

## **Definition - EMPLOYEE & CONTRACTOR**

The following is intended to provide some general information concerning employees of curling clubs and independent contractors who provide a service to the club.

The Canada Customs and Revenue Agency (CCRA) administer the collection aspects of the federal legislation dealing with Income Tax, Canada or Quebec Pension Plan (CPP) and Employment Insurance (EI). None of the legislation dealing with Income Tax, CPP or EI includes a definition of an employee. However, the CCRA claims the right to determine if an individual is an employee for the purpose of Income Tax deduction or CPP and EI contributions. Basically CCRA will consider any individual an employee if he or she provides a paid service to a club whether working full-time, seasonal, part-time, temporary, receiving regular pay or receiving pay based on the number of hours they work.

If it is questionable as to whether an individual is an employee or a contractor, the CCRA can be requested to make a ruling as to the status of the individual. The CCRA may decide that such a ruling is necessary or a ruling may be requested by the employer, the individual, CPP or EI. In the ruling determination process, CCRA has the right to conduct an audit of the employer's practices and payments to the individual as well as the status of other similar individuals. If the employer had considered an individual to be a contractor and the CCRA ruled that he, she or they were to be considered employees, the CCRA may demand payment of the CPP and EI contributions back to the date of hire of the individual(s) and may levy significant financial penalties for non compliance with the applicable legislation. (It should be noted that if the employer requested the ruling from the CCRA and cooperated in the audit process, it is unlikely that the penalties will be levied).

After the payments and penalties are paid, the CCRA ruling may be appealed to the CCRA and if the employer is dissatisfied with the outcome of the appeal, the case may be taken to Tax Court. The appeal and Tax Court processes are long, cumbersome and can be very expensive. To avoid potentially expensive and unpleasant problems with the CCRA, curling clubs should be very cautious about determining whether individuals are employees or contractors or making unilateral decisions (or bilateral decisions with the individual) to consider an individual as a contractor.

Consider the following example:

“For a period of time an individual has worked as a cleaner at a curling club for a few hours each day or an individual has worked as a bartender for a few shifts each week. The individual may or may not have had a signed “provision of service contract” however the club had paid the individual a regular hourly rate and had not deducted Income Tax or made any CPP or EI contributions on his or her behalf. For whatever reason, the club dismisses the individual who then visits his or her local EI office to file an EI claim. The local EI officer notes that no EI contributions were made by the club on behalf of the

individual and therefore forwards the case to the CCRA for a ruling. This very common scenario will prompt an immediate investigation and audit by the CCRA”.

The employees of all curling clubs in Canada are also subject to the applicable Employment Standards Legislation of the province or territory where they work. All of these various pieces of legislation do provide a definition of an employee for the purpose of the application of the applicable Employment Standards Legislation. (Unionized employees of a curling club will also be subject to the applicable provincial or territorial Labour Relations Legislation). As the name implies, the Employment Standards Legislation provides minimum standards that must be applied to all employees covered by the legislation. These standards include hours of work, wages, overtime, vacation pay, termination notice etc. and all curling clubs must meet (or exceed) these standards for their employees.

One of the attractions to a curling club (or any employer) of having certain services performed by a contractor is the fact that the club is not required to deduct Income Tax or make CPP or EI contributions on behalf of the contractor.

Who then can be considered a contractor?

First it is important to note that no employer can simply declare, unilaterally or bilaterally with any individual, that certain services will be performed by a contractor rather than an employee.

None of the following singularly or taken all together is sufficient to declare that certain services are performed by a contractor:

The parties have signed a “provision of services contract”;

The contract states that there is no employer/employee relationship between the club and the individual;

The contract contains a provision whereby the individual will be responsible for any required Income Tax, CPP or EI payments;

The individual has agreed that the applicable provincial or territorial Employment Standard Legislation will not apply;

There are no specified hours of work;

The individual has certain duties and responsibilities but no specific “job description”;

The individual has employees that he or she pays;

The individual supplies some or all of the tools required to perform the services

There are basically two criteria that must be met in order to ensure that an individual(s) providing certain services to an employer can rightfully be considered a contractor.

- The contractor must own a registered company or must partially own and be empowered to act on behalf of a registered company or must be empowered to act on behalf of a registered company and the registered company must hold a valid GST number. If a club is in doubt of any of the above written proof should be sought from the individual.
- The club and the contractor must enter into a “provision of services contract” and that contract must include a provision whereby the contractor acknowledges that an employer/employee relationship does not exist between the parties and that the contractor will be solely responsible for any and all provincial and federal statutory payments and/or deductions required to be made.

We urge caution when making a decision that an individual will be considered a contractor rather than an employee. What could be considered a good business practice may result in expensive consequences.