



**Status – Workers**

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**OBJECTIVE**

1. This practice directive provides direction as to coverage under the *Workers Compensation Act*; explains the test for distinguishing between a worker and a volunteer; and generally aids in the interpretation of *Assessment Manual Item: AP1-1-5*.

**INTERPRETATIVE GUIDELINES**

2. The statutory definition of worker in section 1 of the *Act* effectively creates the following four broad subcategories of workers:

	BROAD SUBCATEGORY	STATUTORY DEFINITION
1	An individual under a traditional contract of service (an “employee”).	Subparagraph (a)
2	An individual who is not, or may not be, in a traditional employment relationship but who is specifically designated as a worker in the <i>Act</i> .	A learner.
		A member of a fire brigade or an ambulance driver or attendant.
		An individual involved in mine rescue or inspection.
		An individual in an approved vocational or training program under section 3(6) of the <i>Act</i> .
3	An independent operator who by purchasing Personal Optional Protection coverage under section 2(2) is admitted as a worker.	Subparagraph (f) <sup>1</sup>
4	An individual who is not described within subparagraphs (a) to (g) of the	“worker includes...”

<sup>1</sup> The definition of “worker” in section 10 of the *Act* includes an employer admitted under section 2(2) (who has been extended Personal Optional Protection). This expanded definition is limited to section 10.

definition but is a worker nonetheless as the definition is not exhaustive.
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3. In addition, section 4 of the *Act* provides that any provision of Part 1 relating to a worker applies or may be applied to a commercial fisher working in or out of a British Columbia port, or on or about the waters of British Columbia, or resident in the Province, notwithstanding that the commercial fisher may not otherwise be a worker under the *Act*.
4. Thus, although a worker is, by and large, a provider of service under a contract of service per subparagraph (a) of the definition, it is nevertheless manifest that the definition of worker and its description in policy are not exhaustive; and, therefore, an individual may be a worker even though the individual does not fit precisely within the four-squares of the language of either or both of the *Act* or policy.
5. The Board, for the purposes of the administration of the *Act*, has the exclusive power to determine whether a particular relationship is one of employment or one between two independent contractors. However, decisions made by the Board are for workers' compensation purposes only and have no authority in connection with other statutes.

## **ADJUDICATIVE GUIDELINES**

### ***I ASSESSMENT MANUAL ITEM: AP1-1-5(A)***

6. As the introductory sentence to *API-1-5(a)* is specifically inclusive, worker status is not limited to the categories listed. In effect, *API-1-5(a)* creates a rebuttable presumption that an individual is a worker if one of the listed categories is established.

### ***II CONTRACT OF SERVICE***

7. An individual providing service under a contract of service – an employee at common law – is a worker by definition, but an individual not providing service under a contract of service is not necessarily excluded from being a worker under the *Act*.
8. A contract of service is a contract under which a worker agrees to provide personal services to an employer for a period of time, rather than to the accomplishment of a specified amount of work, in return for remuneration; and the employer can specify when, where, how, and under what conditions the work will be performed.
9. A contract of service is a category of contract and is therefore a legally enforceable agreement – whether written, oral, implied, or a combination of these – made between two or more parties which exhibits each of the following four elements:
  - Offer and acceptance leading to agreement.
  - An intention to be legally bound.

- Mutuality of obligation between the parties. That is, the agreement must set out more than mere reasonable expectations; there must be defined or determinable contractual obligations, such as an obligation to perform work.
- Consideration.

## **A Contract of service within the context of the Act**

10. The first branch of the statutory definition of worker – “a person who has entered into or works under a contract of service” – explicitly imports the common law’s framework for status determination into the *Act*.<sup>2</sup> However, the common law’s analytical framework is not determinative for workers’ compensation purposes:

*The use of the phrase ‘contract of service’ incorporates a concept developed in the common law courts. This means that we should adopt the general concept. But it does not mean that every technicality and every perimeter rule of the concept should necessarily be adopted...<sup>3</sup>*

11. In particular, *Assessment Manual Item: AP1-1-2(b)*’s direction that, “[c]overage under the *Act* may commence for a worker even though by common law principles no contract of service yet exists,” dictates that common law principles concerning the establishment of a contract of service are not determinative of coverage under the *Act*.

## **III VOLUNTEER**

12. For workers’ compensation purposes, a volunteer is an individual performing services of his or her own free will and without compulsion or constraint who does not receive any of the following in respect of those services:

- compensation, other than reasonable reimbursement or allowance for personal and material expenses incurred during his or her service, or
- money or any other thing of value in lieu of compensation, or

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<sup>2</sup> *Joey’s Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2001] N.B.J. 222, 2001 NBCA 17 at para. 42: “Despite the diverse nature of the legislative schemes that establish rights or impose obligations on the basis of an existing employment relationship, those schemes do share one common feature. Rather than attempting to provide a precise definition that distinguishes an employee from an independent contractor, provincial legislatures and Parliament have traditionally opted for the application of common law principles that have developed over the past 60 years. For example, by defining an employee as one who works under a contract of service as opposed to a contract for service the legislature has signaled that the common law approach to classification is preferred. It is the preferred approach if only because it provides flexibility and avoids the problem of drafting a ‘code’ that is either over or under-inclusive. That is to say, a code that includes workers that should have been excluded or, conversely, that excludes those that should have been included.”

<sup>3</sup> *Workers’ Compensation Reporter Decision No. 26, Re: The Coverage of Workmen’s Compensation*, 1 W.C. R.109, 29 January 1974 (retired as of 1 January 2003).

- any financial or other remuneration of sufficient value as to be reasonably perceived to be more than supplemental to the services, or a possible motivation for volunteering.<sup>4</sup>

13. For these purposes, consideration may be actual or probable remuneration that is significantly greater than the inconsequential incidences of an otherwise gratuitous relationship. However, the probability of remuneration must be both real and substantial as opposed to a mere possibility of, or chance for, remuneration. Thus, for example, the provision or the expectation of a regular or recurrent honorarium or stipend, a benefit such as group life insurance, or access to professional certification may push a volunteer into worker status, and it does not matter that a third party actually provided those benefits.

## A Honorariums

14. “The payment of an honorarium does not create an employment relationship.”<sup>5</sup>
15. “The test for distinguishing between an honorarium and a wage, and between voluntary acts and employment, should be based on the actual nature of the activity and the resulting legal relationships, rather than on the motive or purpose of a non-profit society and its members. Honoraria tend to be for short term or occasional activities. The provision of a service on a daily basis, paid for on that basis, is more readily characterized as involving the payment of a wage under a contract of service.”<sup>6</sup>

## IV SECONDED OR LENT EMPLOYEES

16. *Assessment Manual Item: AP1-1-5(f)*: “In determining whether a worker of one employer has become the seconded or lent employee of another employer, the question to be decided in each case is whether there is an employment relationship between the employee and the other employer for the purposes of the *Act*. The normal tests for determining whether an employment relationship exists are applied with the necessary modifications.”
17. Guidance for the interpretation and administration of *AP1-1-5(f)* can be found in *Decision No. 229*,<sup>7</sup> in which the necessary modification to the normal tests for determining whether an employment relationship exists was formulated as follows:

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<sup>4</sup> See *WCAT Decision Number: WCAT-2007-03752*, 30 November 2007.

<sup>5</sup> *WCAT Decision Number: WCAT-2003-01780-ad*, 31 July 2003.

<sup>6</sup> Noteworthy Decision Summary – *WCAT Decision Number: WCAT-2005-04895*, 16 September 2005.

<sup>7</sup> *Decision of the Commissioners No. 229*, (1977) 3 W.C.R. 75 at 79 (retired as of 1 January 2003).

*When the question of ‘lent employees’ is being considered this test must be reformulated to consider whether the employee has become part of the enterprise of the other employer, or whether he remains independent of it and part of the enterprise of his original employer.*

18. In essence, a seconded or lent employee is in a tripartite worker-employer relationship. The leading statement on identifying a worker-employer relationship in a tripartite context is found in *Pointe-Claire (City) v. Quebec (Labour Court)*,<sup>8</sup> in which the Supreme Court of Canada held that the pith of a worker-employer relationship in a tripartite context is “fundamental control over working conditions”. This requires consideration of which party has control over the selection, hiring, remuneration, discipline, training, evaluation, assignment of duties, and working conditions of the worker; the degree to which the worker is integrated into the business; and the worker’s length of service in the business.

## V SUMMARY OF COVERAGE UNDER THE ACT

		MANDATORY COVERAGE UNDER THE ACT		VOLUNTARY COVERAGE UNDER THE ACT	
		Compulsory	Conditions	Availability	Mechanism
Proprietorship	Proprietor	No	–	Yes	Personal optional protection
	Proprietor’s spouse	No	–	Yes	Voluntary coverage
	Proprietor’s child	Yes	<ul style="list-style-type: none"> <li>• Employment relationship</li> <li>• Remuneration</li> </ul>	No	–
Partnership	Partner	No	–	Yes	Personal optional protection
	Partner’s spouse	Yes	<ul style="list-style-type: none"> <li>• Employment relationship</li> <li>• Remuneration</li> </ul>	No	–
	Partner’s child	Yes	<ul style="list-style-type: none"> <li>• Employment relationship</li> <li>• Remuneration</li> </ul>	No	–
Corporation or similar entity	Principal	Yes	<ul style="list-style-type: none"> <li>• Active in the business</li> </ul>	No	–
	Director	Yes	<ul style="list-style-type: none"> <li>• Active in the operations of the corporation</li> </ul>	No	–
	Principal’s family member	Yes	<ul style="list-style-type: none"> <li>• Earnings are reported for income tax purposes</li> </ul>	No	–
	Officer	Yes	<ul style="list-style-type: none"> <li>• Active in the business</li> </ul>	No	–
	Shareholder (active)	Yes	<ul style="list-style-type: none"> <li>• Active in the business</li> </ul>	No	–
	Shareholder (inactive)	No	–	No	–
	Volunteer	No	Limited circumstances	No	Limited circumstances
	Elected official	No	–	No	–

<sup>8</sup> *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015.