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## PRACTICE NOTE 11: EMPLOYMENT STANDARDS RIGHTS, OBLIGATIONS AND RECOMMENDED PRACTICES

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This Practice Note is aimed at helping the architectural community to understand both its rights and obligations, under both federal and provincial legislation, while dealing with practical issues which arise in the course of operating an architectural firm.

It responds to questions regarding how architect-employers treat persons engaged in various capacities, either on staff or as independent contractors.

As well, it clarifies the status and roles of various individuals who have at least some form of workplace connection to (if not full membership in) the profession. Such requests come from those individuals themselves; employers; lawyers and government departments concerned with making rulings as to claims of either unfair practices or monies owed under the "Canada Labour Code" in British Columbia and/or government agencies (Canada Customs and Revenue Agency).

(**Note:** this Practice Note updates and supersedes its September 2001 edition).

There are two distinctions of an individual's status which need to be clearly understood in the first instance and from which discussions in more detail will flow:

- (a) independent contractor vs. employee
- (b) exemption vs. coverage

The first distinction is largely one of an individual's real "modus operandi" in the business world, as determined not only by appearance and arrangement but also by requirements and interpretations under the *Architects Act of British Columbia* and federal tax law as well as in common law. If one is indeed a "independent contractor" then one is not an "employee" in a given situation but is, rather, dealing with clients in business.

If one is an employee, then there is a second distinction: the person may be either covered under (or exempt from) provincial labour legislation (the second distinction). Architectural firms as well as individuals need to understand both distinctions because an individual's status determines not only the individual's statutory rights but also the firm's statutory obligations.

## (A) INDEPENDENT CONTRACTOR vs. EMPLOYEE

It is common to find individuals working for architectural firms on a "contract" basis (i.e. not on staff). This can have advantages for both the firm and the individual.

The individual "on contract" operates as an independent contractor and therefore can avail oneself of deductible business expenses; capital cost allowances; fiscal year deferrals; income splitting; corporate tax rates (if applicable); and opportunities for business flexibility (multiple, simultaneous or short-term arrangements with various clients). As well, there are no "source" deductions from one's fees as there would otherwise be (income tax, unemployment insurance premiums, etc.) if one were on an employer's staff and receiving a salary. This also means that the firm which has engaged the independent contractor has little administrative overhead, no "source deduction" obligations, and no longer-range commitment.

A consulting arrangement can also have disadvantages for both the firm and the individual. There is no long-range commitment by the individual who may in some ways be the firm's competitor. The independent contractor has no rights (and therefore no legally required access) to holidays, vacation, unemployment insurance, overtime pay, and other benefits which might otherwise accrue in an employment situation. As well, the independent contractor must take care (e.g.) of its own tax payments, professional and business licences, professional responsibilities and insurance.

In the final analysis, whether one operates as an independent contractor or an employee (not a "contract employee", that term being oxymoronic) is a decision made on the balance of factors.

It is essential to understand, however, that one's apparent "independent contractor" status may be deemed a "sham" by Canada Customs and Revenue Agency or provincial labour laws if the individual is not operating a real business (properly established and licensed, with separate accounting); is not pursuing or receptive to marketplace opportunities; is functionally under the "client's" control as if employed by it.

(Individuals are advised to check with Canada Customs and Revenue Agency for current interpretations regarding the "independent contractor vs. employee" distinction.)

If the individual is deemed in retrospect to have been an employee rather than an independent contractor then **both** that person and the employer are exposed to retroactive payments and penalties. The person is likely liable for back-taxes, since "business" deductions and deferrals may be disallowed. The employer is liable, similarly, for its required contributions of source-deductions ... and, possibly, related fines as well (e.g.) as vacation pay, notice of termination, and severance payment.

[in keeping with AIBC Council's ruling of January 17, 2000, please note the following two paragraphs]

If the architect happens to be working on a contract basis to an architectural firm holding a Certificate of Practice, doing what he/she would normally otherwise do if on that firm's staff (e.g. drafting, technical support, development of the firm's ideas, field review) under the supervision of the architectural firm...and is doing so in a manner which is consistent with (e.g.) the Registrar of Companies' regulations or Revenue Canada's requirements for a properly constituted business (i.e. not being under a contract

simply as a tax avoidance strategy for the architect and/or the firm)... then the AIBC does not insist that the architect have an AIBC-registered architectural firm and Certificate of Practice.

However, if the architect is promoting or is contracted to an architectural firm (or any other client) to provide independent, specialized consulting services (e.g. Enhanced Building Envelope Services or those of a Certified Professional) or to take professional responsibility for architectural services (e.g. schematic design; specifications), then the architect must do so through an architectural firm and Certificate of Practice.

[NB: any promotion, provision or billing of any services through an architectural firm must be under the auspices of that firm's Certificate of Practice.]

## (B) EXEMPTION vs. COVERAGE

The Employment Standards Branch of the Ministry of Skills Development and Labour administers and enforces the *Employment Standards Act* (ESA). The ESA and Regulation set minimum standards of wages and terms of employment for most workers in British Columbia (and, in turn, the related employers' obligations). Of particular interest, these classes of profession or occupation (amongst others) do **not** have coverage under the ESA and so are **exempted** from its statutory protection:

- (1) architects (MAIBCs)
- (2) professional engineers
- (3) engineers-in-training

As a result, any employed individual belonging to one of the three classes above has no statutory rights in these regards; nor does the individual's employer have any obligations, similarly. Such employees (and employers alike) would benefit from written employment agreements for their common protection, instead.

(**Any** employer/employee relationship would likely benefit from a mutual agreement; however, such an agreement could not, legitimately, remove or waive a party's statutory rights or obligations.) Furthermore, a person who is a "manager" (i.e. who is employed in an executive capacity or whose primary employment duties consist of the supervision and direction of other employees) is not covered with regard to the "hours of work" and "overtime" provisions of the ESA.

Amongst those classes of individuals who **are** fully covered (and, in relationship to which, employers **have** corresponding obligations) are:

- (a) Intern Architects
- (b) Architectural Technologists
- (c) administrative staff
- (d) technical staff

The matter of full coverage under the ESA for Intern Architects was positively confirmed on November 30, 1990, in writing by the then-Ministry of Labour and Consumer Services, further to initiative taken by the AIBC.

The ESA and its companion Regulation are available from the provincial government. A summary of the

ESA's provisions and Regulation is available from the Employment Standards Branch. Individuals and employers are well advised to read it; to understand the extent to which it applies to them in certain situations; and to become aware of its scope as to rights and obligations. If you have any questions about your rights and responsibilities under the *Employment Standards Act* as an employee or employer, please call the British Columbia Employment Standards Branch toll-free information line at 1-800-663-3316 (toll-free in British Columbia) or (250) 612-4100 in the Prince George area.

You may also contact your nearest Employment Standards Branch office listed in the blue pages of your phone book or their web site: [www.labour.gov.bc.ca/esb](http://www.labour.gov.bc.ca/esb) for additional information.

### (C) RIGHTS AND OBLIGATIONS

The ESA and Regulation (as outlined in the Ministry of Skills Development and Labour's publications) regulates such matters as:

<ul style="list-style-type: none"><li>• Minimum wage</li><li>• Minimum Daily Pay</li><li>• Paydays and Payroll Records</li><li>• Deductions</li><li>• Overtime</li><li>• Statutory Holidays</li><li>• Annual Vacation</li></ul>	<ul style="list-style-type: none"><li>• Leave of Work<ul style="list-style-type: none"><li>– Pregnancy Leave</li><li>– Parental Leave</li><li>– Family Responsibility Leave</li><li>– Bereavement Leave</li><li>– Jury Duty</li></ul></li><li>• Meal Breaks</li><li>• Notice of Termination</li></ul>
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### (D) COMPLAINT RESOLUTION AND THE B.C. EMPLOYMENT STANDARDS ACT

As outlined on the Employment Standards Branch web site [www.labour.gov.bc.ca/esb](http://www.labour.gov.bc.ca/esb):

“Beginning in July 2002, the Employment Standards Branch of the Ministry of Skills Development and Labour implemented a new complaint resolution process.

These changes give employees and employers tools and information to solve problems without immediate government intervention. If a problem cannot be resolved, the Branch will try to facilitate a resolution or, if necessary, issue a decision.

**Important:** Except in unusual circumstances, the Employment Standards Branch will not accept a complaint unless an employee has taken the required steps to try to resolve the problem themselves. This includes using the [Self-Help Kit](#) that is available from any Employment Standards Office and on the Internet.

#### COMPLAINT RESOLUTION STEPS:

##### 1. Understanding rights and responsibilities

Any time an employee or employer feels there may be a problem that comes under provincial

employment standards, they should make sure they understand their rights and obligations. The Employment Standards Act and Regulation set out minimum workplace standards for most employees in British Columbia.

Some professionals are exempt from all or part of the Act and there are a number of employee groups and industries where special employment standards rules apply. Information about employment standards, including a general guide to the Act and Factsheets on various subjects, is available from any employment standards office or at [www.labour.gov.bc.ca/esb](http://www.labour.gov.bc.ca/esb) on the Internet. The Act also sets out time limits for complaints and for the time where the Branch can order an employer to pay money owed to an employee.

## 2. **Resolving problems without immediate government intervention.**

The Employment Standards Branch encourages employers and employees to try to resolve disputes over the payment of wages or other issues under the Employment Standards Act and Regulations between themselves. The employment standards Self-Help Kit provides tools and advice to help employees:

- Learn if the Employment Standards Act applies to their situation.
- Understand employee rights under the Act.
- Calculate how much money they are owed or understand what the employer needs to change.
- Formally request that an employer pay money owing or make changes required under the Employment Standards Act.

The Self-Help Kit takes the employee through a step-by-step process of defining the problem and identifying what they want done to solve the problem. It includes worksheets, sample forms and a letter from the employment standards branch to the employer.

At the end of the process, the employee makes a written request to the employer to pay money owing or to comply with the Act. If the issue involves money and the employer agrees with the employee's request, money can be paid directly to the employee. At this point the matter is considered resolved.

If an employer and an employee cannot work out a solution or if there is no reply from the employer, an employee can still make a complaint to the Employment Standards Branch. In certain unusual circumstances, an employee will not be required to use the Self-Help Kit. This would be when an employer's business is insolvent or if the matter involves a child under 15 years of age.

## 3. **Filing a Complaint Employment Standards**

Complaints must be in writing and can be made by mail, fax, in person or over the Internet. The employee ("the complainant") must supply any evidence that relates to the complaint. If a complaint is accepted, the Branch will notify the employer.

The Branch will also advise the employer what information they must provide if they want to dispute the complaint. If the employer resolves the complaint at this point and pays any money owing, no further action will be taken on the complaint.

## 4. **Dispute resolution**

An officer with the Employment Standards Branch will examine the complaint and the evidence that has been provided. It is the responsibility of the complainant and the employer to provide any

evidence or information that the officer requires. This could include: payroll information, records of hours worked and wages paid, and documentation of disciplinary actions.

If the officer believes the dispute can be resolved through mediation, he/she may arrange a mediation session in person or by teleconference. If the parties agree on a solution, the officer will draft a "Settlement Agreement" that both the complainant and the employer will sign. A Settlement Agreement is a legal agreement to accept the terms of a settlement. The agreement can be registered in the Supreme Court and enforced as a judgment of the Court.

Even if meeting does not resolve the dispute, it will help the employer and employee narrow down issues and agree on a common 'statement of facts ' about the dispute.

#### 5. **Employment Standards Branch Adjudication**

If the complaint can't be settled through mediation, the Branch will make a decision from information on file, or after a short hearing. If a hearing is needed, both parties will be required to attend along with any witnesses necessary to the case. The Branch's decision is called a Determination.

A Determination is a legal document issued under the authority of the Director of Employment Standards. The Determination sets out the Branch's decision.

If the Branch determines money IS payable or that the employer HAS contravened the Act the Determination may include monetary penalties. If a Determination is not paid as requested, it can be filed in Court and is then enforceable the same way as a Judgment of the Court. The Judgment may be turned over to a Court Bailiff for collection.

#### 6. **Appeals**

A Determination can be appealed to the Employment Standards Tribunal. More information on appeals is available at <http://www.bcest.bc.ca/> in the Internet.”

We trust that the foregoing is of assistance to participants in the architectural profession and will guide them with respect to equitable treatment and conduct.

*The AIBC does not have legal or accounting expertise with regard to the rendering of legal and/or financial advice to members of the profession. With regard to any legal, accounting and/or architectural service or recommendations presented in the Practice Note, the AIBC expressly disclaims responsibility to any errors or omissions contained therein. Members are advised to consult their own legal or accounting representatives in order to confirm any advice.*