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of Ontario



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# Bill 28

## **An Act to amend the Employment Standards Act, 2000 with respect to the employer-employee relationship**

**Ms P. Sattler**

**Private Member's Bill**

1st Reading      October 26, 2021

2nd Reading

3rd Reading

Royal Assent



#### EXPLANATORY NOTE

The Bill amends the *Employment Standards Act, 2000* to set out a test for when a person is deemed to be an employee of an employer. The purpose of the test is to ensure that workers are not misclassified as independent contractors.

The test provides that a person who performs work for another person and who is directly or indirectly remunerated by the second person for that work is deemed to be an employee of the second person unless the second person can establish that all three of the following conditions are met:

1. The first person is free from the direct or indirect control and direction of the second person in connection with the performance of the work, both under the terms of the contract for the performance of the work and in fact.
2. The first person performs work that is outside the usual course of the second person's business.
3. The first person is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.

The Bill includes an exemption for business-to-business contracting relationships that meet certain criteria.

**An Act to amend the Employment Standards Act, 2000  
with respect to the employer-employee relationship**

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

**1 (1) The definition of “employee” in subsection 1 (1) of the *Employment Standards Act, 2000* is amended by striking out “or” at the end of clause (c), by adding “or” at the end of clause (d) and by adding the following clause:**

(e) a person who is deemed to be an employee under section 1.1,

**(2) Clause (a) of the definition of “employer” in subsection 1 (1) of the Act is amended by adding “including, for greater certainty, a person who is deemed to be an employee under section 1.1” after “the employment of a person in it”.**

**2 The Act is amended by adding the following section:**

**Test for employer-employee relationship**

**1.1 (1)** A person (the “first person”) who is remunerated by another person (the “second person”), whether directly or indirectly, for performing work is deemed to be an employee of the second person for the purposes of this Act unless the second person establishes that all of the following conditions are satisfied for the duration of the work performed:

1. The first person is free from the direct or indirect control and direction of the second person in connection with the performance of the work, both under the terms of the contract for the performance of the work and in fact.
2. The first person performs work that is outside the usual course of the second person’s business.
3. The first person is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.

**Business-to-business contracting relationship**

**(2)** Subsection (1) does not apply to the determination of whether a business (the “first business”) that contracts to provide services to another business (the “second business”) is an employee of the second business if the second business establishes that all of the following conditions are satisfied:

1. There is a written contract between the first business and the second business.
2. The first business is free from the control and direction of the second business in connection with the performance of the services, both under the terms of the contract for the performance of the services and in fact.
3. The first business is providing services directly to the second business rather than to customers or clients of the second business.
4. The first business maintains a head office or primary location of business that is separate from the business or work location of the second business.
5. The first business is customarily engaged in an independently established business of the same nature as that involved in the services performed.
6. The first business contracts with businesses other than the second business to provide the same or similar services and maintains a clientele without restrictions from the second business.
7. The first business advertises and holds itself out as being available to provide the same or similar services to the public as those it is providing to the second business.
8. The first business provides its own tools, vehicles (other than a personal vehicle) and equipment to perform the services.
9. The first business can negotiate its own rates.
10. The first business can set its own hours and location of work, consistent with the nature of the work.
11. The first business performs work for the second business under the first business’s own name.
12. The first business has the right to perform similar services for others on whatever basis and whenever it chooses.
13. The second business does not represent to its customers that the first business is an employee of the second business.

14. If the first business hires employees,
  - i. all employees are hired without the approval of the second business,
  - ii. the first business pays the employees without reimbursement from the second business, and
  - iii. the first business makes statutory remittances and reports the employees' income to the Canada Revenue Agency.
15. If the services being provided require a licence or a permit, the first business obtains and pays for the licence or permit in the first business's own name.

**Clarification**

(3) For greater certainty, for the purpose of assessing the employment relationship of an individual worker who performs work for a second business described in subsection (2), subsection (1) applies and subsection (2) does not apply.

**3 Section 141 of the Act is amended by adding the following subsection:**

**Transitional regulations**

(2.0.3.5) The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *Preventing Worker Misclassification Act, 2021*.

**Commencement**

**4 This Act comes into force on the day it receives Royal Assent.**

**Short title**

**5 The short title of this Act is the *Preventing Worker Misclassification Act, 2021*.**