

# You Make the Call—Employee or Independent Contractor?



One of the trickiest challenges faced by payroll is distinguishing between employees and independent contractors. Here's a scenario illustrating the factors that apply in the context of determining whether employment is insurable for purposes of employment insurance (EI).

## **SITUATION**

A pet grooming academy in Toronto hires a skilled and experienced dog groomer named Liza Apso. She signs an 18-month contract. The contract describes her as "an independent contractor" and says she's "personally responsible for her own taxes." The characterization of Liza as an independent contractor is repeated at least half a dozen times in the agreement. Liza works unsupervised and sets her own hours. She owns her own tools. But she does all her work in academy facilities using tubs, grooming tables, water and electricity the academy supplies. The clients belong to the academy, not her. Liza has no role in operating the business. She carries no insurance and does no advertising. She's paid by the hour. She doesn't make any more money when the academy's business does well or any less when it does poorly. If she wants to earn more, her only option is to work additional hours.

## **QUESTION**

**Is Liza an employee or independent contractor for EI purposes?**

1. She's an employee primarily because she has no direct, personal investment or stake in and doesn't operate the business.
2. She's an employee because she gets paid by the hour.
3. She's an independent contractor because the contract language clearly demonstrates the intent of both parties to treat her as an independent contractor.
4. She's an independent contractor because she owns her tools, works unsupervised and comes and goes as she pleases.

## **ANSWER**

1. **Liza is an employee for EI purposes because she doesn't operate and has no direct financial stake in the business.**

## EXPLANATION

This example is based on an actual Tax Court ruling in Ontario. It's a small case but a useful showcase for reviewing the factors that determine if a worker should be classified as an employee or independent contractor under EI rules. As often happens, in this case there were factors supporting each classification. But at the end of the day, 3 things stood out:

- The groomer was integrated into the business, i.e., pet grooming was an integral activity of a pet grooming academy;
- She had no personal financial stake in the business; and
- She didn't operate the business.

All 3 of these factors suggested that the pet groomer was employed under a contract of service (under Section 5(1)(a) of the *Employment Insurance Act*) and not as an independent contractor [*Hodgkinson v. Canada (MNR)*, [2006] T.C.J. No. 550].

## WHY WRONG ANSWERS ARE WRONG

**B is wrong** because while hourly wages do suggest the existence of an employment relationship, they don't settle the issue once and for all. In other words, workers aren't automatically employees just because they get paid by the hour. The larger point is that classification involves the weighing of many factors no single one of which is automatically decisive.

**C is wrong** because classification of a worker's status as an employee or independent contractor isn't determined by the parties' intentions and what the worker is labeled in the contract. It's based on the substance of the relationship. And in this case, the circumstances—specifically, the lack of the groomer's proprietary interest in the business—spoke much louder than the fact that the contract called her an “independent contractor.”

**D is wrong** in much the same way B is wrong. Ownership of tools, lack of supervision and the ability to set one's own hours are factors that suggest an independent contractor relationship under EI rules. But they weren't enough to tip the scales in this case. Stated differently, the employment relationship factors were outweighed by the independent contractor factors.