

Status – Distinguishing between a worker and an independent operator

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OBJECTIVE

1. This practice directive explains the analytical framework for distinguishing between a worker and an independent operator and aids in the interpretation of *Assessment Manual Items: AP1-1-1 to AP1-1-7 and AP1-38-1*.

INTERPRETATIVE GUIDELINES

I POLICY OBJECTIVES

2. All statutes have particular policy goals; and, therefore, it is possible that a service provider may be held to be a worker under one statute but not under another. The common-law requires courts and tribunals to take into account the particular policy objectives of the enabling statute when deciding if an individual has worker status. Thus, the Assessment Department’s determination process must reflect the policy goals of the *Workers Compensation Act*: the prevention of work-related injury and occupational disease, and the compensation of workers for work-related injury and occupational disease. Accordingly, a determination made by another

organization (e.g., Canada Revenue Agency, Employment Standards Branch) is not determinative for the purposes of the *Act*, due to the differing policy goals.

3. A foundational principle of the workers' compensation system is that of inclusion. Thus, if the evidence of status is equivocal or equally-balanced, an individual will be presumed to be a worker; for the *Act*, as social legislation, favours inclusion and the coverage thereby afforded.

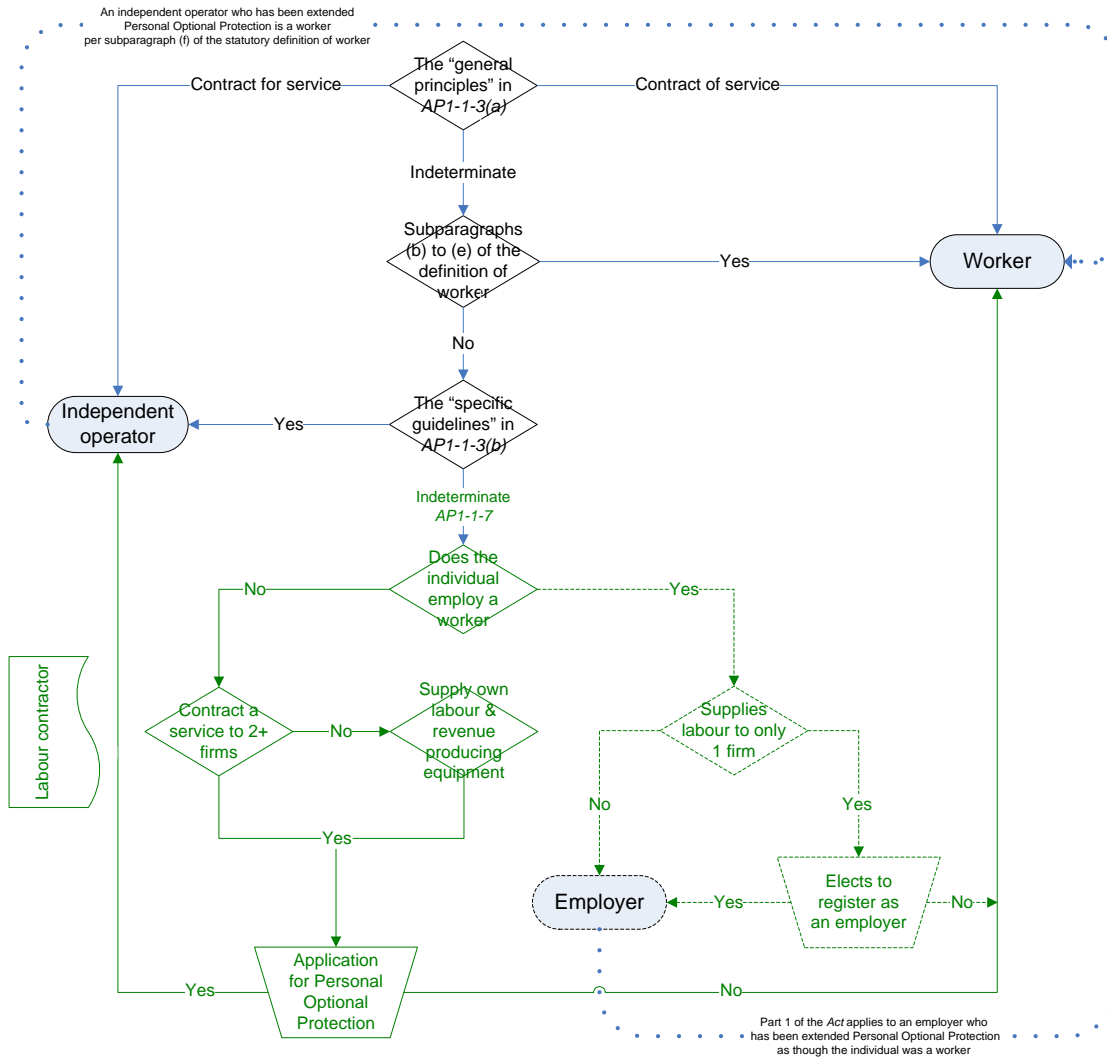
II ASSESSMENT MANUAL

4. The key policies relevant to status determination are found in the *Assessment Manual* in *API-1-1* to *API-1-7* and *API-38-1*.
5. These policies build upon and aid in the interpretation of the three statuses for assessment purposes in Part 1 of the *Act*: employer, worker, and independent operator. In particular, these policies aid in interpreting the nature of the contract underlying the relationship between a service provider and the service recipient; for the foremost thread interweaved through each of the three statuses is the nature of the underlying agreement between the service provider and the service recipient, such that if it is determined that the underlying agreement is:
 - a) a contract of service, the parties to the contract will be employer and worker, or
 - b) a contract for service, the parties to the contract will be independent operators with respect to each other.

III THE HIERARCHICAL ANALYTICAL FRAMEWORK

6. The *Act* and policy jointly create the following hierarchical analytical framework for status determination:
 - a) Whether the underlying agreement between the individual and another is a contract of service or a contract for service. That is, whether the service provider is performing the services as an individual in business on his or her own account or is performing them in the capacity of a worker (the “general principles” of *API-1-3(a)*).
 - b) Whether the individual falls within subparagraphs (b) to (e), inclusive, of the statutory definition of worker in section 1 of the *Act*.
 - c) Whether one of the “specific guidelines” of *API-1-3(b)* is applicable.

- d) If after subjecting the evidence to the above, status is uncertain or the probabilities are more or less balanced between worker and independent operator, the labour contractor criteria described and developed in *API-1-7* are considered.¹



7. As the framework is hierarchical, a conclusive determination at any stage determines status.

¹ If the labour contractor employs a worker, the labour contractor cannot register as an independent operator. The labour contractor may choose to register as an employer.

ADJUDICATIVE GUIDELINES

I CONTRACT OF OR FOR SERVICE

8. In the main, *AP1-1-3(a)* distinguishes between a worker and an independent operator by determining whether the individual qualifies as an independent operator:

ISSUE:	Is the service provider an independent operator?
THE FACT TO BE PROVED:	Is the contract underlying the relationship between the service recipient and the service provider a contract for service?
TEST:	Does the service provider exist as a business enterprise independently of the service recipient for whom the work is done?
FACTORS:	The listed, sundry, and other factors.

A The “major test” in *AP1-1-3(A)*

9. The *Assessment Manual* does not explicitly reference a test for determining a contract of or for service; however, the *Assessment Manual* and the policies within are not intended to be and cannot be interpreted in isolation: the *Assessment Manual* explicitly references its antecedents and recognizes that policy within the *Assessment Manual* continues the substantive requirements of such antecedents.² The tests for determining a contract of or for service were formerly found within *Workers’ Compensation Reporter Series Decisions 26, 32, 138, and 255*. The analysis within those decisions has been encapsulated in the “general principles” of *AP1-1-3(a)*; and, in particular, in the “major test” therein.

The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.

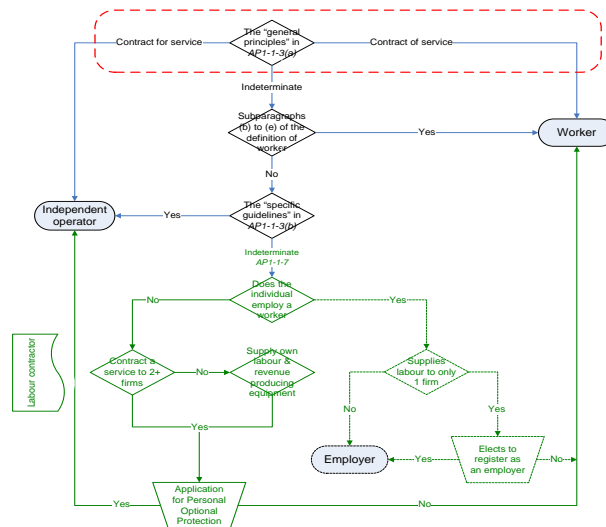
10. An entity exists as a business enterprise independently of the service recipient for whom the work is done, if it is
- constituted or organized under applicable law, whether or not for profit, and whether privately or publicly owned, including any corporation, partnership, sole proprietorship, trust, or other association;
 - undertaking a commercial, industrial, service, or investment activity (or a combination thereof);

² *AP1-1-3*: “APPLICATION: ... The POLICY in this Item continues the substantive requirements of the policies and items referred to in the HISTORY as they existed prior to the Effective Date, with any wording changes necessary to reflect legislative and other changes since the policies and items referred to in the history were issued.”

- free from the control and constraint of another for whom it performs work.

11. Thus, a decision-maker must determine, examine, and interpret the actualities of the contract underlying the relationship between the service recipient and a service provider in order to establish whether the service provider exists as a business enterprise independently of the service recipient.

B The “General Principles” and factors in AP1-1-3(A)



12. The factors referenced in the major test are the nine factors listed in AP1-1-3(a):

- *whether the services to be performed are essentially services of labour; and*
- *the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;*
- *whether the individual doing the work might make a profit or loss;*
- *whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;*
- *if the business enterprise is subject to regulatory licensing, who is the licensee;*
- *whether the terms of the contract are normal or expected for a contract between independent contractors;*
- *who is best able to fulfill the prevention and other obligations of an employer under the Act;*
- *whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and*
- *whether the individual doing the work is able or required to hire other persons.*

13. These listed factors are not intended to be and are not exhaustive, and there is no set formula as to their application: the relevance and relative weight of each factor considered will depend on the particular facts and circumstances of the case.

14. In addition to the nine listed factors, *API-1-3(a)* describes several sundry factors which must be considered in determining “whether a party to a contract has a sufficient amount of independence to warrant registration as an employer”:

...they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They also retain the right to hire and fire their own workers and exercise control over the work performed by their workers.

15. *API-1-3(a)* further sets forth the following two interpretative principles within which the listed, sundry, and other factors must be considered and weighed:

No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time. Yet they are often independent of the person with whom they are contracting in significant respects ...

Some regard must also be paid to the structure and customs of the particular industry involved. Where an industry makes much use of the contracting out of work, this should be recognized as a factor in considering applications for registration as employers by parties to contracts in those industries.

(1) Whether the services performed are essentially services of labour

16. In the main, “services of labour” are a service provider’s physical and mental contribution to the production of a good or service.
17. The essence of this factor is whether the service to be performed requires services of labour only or the supply of labour and materials. When looked at as a whole, this factor mirrors *API-1-3(b)(1)*’s reference to “labour and materials” and is readily distinguishable from *API-1-3(a)*’s fourth bullet point’s specific reference to “equipment”³.
18. The measure of contribution of materials is dependent on both the size and nature of the task. Generally, where only small amounts of materials⁴ are supplied, the service provider is considered to be providing only services of labour. For example, a carpenter supplying only nails, screws, etc. would not be considered to be supplying materials.

³ *WCAT Decision Number: WCAT-2010-01490*, 31 May 2010

⁴ These are typically consumables and are never the main materials required for the task.

(2) Control

19. The essential elements of control are as follows:

- control over what the service provider has to do;
- control over where the service provider carries out the work;
- control over when the service provider carries out the work; and
- control over how the service provider carries out the work.

20. As a general principle, the more control a service recipient exercises over a service provider, the more likely the underlying contract is one of service. Conversely, the less control a service provider exercises, the more likely the underlying contract is one for service. In this respect, the fixing of remuneration or purpose of work, paying remuneration, or checking whether specifications have been met is not control for the purposes of this factor.

21. It is the right to exert control that is material, not whether that right is exercised. In actuality, an employer may rarely or never exercise this right; particularly if the worker is an individual with specialist skills or knowledge used to working on his or her own initiative.

22. The right of control may be explicitly set out in the contract or may be merely implied. Where a right of control exists, it does not have to be exercised directly by the service recipient: the right can be delegated to a third party such as a customer's representative (e.g., site foreman, project manager, office manager).

(a) Control over what the service provider has to do

23. In some cases the service provider will clearly be subject to control over what he or she does; the employer or its agent will constantly give instructions on what to do. In others, the service provider will choose what to do for himself or herself.

EXAMPLE 1:⁵ An electrical contracting firm retains Electricians A, B, and C to wire portions of the interior of an office building.

Electrician A's contract with the firm requires him to provide services as directed. During the first week he is ordered to wire offices in the 2nd floor of the building. In the second week, he is moved to work at a residential site. In the third week, he is told to return to the office building to wire the 3rd floor of the building. In this case, the firm has control over what Electrician A does at any particular time; and this is indicative of a contract of service.

Electrician B's contract is to wire all of the offices on the 5th floor within three weeks. It is up to Electrician B to decide what work she is going to do in order to fulfil this contract, and the firm cannot tell her to stop and wire another part of the building instead. In this case, the firm has no control over what is to be done; and this is indicative of a contract for service.

⁵ Examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

Electrician C contracts with the firm to wire all of the offices on the 7th floor within three weeks. At the end of the three weeks, the firm asks him to wire the 6th floor as well, and he agrees to do so under a new contract for a negotiated price. That is, Electrician C voluntarily agreed to undertake additional work for an additional fee under a new and separate contract. The original contract to wire the 7th floor is still effective and he must complete that work within the agreed time scale. Again, the company has no control over what is to be done and the contractual arrangements point towards independence.

(b) Control over where work is done

24. A requirement in a contract for a service provider to work at a specified place is more characteristic of a contract of service than one for service. Where a service provider can carry out work wherever he or she wishes, the contract is more likely to be a contract for service. However, a Board officer should be careful about making a judgement concerning status where the nature of the work dictates where it should be carried out. In such cases, this sub-factor is not likely to be of any significance in determining status.

EXAMPLE 2: An accounting firm retains Accountants A and B and Cleaner C.

Accountant A's contract specifies that he must work at the firm's offices. He therefore travels to the same office every day to carry out his duties. This is a pointer towards a contract of service.

Accountant B's contract specifies that the accounting services may be carried out at the office, the accountant's home, or elsewhere – at the accountant's choice. Accountant B has an office in her home and covers the costs of that office herself. This is a pointer towards a contract for service (if the firm had covered the cost of working from home this would have been indicative of a contract of service).

Cleaner C's contract requires Cleaner C to clean the firm's offices five evenings each week. In this case, as the nature of the work dictates where the work has to be carried out, this sub-factor is without significance in determining status.

(c) Control over when the work is done

25. Generally, a worker is required to work hours prescribed by his or her employer. In contrast, generally an independent operator is not subject to extensive control over when the work is carried out. There may be an agreed deadline by which the specific work, or stages in the work, must be completed; however, within this deadline, the independent operator will usually have freedom to do the work at times to suit himself or herself.

26. Nevertheless, an individual engaged under a contract for service may be subject to considerable restrictions where commercial pressures dictate. For example, if the work to be done is part of a multi-faceted undertaking (such as dry-walling during the construction of a house), the service provider may be limited by scheduling as to when services can be provided. In such circumstances, the limitations put on when the work can be carried out tells us little about the status of the individual.

EXAMPLE 3: A publishing firm retains three individuals to provide services.

Individual A is engaged as an editor. He is required to be at the firm's offices from 8 a.m. to 5 p.m., Monday to Friday. He is entitled to one 15 minute coffee break in each of the morning and the afternoon, and a lunch break of thirty minutes. He cannot leave the office during work hours or schedule a vacation without the permission of his manager. This extensive control over when the work will be carried out is an indicator of a contract of service.

Individual B contracts to provide an article for a magazine. The article must be completed and submitted to the firm by 31 October. Apart from this condition, Individual B is free to work on the article as she sees fit. This lack of control over when the work will be carried out is a pointer towards a contract for service.

Individual C is retained as a graphic artist and is required to submit art-work daily by 2:00 p.m. Although there is limited control over when Individual C can carry out the work, within this broad framework she is free to work as she pleases. On its own, this tells us little about whether Individual C is providing services under a contract of or for service.

(d) Control over how work is done

27. Control over how work is done is the ability of the service recipient to control the manner in which the service provider performs his or her duties and requires that the service provider follow instructions. The right of control may be explicitly set out in the contract or be merely implied.
28. This form of control is absent if the worker is free to carry out the work in whatever way he or she likes. The only check that the service recipient might have is that the work must be to a satisfactory standard and subject to a final quality control check. This does not give the service recipient the right to control how the worker does the work: the service recipient is merely confirming compliance with the contract.
29. The presence of control over how work is done is a strong pointer towards a contract of service. However, its absence is only likely to be a mild pointer towards independence. This is because many workers are experts in their particular fields with particular skills and specialist knowledge and are not subject to such control.

(3) Profit or loss

30. The chance of profit and risk of loss are inherent in a contract for service; and, accordingly, if a service provider is taking financial risk in relation to the contract, the service provider is more likely to be seen as having a separate business existence. In contrast, a worker hired under a contract of service does not normally share to a significant degree in either the profits realized in a successful business or the losses incurred in an unsuccessful business. That is, at least a portion of a worker's earnings are not contingent on the success or lack thereof of the business.
31. However, the risk of loss must be real:

- a) There must be a probability of financial loss as opposed to the mere possibility of financial loss;
 - b) The probable financial loss must be actual as opposed to illusory; and
 - c) The loss must not be occasioned by irrational or irresponsible action or inaction, or by extraordinary circumstance.
32. Each of the abilities to negotiate the terms of a contract; accept or decline to take a job or accept or decline to take multiple jobs; or to profit through speed and efficiency, reduction of overheads, or effective organization of work entails a chance of profit and risk of loss.
33. That a service provider is required to correct mistakes or poor workmanship in his or her own time is a pointer towards independence. The pointer to independence will be increased where the service provider must also supply replacement materials.

EXAMPLE 4: If a bricklayer has to re-build a wall and supply or pay for the cost of the bricks and mortar, this would be a stronger pointer to independence than if the service recipient supplied the replacement materials.

(4) Provision of major equipment

34. For the purposes of workplace status determination, major equipment means a single asset used to generate revenue and which requires a significant capital outlay to purchase and a significant expense to provide, including maintenance and operating costs. Hand tools (including chain saws except as listed in Schedule A to *Practice Directive I-1-7(A)*) and vehicles used for personal transportation or to move lesser equipment are generally not major equipment.
35. Normally, in an employment relationship, the employer supplies the major equipment required by the worker and is responsible for the expenses – repairs, insurance, transport, rental, and operation (e.g., fuel) – related to its use. As well and generally, in a relationship between independent firms, the provider of service supplies his or her own equipment and is responsible for the expenses related to its use. Thus, evidence that the service provider owns and utilizes equipment that requires a major investment, costly maintenance, or both is indicative of independence.
36. Although unstated, it is obvious that the equipment referenced in this factor is the major equipment necessary to fulfill the service provider's obligation under the contract. That is, absent such major equipment it is probable onto certain that the service contracted for could not be provided as and when required.
37. The determination of what constitutes major equipment incorporates both the category of equipment as well as the quality of the equipment. Categories of equipment that are generally considered major include dual-axle trucks and heavy equipment such as mobile cranes, combines, or grapple loaders. The quality of the

equipment, whether the equipment is of industrial, professional, or residential grade, may be considered for equipment such as computer software or light-duty equipment. The fact that a piece of equipment is of professional-grade is not enough on its own for the Board to deem it as major.

38. Schedule A to *Practice Directive 1-1-7(A)* contains a non-exhaustive list of industry-specific major revenue producing equipment.

(5) Regulatory licensing

39. The weight to be given to this factor must be measured within the practices of the industry and the requirements of the regulatory bodies issuing the licenses.

(6) *Are the terms of the contract normal or expected for a contract between independent contractors*

40. In determining and weighing the terms of the contract between a service provider and a service recipient, a Board officer must look to the entirety of the agreement (which may include practices or conventions that exist in certain trades and industries; which, although not expressly agreed between the parties, form part of the agreement), the nature of the interactions between the individual and the service recipient, and the custom of the industry; and, in so doing must keep, in the forefront of consideration the seminal principle that what must be determined is the actuality of the relationship and not merely the intent of the parties to the relationship.

(7) *Prevention and other obligations of an employer under the Act*

41. Employers, workers, and independent operators share the responsibility for creating and maintaining a safe and healthy workplace to the extent of their respective authorities and abilities to do so. However, the most basic responsibilities are primarily employer duties: the duty to promote safety and health, and the duty to provide training.

(8) *Continuity of work*

42. This factor considers whether the service provider is engaged continuously and indefinitely for the same service recipient or intermittently for different entities. That is, is the relationship a transaction-based relationship or a continuing one, in which the service provider reports for and discharges duties day-after-day. The former is more indicative of independence, and the latter more indicative of employment.

(9) *Employment of others*

43. Generally, for there to be a contract of service, the service provider must be required to carry out at least some of the work personally. That is, the service provider must be obliged to provide his or her own labour and skill in the discharge of the contract. Unfettered discretion to do a job either by one's own hands or by another's is

inconsistent with a contract of service, though a limited or occasional power of delegation may not be.

(10) *The sundry factors*

44. In the main, the “sundry factors” are the major and minor administrative processes involved in the operation of a business enterprise, and include the following: advertising and marketing, bookkeeping, and making statutory remittances.

(11) *Intent*

45. The factor of “intent” is superimposed on the above listed and sundry factors. If it can be established that the terms of the contract, considered in the appropriate factual context, reflect the legal relationship that the parties intended, then their stated intention cannot be disregarded. It should be determined, based on the applicable factors, whether that intention was fulfilled.

C Summation – the weighing of the factors

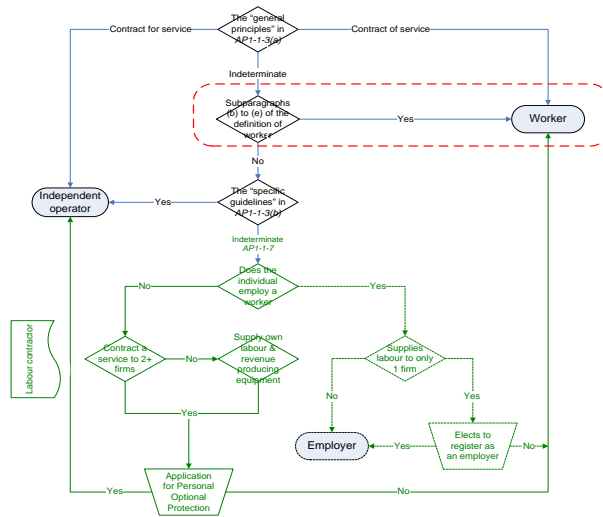
46. The listed, sundry, and other factors cannot be integrated into the major test simply by running down some form of checklist or adding up the number of factors pointing toward employment and comparing that result with the number pointing toward independence. Instead, and within the framework of the major test, the possible factors which bear on the relationship between the parties must be identified and examined, given their proper weight, and a judgement made about their overall effect. That is, a Board officer must consider all the evidence in light of the applicable factors and give the evidence the weight required in the circumstances of the case.

ASSESSMENT MANUAL ITEM: AP1-1-3: FACTORS CONSIDERED IN APPLYING THE "MAJOR TEST"	EVIDENCE		MORE INDICATIVE OF:	
	Relevance	Weight	Contract for service	Contract of service
Whether the services to be performed are essentially services of labour				
The degree of control exercised over the individual doing the work by the person or entity for whom the work is done				
Whether the individual doing the work might make a profit or loss				
Whether the individual doing the work or the person or entity for whom the work is done provides the major equipment				
If the business enterprise is subject to regulatory licensing, who is the licensee				
Whether the terms of the contract are normal or expected for a contract between independent contractors				
Who is best able to fulfill the prevention and other obligations of an employer under the <i>Act</i>				
Whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons				
Whether the individual doing the work is able or required to hire other persons				
Whether the individual seeks out and bids on his or her own contracts				
Whether the individual keeps his own books and records				
Whether the individual makes income tax, unemployment insurance, and Canada Pension Plan deductions				
Other				
Intent				

47. If on the measure and weighing of the factors, it can be determined whether the individual service provider is either (a) a worker or (b) an individual with a separate business existence, then status is determined. The remaining stages of the hierarchical analytical framework need not be considered; for the framework is hierarchical, and a conclusive determination at any stage determines status.

II SUBPARAGRAPHS (B) TO (E) OF THE STATUTORY DEFINITION OF WORKER IN THE ACT

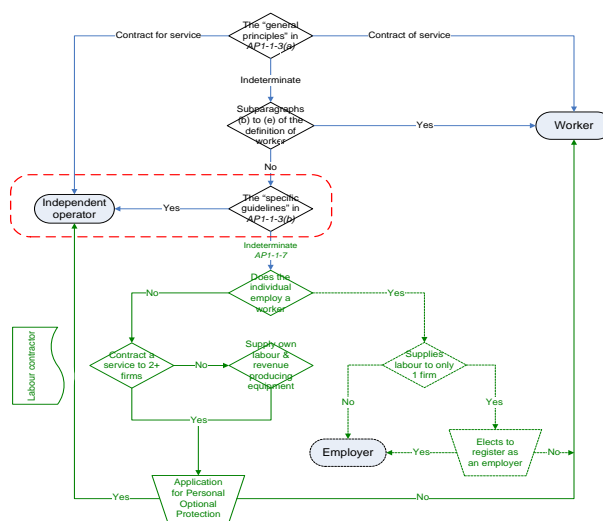
48. If a conclusive determination of the nature of the underlying contract cannot be ascertained from a consideration of the general principles, the hierarchical analytical framework for status determination requires that it must then be determined whether the service provider falls within subparagraphs (b) to (e), inclusive, or subparagraph (g) of the statutory definition of worker in the *Act*.



49. If an individual falls within any of subparagraphs (b) to (e), inclusive, or subparagraph (g), then that individual’s status as a worker is determined; and the remaining stages of the hierarchical analytical framework need not be considered.

III THE “SPECIFIC GUIDELINES” IN AP1-1-3(B)

50. If the individual cannot be determined to be a worker under any of the subparagraphs of the statutory definition, then AP1-1-3(b)’s “specific guidelines” must be considered. In these specific cases, certain sets of facts may infer that a person exists as a business enterprise independently of a service recipient. Each of the specific guidelines is a rebuttable presumption: if the relevant set of facts is established, a Board officer should find that the person is an independent firm, unless the presumption is refuted.



51. In *Assessment Manual Item: AP1-1-1* an independent firm is described as a term used “to identify those persons who are either required by the Act to register with the

Board as employers of workers, or from whom, as unincorporated employers or independent operators, the Board will accept a registration through the purchase of Personal Optional Protection for themselves”. Thus, an individual deemed to be an independent firm is an independent operator.

A Supply of labour and materials

52. The guideline requires that the service provider incur the entirety of the financial obligation and risk related to the purchase, supply, and application or installation of the materials, including the obligation to correct any deficiencies in the work-product at the service provider’s own expense.

B Two or more pieces of revenue producing equipment

53. Revenue-producing equipment means the major equipment necessary to fulfill a service provider’s obligation under a contract. That is, absent such major equipment it is probable onto certain that the service contracted for could not be provided as and when required.

C “Incorporated companies”

54. Section 2(1) of the *Act* directs that Part 1 of the *Act* “applies to all employers ... in British Columbia except employers or workers exempted by order of the Board”. Thus, the *Act* creates a mandatory statutory scheme, under which an employer must register with the Board immediately upon becoming an employer in British Columbia, unless exempted by order of the Board. As a corporation is an employer as defined in section 1 of the *Act*, it is required by law to register with the Board unless it is exempted from registration.

55. *API-1-3* and *API-38-3* set out criteria established by the Board for exemption of incorporated companies from registration (and coverage) under the *Act*. One such exemption is found in *API-1-3(b)(4)* for a corporation which is not sufficiently independent of the firm for which the corporation provides work. In the main, *API-1-3(b)(4)* is structured as follows:

- (a) A presumption that an incorporated company is an independent firm (and is therefore, per the description of “independent firm” in *API-1-1*, “required by the *Act* to register with the Board”).
- (b) A rule that the presumption may be rebutted if “there are circumstances indicating that the principals of the corporation are workers rather than independent firms”.
- (c) Exemplification of “[t]wo common situations where corporations will not be considered independent firms”.

56. In effect, to be registered as an employer, a for-profit corporation must be:

- (a) An employer, as that term is defined in the *Act* and described in policy.
- (b) Active. That is, the corporation must be engaged in work in or about an industry in British Columbia. In the main, this entails the following: “(i) the occupation of time, attention, and labour; (ii) the incurring of liabilities to other persons; and (iii) the purpose of a livelihood or profit.”⁶
- (c) Sufficiently independent.

57. The measure of sufficiently independent can be discerned from *API-1-1*'s description of the term “independent firm”:

The Board has created the term ‘independent firm’ to identify those persons who are either required by the Act to register with the Board as employers of workers ... An independent firm performs work under a contract, but has a business existence under the contract independent of the person or entity for whom that work is performed. An independent firm may be an individual, a corporation or another type of legal entity ... [emphasis added]

58. It is noteworthy that the measure of an independent firm is “business existence” and not “independent existence”. The latter – independent existence – merely requires that an entity legally exist separate and distinct from others, including from those persons who constitute the entity (its shareholders, members, etc.). In contrast, in a free market economy, the pith of business existence is the holding out to the market society the availability of goods and services at the best possible price having regard to competing pressures exacted upon a particular market.

59. A firm cannot have a business existence under the contract independent of the person or entity for whom that work is performed if it is not free from the control and constraint of another for whom it performs work. For these purposes,

- a) Control means the power or ability, direct or indirect, to influence the management, operation, and policies of a firm, whether through ownership, voting control, by agreement, by contract, or otherwise.
- b) Constraint means a substantive restriction, limitation, or regulation that materially affects the management, operation, and policies of a firm.

60. Generally, a firm whose operations are extensively integrated with or within the operations of another business entity or enterprise will not be sufficiently independent to be registered with the Board.

⁶ *Gordon v. The Queen*, [1961] S.C.R. 592.

D Personal service corporation

61. Generally, a personal service corporation is a corporation whose principal activity is the performance of personal services, and such services are effectively performed only by one or more worker-shareholders.

62. *Jacobs v. Harbour Canoe Club Inc.*, 1999 CanLII 3642 (BC S.C.):

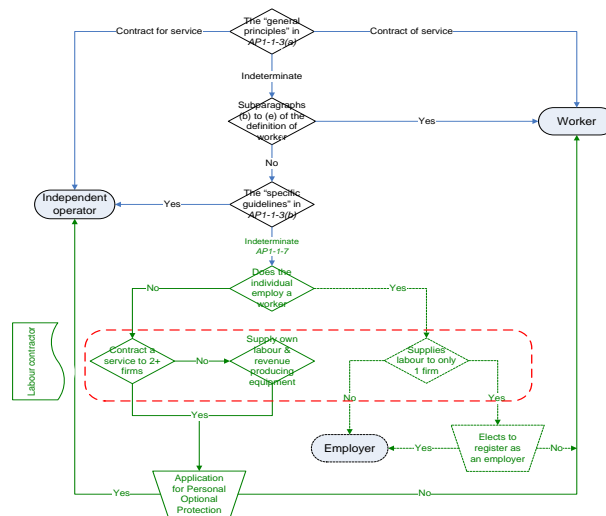
“... in determining whether an employer/employee relationship exists, courts have looked beyond the formal terms of employment agreements to examine the actual nature of the relationship. For example, in situations where an individual has incorporated a personal services corporation and an employer pays that corporation, the individual has, nevertheless, been held to be an employee entitled to maintain an action for wrongful dismissal against that employer ...”

“In addition, where a person has been employed by one entity but in fact provides services to an additional entity, and both entities exercise some measure of control over that person’s affairs, that person has been held to be an employee of both entities....”

63. Thus, when an individual has incorporated and the individual himself or herself provides services through the corporation, the fact of the incorporation does not preclude a finding that the individual is a worker of another entity. The general principles in *API-1-3* should be applied to determine the true legal relationship. In so doing, the key question to be considered is this: if it were not for the corporation, would there be a contract of service between the entity contracting with the corporation and the individual? By and large, such a contract of service will exist collaterally to the formal agreement between the entity contracting with the corporation and the corporation.

64. Where the indicia, other than those which are directly associated with remuneration, evidence that the individual acts under a contract of service with the entity contracting with his or her corporation, the corporation may not be allowed to register.

IV THE LABOUR CONTRACTOR CRITERIA IN AP1-1-7



65. If after subjecting the evidence to each of the previous stages of the hierarchical analytical framework, status is uncertain or the probabilities are more or less balanced between worker and independent operator, the three labour contractor criteria described and developed in *API-1-7* are considered. The “Explanatory Notes” to *API-1-7* state the following:

For persons who are not covered by the normal criteria for “independent firms” set out in the POLICY in Item AP1-1-3, the Board uses a category called “labour contractors” in determining whether a person is a worker or independent firm under the Act. This policy sets out the guidelines for determining who is a labour contractor and the significance of that determination.

66. Thus, it must be determined whether the individual is an unincorporated individual or partner who,

- has workers and supplies labour only to one firm at a time;
- is not defined as a worker, does not have workers, or supply major materials or major revenue-producing equipment but who contracts a service to two or more firms on an ongoing simultaneous basis; or
- may or may not have workers but contracts a service including one piece of major revenue-producing equipment to a firm or individual.

67. Once it has been determined that the individual fits within the labour contractor category, it must be discovered whether the individual is registered with the Board; for *API-1-7* dictates that the individual’s status under the *Act* flows from whether he or she was registered or not:

Labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain Personal Optional Protection as an independent operator if they do not have workers. A labour contractor who takes one of these actions is an “independent firm” for purposes of Item AP1-1-3.

68. Thus, an individual determined by the Board to be within the labour contractor category can elect to apply for personal optional protection coverage; and, on so doing, the Board will consider that individual to be an independent operator for the purposes of section 2(2) of the *Act*.