

Income Tax

RRQ. 1-1/R2 **Status of Workers**
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Reference(s): *An Act respecting the Québec Pension Plan (R.S.Q., c. R-9), sections 1 and 65*

This bulletin cancels and replaces bulletin RRQ. 1-1/R1 of September 30, 1988, and applies to every determination of status processed after November 1, 1996.

This bulletin sets forth, and comments on, the main criteria usually retained by the Ministère du Revenu for determining the status of a worker.

APPLICATION OF THE ACT

“Employee” is defined in paragraph *g* of section 1 of the *Act respecting the Québec Pension Plan* as follows:

“an individual who does work under a contract of lease and hire of personal services, or who holds an office.”

This bulletin deals only with the first part of the definition, not with an individual who holds an office.

The concept of “contract of lease and hire of personal services” is drawn from the civil law concept of “contract of employment”. In this respect, section 423 of the *Act respecting the implementation of the reform of the Civil Code* provides that in the statutes and statutory instruments, the concepts introduced by the new Code replace the corresponding concepts of the former Code. Thus, the former civil code concept of contract of “lease and hire of personal services” corresponds to the new civil code concept of “contract of employment”.

The Ministère du Revenu recognizes that in the absence of derogation from the principles of civil law in the fiscal laws, the concepts of civil law shall prevail.

Article 2085 of the *Civil Code of Québec* provides that a contract of employment is a contract by which a person undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

What emerges from the civil law is that the relationship of subordination constitutes the main element for determining a worker’s status. Article 2085 of the *Civil Code of Québec* read in conjunction with article 2099, leads us to conclude that the existence of a relationship of

subordination with respect to the performance of work is the main element of a contract of employment.

The subordination referred to therein is a legal subordination and the Ministère considers that such subordination, however minimal, suggests the existence of a contract of employment.

As opposed to this, a contract of enterprise or for services is defined in article 2098 of the *Civil Code of Québec* as a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client, or to provide a service, for a price which the client binds himself to pay. Article 2099 of the *Civil Code of Québec* specifies in this respect that the contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists in respect of such performance.

To determine if a worker is to be considered as an employee or self-employed with respect to a principal, jurisprudence instructs us that the degree of subordination existing between them must be evaluated. For this purpose, all the facts surrounding the worker-principal relationship must be analysed.

Please note that in this bulletin, the term “principal” is used to designate the person who gives the work, as opposed to the “worker” who performs it. These two terms, therefore, are also used to respectively designate the employer and the employee, if such is their status.

Though not exhaustive, the following criteria are taken into consideration in this analysis:

1. actual subordination of the work;
2. the economic criterion;
3. ownership of the tools;
4. integration of the work performed by the worker;
5. the specific result;
6. the attitude of the parties in their relationship.

Two of these criteria, actual subordination of the work and the economic criterion, are themselves broken down into sub-criteria that contribute to the overall evaluation of the two criteria in question.

In short, these criteria serve as a guide in considering the relationship between the worker and the principal. Only through analysis of the entire situation can the legal relationship binding the worker to the principal be determined, i.e. is it a contract of employment or a contract of enterprise. In this respect, each criterion must be compared with the facts involved and the qualification given to the contract by the worker and the principal will be set aside if it does not correspond to reality. Lastly, each criterion takes on a relative importance according to the nature of the business and the work to be performed.

The Ministère considers that the presence of actual subordination of the work is a determinant element in a relationship of employment and consequently, deems it to be of crucial importance.

From this viewpoint, the analysis of two aspects is proposed: first, **actual subordination** and second, **the other criteria**. Thus, when the criterion of actual subordination is conclusive per se, there is no reason to analyse the other criteria. However, if a doubt subsists, the other ancillary criteria are useful in confirming if a contract of employment exists between the parties.

Each criterion and sub-criterion is examined below. It is briefly defined or commented and is followed by a list of affirmations dealing with facts significant in determining the existence of a status of employee.

ACTUAL SUBORDINATION OF THE WORK

Subordination is generally defined as the capability, for the principal, of determining the work to be performed, managing and controlling this performance. It is present if, in fact, a relationship of authority is concretely established by the principal over the worker. In practice, subordination translates by the application of directives and norms, fixed by the principal, that determine the actual framework within which the work is performed.

Control tends to diminish and change as the degree of specialisation of the employment and its hierarchical degree increase. Thus, to attain its purpose, this concept must be liberally interpreted so as to adapt it to the evolution of the socio-economic context in which the techniques of specialisation and expertise allow the worker to enjoy greater autonomy in the performance of his work. From this perspective, an employee is a person who accepts to integrate himself into a business's operational framework to afford it the benefit of his work, and subordination is not centred on the manner of performing the work, but rather on the regularity of its performance and the quality thereof.

As well, a professional who carries on his practice in a business at a place fixed by the principal, remains an employee even if the principal does not provide him with detailed instructions on the manner of fulfilling his duties. Consequently, membership in a professional order, by and of itself, cannot be used to conclude that the worker's status is that of a self-employed worker.

The following elements constitute indications of worker management that may afford guidelines as to the presence of the criterion of actual subordination.

1. Control over the execution of the work

From the viewpoint of the responsibility laid by the *Civil Code of Québec* upon the principal for the faults of his servants, the actual control is of special import. Indeed, the presumption of responsibility applies when the servant's fault is established. However, a person cannot be held responsible for the fault of one of his servants if that person has no power of supervision or control over that servant.

1.1 Job description

An employer who assigns a person to a specific task explains, in steps, the work to be done or the responsibilities to be assumed. He does not limit himself to expressing his expectations concerning the result.

- The principal describes the job in writing.
- The principal is responsible for planning the work.
- The principal decides on the sharing of responsibilities.
- The principal has the right to instruct the worker on how to perform the work.
- The principal exercises his right to instruct the worker on how to perform the work.
- The principal fixes the standards to be met or the objectives to attain with regard to:
 - the quality of the work;
 - the quantity of work.

1.2 Training and development

Investments in training and development are associated with the search for increased productivity. Increased productivity is reflected in the profitability. We can state therefore, that usually, the principal only proposes or imposes training and development to, or on, his employees.

- The principal has arranged for worker training.
- The principal pays for outside training or development courses (training allowances).
- The principal pays an outside instructor to train his workers.
- The worker has learned his work from a foreman or other member of the principal's personnel.

1.3 Safety standards

The person who assumes accident or loss liability in the event of a theft, a fire or any other accident, may decide on the standards applicable to his firm; standards that cannot be inferior to those imposed by law.

- The principal inspects the work premises.
- The principal chooses the safety equipment.
- The principal requires a medical examination prior to, or upon hiring.
- The principal assigns a foreman or other person (group leader, director, ...) to supervise the work.
- The principal controls all movements into and out of the work premises.
- The worker must submit to a set of safety standards determined by the principal.

1.4 Measures for appraising and checking the work

They are meant for checking the final result and for checking the work method. They may also be used for fixing the remuneration or taking disciplinary measures.

- The principal prepares the work evaluation criteria (evaluation chart, performance report, etc.).
- The worker must submit written reports.
- The worker's reports must be submitted on a form prepared by the principal.
- The principal maintains records on the worker (medical file, disciplinary reports, etc.).
- The principal maintains records of the worker's notes, reports, statements or correspondence.
- The worker submits a log of his activities to the principal.
- At regular intervals, the worker makes an inventory of the products he has on hand.
- The worker must record the distance he travels and his fuel purchases.

1.5 Customer lists

When the worker is not free to find his own customers, this situation is favourable to the status of employee.

- The principal provides a list of customers.
- The principal assigns the worker to a territory.
- The worker solicits no customers other than those indicated by the principal.

1.6 Obligation as to the means or the result

The decision to have work redone, with the expenses related thereto, is associated with the notion of profits and losses. As well, the power to criticise the result of the work is a logical extension of the power to indicate how to perform the work.

- The principal indicates the work to be redone.
- The principal supports all expenses relating to work redone.

1.7 Civil liability

The employer assumes the cost of damages caused by his employees.

- The principal holds liability insurance covering worker faults.
- The principal does not oblige the worker to take out a liability insurance.

1.8 Approval of forms and contracts

When documents identify the worker with the principal's business, this situation is favourable to the status of employee.

- The worker uses the principal's letterhead stationery.
- The principal prescribes the forms the worker must use (reports, technical notices, contracts, ...).
- The contracts negotiated by the worker or other documents issued by the worker must be countersigned by the principal.

2. Personal performance of the contract

2.1 Possibility for occasional replacement

It is rarely given to an employee since he then substitutes himself for the principal with respect to the choice of the person who does the work. Control would then be partly exercised by the employee, which is not compatible with the nature of the contract of employment.

- The worker cannot have himself replaced without the principal's approval.
- The principal has a list of replacements.
- The principal requires the work to be done by the worker himself, excluding any other person (artist, master of ceremonies, singer, musician, ...).

2.2 Possibility of obtaining assistants

When the hiring and remuneration of assistants is controlled by the principal, the person who is assisted remains an employee.

- The choice of the assistants is the principal's exclusive responsibility.
- The choice of the assistants is subject to the principal's approval.
- The principal imposes conditions prior to approving the hiring of assistants.
- The principal pays the assistants.
- The principal holds liability insurance for the faults of these assistants.

3. Work Schedule

The work schedule is usually determined by the employer. The employer may call upon the worker's services on a regular or intermittent basis, whether full-time or part-time.

- The principal controls the number of hours worked (time sheets, punch clock, ...).
- The worker must produce a fixed number of pieces or parts per period (production schedule fixed by the principal).

- The worker is subject to a fixed work schedule.
- Overtime is paid according to a policy which is basically the same as that of the principal's employees.

A self-employed worker may also be subject to work schedules related to the principal's activity.

- Cleaning in an office building which must be done after working hours.
- Work performance schedules (construction contract ...).

4. Place of work

The employer determines the place of work on the basis of the job to be done.

- The work is done at an establishment of the principal (plant, office, warehouse, ...).
- The principal informs the worker of the route he must follow to perform his work (home delivery man, long distance truck driver, ...).
- The work is done at a place under the principal's control.
- The worker has access to facilities on the work premises (parking, cafeteria, gymnasium, ...).

5. Hiring and dismissal conditions

An employer who hires an employee establishes on a general basis, i.e. without referral to a specific co-contractant, rules for recruitment, selection, hiring, personnel management and dismissal.

5.1 Length of contract

- The hiring contract is renewable upon consent of the parties.

5.2 Exclusivity

- The worker works only for the principal.
- The worker sells only the principal's products.

5.3 Creation, invention and copyrights

- The hiring contract specifies that all discoveries, inventions and copyrights belong to the principal.

5.4 Guaranteed quantity of work

- The quantity of work to be done is constant.
- Even if the quantity is not constant, the worker is remunerated nonetheless.

5.5 Disciplinary measures

- The principal has the right to impose disciplinary measures (salary cuts, suspensions, ...).

N.B. Disciplinary measures should not be confused with the penal clause found, in particular, in various construction contracts.

THE OTHER CRITERIA

Economic criterion

An employee is usually not autonomous with regard to matters of an economic nature which affect him in relation to the principal, he is bound to the latter.

The power of decision and control over economic matters and the actual economic relation existing between the two parties may be determined in light of the following factual elements:

1. Possibility of profits and risk of losses

This notion must be liberally interpreted to include all forms of profits or losses which may have pecuniary consequences.

An employee usually does not incur any risk owing to his employment, he is entitled to his full remuneration whatever may be the financial results of the principal's operations.

Example:

A self-employed mechanic who works in his own garage will make a profit when he decides to repair a part rather than replace it. The mechanic will incur a loss if he must correct a bad repair, not only because he is not paid for his work but also because he must pay for the parts changed uselessly.

An employee mechanic, on the other hand, will not incur any loss because of a bad repair since he will still be remunerated.

In general, an employee does not have to incur the following expenses or they are at least refunded to him by the principal:

- theft of merchandise under his control;
- credit or terms of payment granted to purchasers for merchandise sold by the employee for the principal's account;
- bad debts and various losses;
- expenses relating to calculation errors which lead to losses;
- guarantee on materials and labour.

A piecework worker is not subject to the economic fluctuations that may lead to losses for a given business; the only risk he assumes is that of undergoing a reduction in the number of units he is

asked to finish. Since the risk of losses he may incur does not derive from the operation of a business, the consequence of the quantity reduction which may occur at some time is a reduction of income and not a loss, in that he is not deprived of something which he previously owned.

2. Terms and conditions of remuneration

This notion must be liberally interpreted to include all forms of remuneration or advantages.

Fixed and periodic allowances, bonuses and other advantages are generally paid only to employees. The following factual elements, therefore, are pertinent in determining the relation of master and servant which exists between the worker and the principal with regard to the terms and conditions of remuneration:

- payment of fixed allowances and bonuses, profit sharing, suggestion premiums;
- payroll registration on equal footing with workers considered as employees by the principal;
- the existence of fringe benefits;
- the principal offers a pension fund;
- special leave;
- sick leave;
- paid vacations;
- group sickness and prescription drugs insurance;
- seniority;
- discount purchases offered by the principal;
- payment of union dues;
- existence of a collective agreement or a general agreement between the worker or a group of workers and the principal;
- the principal refunds food, clothing, transportation and lodging expenses;
- the worker receives a remuneration greater than that of workers which the principal considers as employees. That remuneration may be used, in certain cases, to pay for expenses that the worker pays. This sometimes constitutes a disguised refund of expenses.

The income of a piecework worker who works at home or at the principal's establishment will be reduced or increased according to the number of units he assembles in a specific time period. The remuneration owing to him is derived directly from the work he does and he cannot expect a greater remuneration from any source other than his work. He benefits only from the income assigned to the exercise of his occupation and is not in a position to take advantage of the benefits of economic activities other than his work.

Ownership of the tools

The employer is usually the owner of the tools and he supplies all that is required to perform the work.

“Tools” means all the items, instruments, rolling stock or others, needed by the worker to do his work.

An employee usually does not have to bear the costs related to his tools, such as, for example:

- costs of repairs;
- insurance;
- transportation of the equipment;
- operating costs (fuel ...);
- leasing costs;
- telephone charges;
- financial costs, etc.

This criterion, though, must be delimited with respect to a worker who is provided with an automobile to do his work. In certain cases he will have to assume the operating costs of the automobile when he uses it for his personal use. Such costs must not be considered as related to his work since they are related, in fact, to the personal use of the automobile.

Some equipment is very costly and highly specialized. It cannot be considered, though, that the fact that a principal puts it at the disposal of a worker is conclusive as regards this criterion. Inversely, this criterion does not necessarily indicate a status of self-employed worker simply because a worker must supply his own tools by reason of the very nature of his duties.

Integration criterion

Under a contract of employment, a person is part of a business and that person’s work is an integral part of the business. However, under a contract of enterprise, his work, although done for the business, is not integrated into the business but is only accessory to it.

The operation of a business means offering customers goods and services at the best possible price, taking into account the constraints that competition imposes upon a given market. A business cannot prosper if its growth is totally linked to the operations of a certain customer, i.e. if it is integrated into the customer’s business. The contractor’s independence is the main factor distinguishing him from an employee.

The matter of integration, therefore, must be applied from the worker’s viewpoint, not that of the principal. Thus, the following factual elements are relevant in determining the relationship of subordination that exists between the worker and the principal with regard to the criterion of integration:

- With respect to the aggregate of his income from work of a single nature, the worker draws his main source of income from the work done for the principal.
- The worker has only one “client”, the principal.
- The worker has no other employment or remunerated contract for another principal.
- The worker could not survive without the income contribution generated by the principal.

The criterion of integration cannot be decisive by and of itself, nor can it be separately analysed; this could lead to aberrant results. Even in the presence of economic dependence, a contract may qualify as a contract of enterprise in the absence of any relationship of subordination. Thus, it may be stated that even if a worker has only one “client”, this fact is not conclusive as to a status of employee if all the criteria are favourable to the status of self-employed worker.

Specific result

The aim of the criterion of specific result is to determine if the services of the worker are retained to carry out a specific task or, to the contrary, if the worker personally entered into an employer’s service for a certain period of time. The fact of undertaking to provide a specific result indicates the presence of an enterprise.

Attitude of the parties in their relationship

This is a catch-all criterion. It allows us to take into account all the evidence, to take into account elements that would otherwise not be classed into any other criteria. For example, the following factual elements may be included:

- the payment by the principal of the contribution to the Commission de la santé et de la sécurité au travail (CSST) for the wages and salaries paid to the workers;
- the overall interpretation of the contract of employment;
- the actual behaviour of the parties regarding the contract of employment;
- the existence of counter-deeds amending the contract;
- the attitude of the parties regarding the renewal of the contract of employment or the contract of enterprise;
- the attitude of the parties in case the contract of employment or the contract of enterprise is not renewed;
- the worker refunds wage and salary advances to the principal;
- severance pay;
- etc.

It should be noted that the Ministère du Revenu is not bound by decisions on a worker's status that are rendered by other government bodies for the purposes of laws other than the laws administered by the Ministère.