

**Status – Specific occupations**

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**OBJECTIVE**

1. This practice directive is a codification of established evidentiary presumptions for determining an individual’s status as an independent firm in specific circumstance and industry.

**INTERPRETATIVE GUIDELINES**

2. An independent operator – as that term is used in the *Workers Compensation Act* and described in Board policy – exists as a business enterprise independently of the service recipient under a particular contract. Generally, this requires that the individual be in business for herself; hold herself available to the general public to perform services; and be free from control and direction in the performance of services, both under the particular contract and in fact. The analytical framework for distinguishing between a worker and an independent operator are presented in *Practice Directive 1-1-3(A)*.
3. An independent operator is not required to be registered with the Board but may elect to apply for personal optional protection coverage (optional insurance coverage which extends the protections afforded by the *Act*, including medical and rehabilitation services and protection against income loss, to independent operators). If the Board accepts an application and extends personal optional protection coverage, the independent operator is entitled to be registered with the Board for so long as the status and contractual relationships remain unchanged and the coverage is in effect and good-standing.
4. An independent operator who retains an individual to temporarily take his or her place may become the employer of that individual. If the engagement of the replacement creates an employment relationship, the employer must register with the Board; and, in so doing, must advise the Board of the anticipated duration of the employment relationship.

## **I THE STRUCTURE AND CUSTOMS OF THE PARTICULAR INDUSTRY**

5. *Assessment Manual Item: API-1-3(a)*'s direction that "[s]ome regard must also be paid to the structure and customs of the particular industry involved" recognises that status determination is contextual; and requires that a decision-maker consider, among other matters, whether a master-servant relationship – which is the pith of the "contract of service" referred to in section 1 of the *Act* – is applicable in a particular industry or circumstance.
6. Through long-established practice, the Assessment Department has recognized that a set of facts unique to a particular industry may infer that an individual exists as a business enterprise independent of a service recipient in that industry. In the main, each of the sets of facts below is a rebuttable presumption: that is, if in a particular industry the relevant set of facts is established, a Board officer should find that the "service provider ... has a sufficient degree of independence to be an independent operator,"<sup>1</sup> unless the presumption is refuted.
7. The Workers' Compensation Appeal Tribunal has recognized that, "the desirability of having policies and practices to promote a consistent approach is obvious, and long-standing practices are, in our view, deserving of some measure of deference. To conclude otherwise could lead to an unacceptable level of uncertainty regarding the status of such persons, with far-ranging consequences."<sup>2</sup>

## **ADJUDICATIVE GUIDELINES**

### **I REALTORS**

8. A realtor operating within the industry defined in the Employer Classification System by Classification Unit 762033 [Real Estate Agency] will be presumed to be an independent operator if the realtor meets each of the following conditions:<sup>3</sup>
  - a) The realtor must pay a fixed amount of not less than \$100 per month to the agency for administrative and operating costs regardless of whether any sales are made or commissions are earned.
  - b) The realtor must be responsible for his or her own expenses (e.g., personal promotion, advertising, or travel and vehicle expenses).
  - c) The realtor must be entitled to the full amount of the gross commissions earned.

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<sup>1</sup> *Assessment Manual Item: API-1-1(e)*.

<sup>2</sup> *WCAT Decision Number: WCAT-2007-01737*, 6 June 2007, page 38 (published as a noteworthy decision).

<sup>3</sup> The Director Assessments' 31 October 1995 letter to the British Columbia Real Estate Association and the 9 November 1995 clarification thereto.

## **II TAXI SHIFT LEASE OPERATORS**

9. A shift lease operator is an individual operating in the taxi service industry who leases a taxi from another person for a specific period of time for a flat fee – a single fixed fee for a service, regardless of usage – per shift.
10. A shift lease operator operating within the industry defined in the Employer Classification System by Classification Unit 732037 [Taxi Service] will be presumed to be an independent operator if the shift lease operator meets each of the following conditions:
  - a) The shift lease operator is the lessee to a lease arrangement.
  - b) There is no sharing of revenue between the shift lease operator and the lessor.
  - c) The shift lease operator is in a profit and loss situation.
  - d) The lessor exerts no more than minimum control of the shift lease operator's operations beyond license or regulation restrictions or both license and regulation restrictions.

## **III FOSTER PARENTS OPERATING A FAMILY CARE HOME**

11. A family care home is a residence provided by a foster family for a child. A family care home is funded and approved through a Provincial Ministry or Agency that conducts a home assessment prior to approval and the contract agreement with the foster parent(s).
12. A foster parent operating within the industry defined in the Employer Classification System by Classification Unit 764029 [Hiring or Providing Domestic Childcare] will be presumed to be an independent operator if the foster parent meets each of the following conditions:
  - a) The foster parent owns or rents the residence and pays for the equipment and materials necessary for the care of the child in the family care home.
  - b) The Provincial Ministry pays the foster parent directly, or the foster parent is paid by an Agency contracting with the Province, and the allotment of those funds is under the control of the foster parent.
  - c) The Provincial Ministry or Agency has little control over the day-to-day management of the family care home's operations.

## IV PHYSICIANS

13. A physician is an individual engaged in a profession – a specialized occupation or vocation characterized by each of a regime of formal education and training leading to a professional degree, and licensure by a regulatory body (e.g., the College of Physicians and Surgeons of British Columbia under the *Health Professions Act*).
14. With respect to physicians, each of
- structure – generally, medical services are a component of British Columbia’s greater societal framework and are funded by the Government of British Columbia, which is responsible for each of the capital costs and the operating costs for such services, and
  - custom – the common-law’s recognition that a physician is not in a master-servant relationship suggests that the principles, test, and analysis that flow from a master-servant relationship cannot apply in its entirety in determining the status of a physician for the purposes of the *Act*.
15. A physician is presumed to be engaged under a contract of service and therefore a worker under the *Act*, if the physician
- provides services to a **health authority**<sup>4</sup> or any other **agency** under a **salary agreement**, or
  - receives a *T4 Statement of Remuneration Paid* or a *T4A Statement of Pension, Retirement, Annuity and Other Income*.

The **agency** or the party which issued the *T4* or *T4A* would be an employer of the physician.

This presumption may be disproved through evidence that the physician is not in a contract of service with the **agency** or party. The person seeking to disprove the presumption must present the evidence necessary to establish that the physician is not engaged under a contract of service.

16. A physician operating within an industry in *Subsector 7660 – Health Care and Social Assistance* will be presumed to be an independent operator if the physician meets either of the following criteria:
- a) the physician is a proprietor of or a partner in a private practice serving the general public, directly or by referral; or
  - b) the physician’s income is derived solely or essentially through one or more of:

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<sup>4</sup> Bolded words or terms have the same definition as those words and terms have in the *Physician Master Agreement* made 1 November 2007.

- a **service contract** (under which a physician provides services as an independent contractor to an agency),
- a **sessional contract** (under which a physician provides services on a time or sessional basis, in which a session equals 3.5 hours of the physician’s professional services),
- **fee-for-service** payments from **Medical Services Plan**, and Workers’ Compensation Board and Insurance Corporation of British Columbia services submitted through and paid by **Medical Services Plan**, or
- earnings related to private practice (third party, medico-legal and private billings).

## **A Health profession corporations**

17. A physician may practice through a health profession corporation, as defined in the *Health Professions Act*.
18. A health profession corporation will be deemed to be a personal service corporation if it meets each of the following requirements:
- a) The health profession corporation’s only workers are shareholders of the corporation; and
  - b) Substantially all of the health profession corporation’s revenue is received from a single health authority or health care facility.
19. A physician practicing through a health profession corporation deemed or determined to be a personal service corporation is a worker of the health authority or health care facility contracting with the health profession corporation.

## **V PERFORMERS**

20. A performer is an entertainer who performs by, *inter alia*, acting, rendering music, or performing a skill or ability for an audience.
21. A performer will be presumed to be an independent operator if the consideration and weighing of the following “performer factors” results in a finding that the underlying contract is more indicative of a contract for service. As always, no one single factor is determinative, nor do all factors need to be present to establish the nature of the relationship.

FACTORS CONSIDERED IN DETERMINING THE STATUS OF A PERFORMER	EVIDENCE		MORE INDICATIVE OF:	
	Relevance	Weight	Contract for service	Contract of service (worker)
<b>WHETHER THE PERFORMER:</b>				
• provides her services for a specific engagement or consecutive engagements of limited and determinate duration				
• sets or negotiates the fee for engagement, without any requirement of, or provision for, statutory withholdings				
• dictates the conditions of the engagement, for example event set up, security arrangements, transportation requirements, and food and beverage provisions				
• retains the right to exercise artistic control over the elements of the performance				
• is neither required nor paid to attend rehearsals				
• has a number of engagements with different persons during the course of a year				
• can arrange the time, place, and nature of performances				
• has an investment in the equipment utilized in the performance				
• retains the services of an agent on a continuing basis				
• can select or hire employees or helpers, fix their salary, direct them or dismiss them				
• operates under the guise of a corporation and is the principal of that corporation				
<b>THE CONTRACT OF ENGAGEMENT:</b>				
• is entered into substantially before the date or dates of performance				
• includes provision for ownership of the copyright of the performance				