



National Insurance Board of Trinidad and Tobago (NIBTT)

Guidelines To Assist In Determining A **Contract For Service** And A **Contract Of Service**

Determining who is an “**Employee**” for the purposes of the National Insurance Act

In determining a “contract of service” or a “contract for service” exists, the Courts often rely upon a number of tests which they deem applicable to the specific situation and which may be used in conjunction with each other. It is noted that all the tests are required to be satisfied. The fact that a written agreement states that a person is an independent contractor is by itself immaterial. Where there is no written agreement the terms and conditions of work are examined. In some instances even if there is a written agreement the actual conditions of work are examined if they are found to be different from the written agreement.

Some of these tests are as follows:

1. **CONTROL TEST**

There must be a sufficient degree of control in the performance of his duties particular with reference to time, place, manner and means. The greater the amount of control the more likely the relationship is one of employment. In the case of professional or skilled workers the employer may have little or no control over the performance of the work but he can direct the worker as to what work is to be done.

2. **ORGANIZATION TEST**

The question that is usually asked is whether the duties of the person are integral to the running of the business in its ordinary operations. It is also key if the person who has engaged himself to provide these services performing them as a person in business on his own account. If so, and the position is extraneous to the business then the person is not an employee.

3. **ECONOMIC REALITY TEST**

The factors of whether the person performing the service provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task are more in the nature of an independent contractor.

4. **MUTUALITY OF OBLIGATION**

In some cases, such as casual workers continuing mutual obligation on the employer to offer employment and on the employee to accept employment is indicative of an employment relationship.

5. **PERSONAL PERFORMANCE AND EXCLUSIVITY**

Normally an employee cannot delegate all of his duties to another person so that where there is no obligation on the part of the person to provide his own work and skill then he is not an employee. Where the contract entitles someone to the exclusive or full time services of another person this suggests that there is an employer/employee relationship.

6. **REMUNERATION**

The payment of wages or salary is usually an indication of an employment relationship, but this is not an irrefutable presumption. In addition, the manner of payment is a useful criterion as payment by “hours” worked implies employment as opposed to payment by “job”.

7. **POWER TO DISMISS**

Where dismissal is given by a period of notice this implies the existence of an employer/employee relationship.

8. **DEDUCTION OF PAYE AND NIS**

These deductions indicate that the parties view the relationship as that of employer/employee. However, this is not conclusive as failure to make payments does not signify that a person is an independent contractor nor does making payments imply an employment relationship.

9. **METHOD OF PAYMENT**

The procedure for payment of a person by the use of requisitions for the supply and payment of the services and the use of purchase orders and contractors’ invoices does not negate the assumption of an employer/employee relationship. It is trite law that where a legal question falls to be determined the Courts will look at the substance and not the form.

10. **DECLARED INTENTION OF THE PARTIES**

The declared intention of the parties may be of significance where

- a. There has been a deliberate change in the basis of employment

- b. The work in question is of an unusual nature so that an ambiguity as to its true nature might be found more easily, or
- c. The arrangement has been entered into in a relatively informal manner and has to be construed in light of several factors and circumstances.
However, this can be rebutted if it is proven that the person misunderstood the effect of what was being said and done at the time of engagement.

- Do you provide the major items of equipment to do your job?

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- Are you free to hire people on terms of your choice, to do the work that you have agreed to undertake?

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- Do you have to correct unsatisfactory work in your own time and at your own expense?

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