

Employee or Independent Contractor?

The distinction between an employee and an independent contractor/consultant mainly lies in the contractual relationship between the parties to the contract. While an employee has a contract of service, an independent contractor has a contract for service.

Why make the distinction?

For employers, this distinction is important to enable them avoid engaging an employee when in fact, an independent contractor would be the best choice and vice versa. The distinction also helps employers avoid unnecessary litigation or know the best defence strategy in case of litigation.

For employees, this distinction makes it easier to know what to claim for at the end of the contract i.e. whether one is entitled to terminal benefits or contractual sums. What then is the difference between an employee and an independent contractor?

The Employment Act defines an employee as a person employed for wages or a salary including a trainee. The Act does not define an independent contractor but an independent contractor can be defined as a person, who is tasked with producing a certain result, but whose mode of performing the task is not controlled or determined by the person hiring him and he may use his discretion in performing the task.

When determining whether a person is an employee or an independent contractor, it is important to look beyond the wording in the contract between the parties. It requires a keen scrutiny into the

entire range of facts and circumstances to establish whether an employer/ employee relationship exists. Below, are the distinguishing factors between an employee and an independent contractor.

1. Control

This is the most crucial distinguishing factor. An employer has total control over the work of an employee including the place of work and hours of work. The employer also has control over the exact manner in which the employee performs tasks assigned to him. An independent contractor on the other hand works under minimal supervision and determines his place of work, the hours of work and the manner in which he should perform the task.

2. Integration into the employer's core business

An employee forms part of the employer's business and the employer is responsible for providing the necessary material and equipment for the running of the business. An employee is also subject to the employer's rules and regulations in the work place. However, an independent contractor is free from the business and his performance is only subject to the terms of the contract or standards of his profession. He is also free to work for any other party at the same time.

3. Mode of payment

An employee is usually paid at certain intervals determined by the employment contract and the Employment Act. Payment of an independent contractor does not have to adhere to strict payment intervals and may be determined by the parties. For instance, in a case where the Claimant was paid per each completed job and his payment evidenced by local purchase orders, the court held that, such a mode of payment was not ordinarily found in an employer/employee relationship and found that the Claimant was not an employee of the

Respondent but an independent contractor under a contract for services.

4. Benefits and statutory deductions

Under the Employment Act, an employer is obligated to make statutory payments for an employee such as NHIF and NSSF payments. The Employer is also required to remit PAYE for the employee. An independent contractor on the other hand is not entitled to payment of such statutory remittances by the employer. He is a registered taxpayer, responsible for remitting his own taxes based on the payment for the services will. He is not subject to usual 'employment' matters such as the deduction of PAYE and taking annual leave.

5. Liability for wrongful acts

An employer is liable for the wrongful acts of his employee if the acts are committed in the course of employment. This is known as vicarious liability. On the other hand, a person who hires an independent contractor is not liable in general for the negligence and other wrongful acts committed by the contractor.

Having distinguished the difference between an employee and an independent contractor, it is important to determine whether a business requires an employee or an independent contractor. Each has its pros and cons and before choosing either of them, it is important to weigh each option by considering the length of the task, the resources available and the type of work. For instance, where the task will take a short period and requires a number of people with different qualifications, then it is only advisable to hire an independent contractor. On the other hand, where the work to be done is for long periods and only requires one form of qualification or where one person can perform multiple tasks, then it is better to hire an employee

Once you have decided on the best option for your business, ensure the contract is in strict terms and adhere to it. It is advisable to stick to the terms of the contract, to avoid converting it from one form to another. This is because as discussed earlier, the conduct of the parties is more important than the wording in the contract. For instance, where A and B enter into a contract for service, but in the course of the contract, B provides the work equipment, dictates the working hours for A and remits his statutory deductions, the contract stops being a contract for service and becomes a contract of service by conduct.

Lastly, discuss the terms of the contract before work begins. It is possible to infer the contractual relationship from the terms of the contract. For instance, where the contract requires A to report to their workstation from 8 am to 6 am from Monday to Friday, this could be construed as control over the working hours making it an employment contract and not a contract for service. However, where the contract states that A is required to complete a certain task within 5 days, this can be interpreted as a contract for service since the instructing party does not determine the exact working hours. Discussing the terms of the contract creates certainty and avoids any doubt on whether a person is an independent contractor or employee.

Conclusion

While the employment relationship is a special relationship safeguarded by Labour laws, the only binding document between an independent contractor and the instructing party is a contract for performance of services. Consequently, claims relating to employment are filed at the Employment and Labour Relations Court while claims between an independent contractor and the instructing party can only be filed in a civil court under the law of contract.