltd. was bought by Right Management Consultants in April. Since then, Ms. O'Connor herself has been working for the new firm, Right Axmith, on a freelance basis.

When it's set up properly, this kind of freelance working arrangement benefits all parties, she says. There aren't any hard numbers on the trend, but human resource professionals, employment lawyers and those in the job outplacement business report that companies increasingly are hiring freelancers as needed, without having to pay full-time wages, benefits or severances, or make deductions.

“Besides saving them money, it gives companies a lot more flexibility. And when you use a person who already knows the company, there's a great comfort level all-round,” says O'Connor, who estimates she spends about half of her time working on projects for Right Axmith.

Unless they're careful, though the parties involved can run afoul of government regulations, often unintentionally. Or they can end up in court in a wrongful dismissal case if a long-time freelance worker believes she did the job of a regular employee and is entitled to severance pay.

In fact many companies and contractors aren't aware of all that's required to maintain an arm's length relationship, Ms. O'Connor says.

If it's determined that the self-employed worker is a de facto employee, the penalties can be steep, especially for the employer, says Colette Gentes-Hawn, spokeswoman for the Canada Customs and Revenue Agency in Ottawa.

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The agency is now conducting about 80,000 investigations a year into freelance working arrangements to determine if they're really employer/employee relationships, Mr. Gentes-Hawn says. Some of these investigations arise during a routine audit of a company's books, but most result after a contract ends and the person tries to collect employment insurance benefits. Self-employed workers don't make EI contributions and therefore aren't eligible to collect such benefits – a fact that some aren't aware of or are trying to fight.

“If the government deems the person was actually being treated like an employee, both sides get jumped on and face substantial payments for back withholdings, not only of EI, but CPP, income tax deductions, provincial occupational health and safety payments, plus interest and penalties,” says Toronto lawyer Randall Scott Echlin, a partner in Borden Ladner and Gervais LLP.

In such a case, the unemployed worker may seem to come out ahead by being able to collect EI after all, but any claims made against income tax for being self-employed, such as home work space, mileage and supplies, will be denied and a new T4 slip will be issued showing the amount of tax the person owes, going back four years, plus interest.

The employer gets sapped again, with a 1 percent penalty for the amount of tax that should have been deducted at source all along.

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Deals that Can Work

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To prevent these pitfalls, Canada Revenue issues a set of guidelines outlining the difference between a business relationship and an employer-employee situation. The courts consider many of the same points in making their rulings, Mr. Echlin says.

First and foremost, it comes down to a matter of control.

“The thing is, if the employer is controlling where, when and how the work is done, the worker is essentially an employee,” Ms. Gentes-Hawn says.

If the person works on-site using company equipment that strengthens the case that he’s an employee. So does paying the worker a weekly salary, as opposed to an hourly rate, say, on a project-by-project basis.

“A lot of employers get into trouble then they’ve been instructed to downsize but they still need a certain skill set. They have to show cuts, so they’ll put people on an ongoing contract, with no end date in sight,” says human resources consultant Sheila Whaley of Oakville, Ont.

The public sector and Canadian subsidiaries of U.S. companies are two of the biggest employers of independent contractors, Mr. Echlin says. Although saving money is the reason many organizations slash their work force then bring back former staff as self-employed professionals, it doesn’t always work out that way, he says. The severance package for someone at the upper end can be substantial, as can the rate charged for contract work.

“Tell clients to charge 25 to 30 per cent higher than the staff salary, since they’re not getting benefits and they’re covering their own overhead. From the company’s perspective, there can be no cost savings at all, it can even cost more,” he says.

The benefits, though, outweigh the drawbacks for companies that have a cyclical work flow or must deal with a lot of business fluctuations, says Monika Morrow, Vice-President of career management consulting at Right Axmith.

Because of the nature of their business, consulting firms have traditionally used a lot of self-employed professionals, many of whom, like **Ms. O’Connor**, once were full-time. For instance, one former employee now working as an association is a grandmother who wanted to live outside the city and spend more time with family, Ms. Morrow says. Another decided to start her own coaching business, but freelance for Right Axmith as well.

“The key to making this work is having a clearly laid-out contractual arrangement drafted by a lawyer,” she says.

“Our contract outlines the work, the reporting relationship, the causal nature of the business, what we reimburse in expenses, and reiterates strongly that the contractor is responsible for remitting CPP, EI and taxes.”

Since it started operating in Canada in 1988, the company hasn’t run into any problems over its contractual arrangements, Ms. Morrow says.

With Canada Revenue hiring 6,000 new employees over the next few years, many of whom will be in tax collection, Mr. Echlin predicts that the independent contractor relationship will come under even closer scrutiny. Ms. Gentes-Hawn though, says the department isn’t on any kind of witch hunt.

Even if work arrangements do become targeted, “it’s easier than ever for companies to keep in the clear,” Ms. Morrow says. “If anything, the guidelines have become more black and white in recent years.”

Set it up right to begin with, she says, and this kind of casual arrangement can deliver plenty of benefits without any nasty surprises.

If you want to hire people on a freelance basis and keep out of trouble with the law, it definitely helps to have them work out of their own home, use their own equipment, set their own hours and bill by the day or project. But it isn't just the obvious working arrangements that determine whether a worker is an employee or a bona fide self-employed contractor.

“Watch out for the little dumb things that are real telltales,” says Toronto Lawyer Randall Scott-Echlin, a partner in Borden Ladner Gervais LLP.

Forget issuing them business cards or inviting them to play on the ball team or attend the Christmas party, he says. Such common courtesies enjoyed by employees are out of bounds when you're trying to establish a totally separate working relationship.

“I once had a case where one of the prime exhibits was a picture in the company paper showing silver tray congratulating the person for their 25 years with the company,” he says. “this kind of thing becomes evidence of a longstanding employee relationship in an investigation by government or if an employee sues for wrongful dismissal.”

Bringing back ex-staffers for short stints can be productive and cost-effective, as long as the relationship doesn't get too cozy. Here are some other tips from employment experts to ensure the company keeps its distance:

Make sure there's a clear start and finish to each project, with breaks in between, says Sheila Whaley, a human resources consultant in Oakville, Ont. (In the garment trade, they call it piecework.)

Stipulate in writing that your contractors have to make their own remittances for CPP, income tax and the like and get them to sign the letter of understanding. It doesn't hurt to go a step further and do a periodic check that they're following through, says Monika Morrow, Vice President of career management consulting at Right Axmith in Toronto.

If for some reason your temporary help has to work on your premises, charge them for the use of the space and equipment, Mr. Echlin says.

The contractor should be able to offer another person to fill in for them during an absence, Mr. Echlin says, because the last thing an employer wants is for that one person to become absolutely integral to the business.

Encourage the independent contractor to develop other clients, says Lynne O'Connor, who is herself a freelance consultant with Right Axmith in Toronto. “as a self-employed person, you want to be able to show three sources of income to establish that you're not a part-time employee with one company,” she says “Even if you only have one client, keep records showing your due diligence to find other work.”

Employers should not put independent contractors on their benefits plan. “Believe it or not, I've seen that done,” Mr. Echlin says.

If the situation requires it, the employer can soften the working relationship without leaving the company too vulnerable, Ms. Morrow says and the person really needs EI, it may be better to put them on your payroll so they can collect it if they can't get another client. The go-it-alone-worker can then become a contract employee without benefits.