

WSIB and contractors: Do you know where you stand?

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Editor's note: The following article is a scenario in regards to WSIB. The names of people and businesses are fictional. Rob Kennaley will return to this space in the next issue of *Horticulture Review*.

Business is good

Soren runs a landscape gardening business. He only has two employees, each of whom works two or three days a week at the homes of customers; the employees travel to and from the customers' homes using Soren's cube van. Soren has always been able to manage the work using his own employees, but as the home improvement trend gains steam, he finds it difficult to keep up with customers' orders.

To keep up with demand, Soren engages Kyle, a retired landscape gardener, to perform some of Soren's smaller contracts. Soren and Kyle agree that Kyle will work for Soren as a contractor. Soren calls Kyle whenever there is work available; Soren pays him according to the amount of work Kyle performs, and no taxes or other deductions of any kind are taken off Kyle's cheque. Kyle likes this arrangement, as he has grown bored with retirement, but does not want to work full time.

Kyle primarily uses Soren's equipment because he sold most of his own when he retired. Kyle does have some small tools and gardening equipment which he keeps locked in Soren's shop. Kyle is an experienced landscape gardener who does not need much direction or supervision. He often gives Soren suggestions on the best way of going about a job.

Over time, because the excellent working relationship they have created, Kyle, who used to work with a number of different people, now works only with Soren.

Trading work with contractors

In addition to his arrangement with Kyle, Soren has an arrangement with another landscape gardening company, Grow Co. Soren sends work to Grow Co. when he and his wife go on vacation in the fall. In exchange, Soren takes care of Grow Co.'s clients when the owner of Grow Co. goes on vacation in the early spring.

One day Soren was audited by the Workplace Safety and Insurance Board (WSIB). Soren didn't think anything of it because he had been paying WSIB premiums for his two

employees and was confident that he was fully compliant. He was a bit puzzled by the WSIB's request that he provide a list of contractors who perform work for his business and the amounts they were paid for their services. He provided the information as requested, because he had nothing to hide. The WSIB auditor came in,

**Ask subcontractors
for a WSIB Clearance
Certificate — valid
for 60 days**

looked at a number of documents and then went away saying that he would be in touch. The next thing Soren knew, the WSIB notified him that he owed thousands of dollars in unpaid premiums with respect to Kyle and the employees of Grow Co. It turns out that the owner of Grow Co. failed to register with the WSIB as required.

Soren is shocked and dismayed. At a friend's suggestion, Soren speaks to a labour lawyer about the matter. Soren wants to find out why he would be liable for WSIB premiums for a contractor, and for someone else's employees.

The lawyer explains that anyone who hires an employee in an industry that is required by law to be covered by the WSIB insurance plan must register with the WSIB and pay premiums for those employees. "But Kyle is not an employee," protests Soren. Unfortunately, it does not matter that Soren thought he had hired Kyle as a contractor, and that Kyle agrees that he is a contractor and not an employee — the WSIB looks past labels of "contractors" and "employees" into the actual arrangements between the parties.

That said, the following aspects of their working relationship support the conclusion that Kyle is a contractor:

- Kyle is not closely supervised or given instructions on how work should be done
- Soren does not provide training to Kyle
- Soren tells Kyle when work needs to be completed but does not otherwise dictate Kyle's hours of work
- If a job is not done properly, Kyle is responsible for making it right without receiving additional payment

On the other hand, the following factors point to the conclusion that Kyle is Soren's employee:

- Kyle is obliged to perform the work personally; that is, he is not free to assign the work to someone else
- Kyle does not have any significant chance of profit or risk of loss — he is primarily providing labour in exchange for payment
- Kyle performs work using Soren's equipment
- The work performed by Kyle is an integral, continual part of Soren's business
- Soren provides the materials and supplies needed in performing work
- Kyle works exclusively for Soren, and has done so for a number of years

There is no hard and fast rule as to when a relationship will be considered to be employer-employee or principal-contractor — it is determined by the WSIB on a case by case basis. In this instance, the WSIB considers the overall picture and decides that Kyle is an employee of Soren's, not an independent operator (which is what the WSIB calls an independent contractor with no employees), for whom he is responsible for paying WSIB premiums.

Formally determine working relationship

If there are no rules, how would Soren know whether someone who works for him is an employee or an independent operator? The lawyer suggests that Soren may want any new contractor he is hiring to fill out a WSIB form, called the Independent Operator Questionnaire, and forward it to the WSIB for a determination. The Independent Operator Questionnaire asks questions regarding the working arrangement and relationship such as the factors mentioned above. If the WSIB determines that the individual is an independent operator for whom Soren is not required to pay WSIB premiums, it will issue an Independent Operator Letter which Soren should keep on file should he be audited by the WSIB. If the WSIB determines that the individual is an employee, Soren must pay premiums on his/her behalf.

But surely Soren cannot be liable for unpaid WSIB premiums for the employees who work at Grow Co.? Does that company not have the obligation, as an employer, to register with the WSIB and pay premiums for its own

employees? The lawyer has some more bad news: under the WSIB legislation, if a contracting company is not registered with WSIB or not paying the required premiums, Soren can be liable for those payments. It may not seem fair to hold Soren liable for a debt over which he has no control, but the lawmakers decided that such a measure is necessary to ensure that the WSIB insurance fund is maintained at a sufficient level to provide worker benefits.

Ask for Clearance Certificate

In order to prevent the same thing from happening again, the lawyer advises Soren to always ask companies, for which he contracts out work, for a document called the Clearance Certificate, prior to engaging them and again before he makes the final payment on the contract. A Clearance Certificate is a document issued by the WSIB which certifies the contractor is registered with the WSIB, has filed all necessary paperwork and most importantly, paid all premiums billed by the WSIB. That way, Soren knows that he will not be liable for any unpaid premiums by the contractor. As an additional protection to Soren and an incentive for a contractor to provide a Clearance Certificate, Soren has the right to hold back up to 100 per cent

of the labour portion of his contracts until the contractor provides him with a valid Clearance Certificate. A Clearance Certificate is valid for 60 days, so Soren must request it more than once if he works with the contractor over a longer period of time.

All this information is giving Soren a headache and he wonders whether he gets anything out of the WSIB premiums that he is legally required to pay. The lawyer finally has some good news: as a result of WSIB coverage, Soren's employees and Soren's contractors' employees (who are required to be covered by the WSIB insurance plan) cannot sue Soren as a result of workplace injuries or illness. The only exception to this general rule is that owners, partners or executive officers of contracting companies who are not automatically covered by the WSIB insurance plan, and who did not purchase optional WSIB coverage, may still sue Soren.

Soren is confident that he knows what to do to protect himself and to comply with the law on a go-forward basis; but what about the thousands of dollars that the WSIB says he owes? The lawyer advises Soren that he has the right to appeal any determination made by the WSIB. The appeal process may take months to

complete, requires lots of paperwork, and involves the making of legal arguments before the WSIB and possibly before the Workplace Safety and Insurance Tribunal (the body that hears appeals from the WSIB). The lawyer suggests that Soren consider the cost and benefit of pursuing an appeal, and make a decision that makes the most sense to him as a business person. **HR**

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