

**Assessable payroll**

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**OBJECTIVE**

1. This practice directive explains how assessable payroll is determined and aids in the interpretation of *Assessment Manual Item API-38-2*.

**INTERPRETATIVE GUIDELINES**

2. Section 36 of the *Workers Compensation Act* mandates the Board to continue and maintain the accident fund for payment of the compensation, outlays, and expenses under Part 1 of the *Act* and for payment of expenses incurred in administering Part 3 of the *Act*. Section 39(1) of the *Act* permits the Board to collect sufficient funds from firms to meet all amounts payable from the accident fund by way of “assessment rated on the payroll”, “the unit of production”, or “in a manner the Board considers proper”.
3. The term “payroll” is not defined in the *Act*, but by denotation is:
  - (a) An employer’s list of individuals to be paid, together with the amount that each individual is to receive.
  - (b) The total amount to be distributed among these individuals.
4. As well, the term “assessable payroll” is not defined in the *Act*, but section 38(3) suggests that assessable payroll is that portion of the payroll that represents workers and employment within the scope of Part 1 of the *Act*, subject to the maximum wage rate referenced in section 33 of the *Act*. Thus, the *Act* dictates that the Board can only assess for workers.
5. Each of the four general categories of assessable payroll in *API-38-2(1)* is a specific instance of remuneration to workers:

- (a) “Wages and salaries” are paid to workers providing services under contract of service.
- (b) “Principals’ earnings” are wages, salaries, and emoluments paid to that subset of workers who have the ability or power, actual or potential, direct or indirect, to control, influence, direct, or cause the direction of the management and policies of a firm.
- (c) “Contractors’ earnings” relate to the earnings of non-registered labour contractors, who by operation of *Assessment Manual Item: AP1-1-7* are deemed to be workers.
- (d) Personal optional protection premiums relate to those individuals who are workers per subparagraph (f) of the statutory definition of worker.

## **A Dividends**

- 6. The Board generally embraces corporate law and taxation law principles unless such principles are specifically or by necessity set aside by the *Act*, Board policy, or by practice in order to achieve the statutory purposes of the *Act*. Thus, and although the Board recognises that a declaration of a dividend is essentially the allocation of a company’s undistributed profits to its shareholders in proportion to the shares held by them and in accordance with the rights attached to those shares, the Board may nevertheless include dividends in assessable payroll if it believes that an active shareholder has effectively paid himself or herself, in whole or in part, by way of dividend rather than salary.
- 7. The following analytical underpinnings for the distinctions between taxation of compensation for labour and compensation for the use of capital are not universally transposable to the workers’ compensation system:
  - (a) The corporate law principle that a dividend is a return on capital which attaches to a share and is in no way dependent on the conduct of a particular shareholder does not hold true for smaller companies in which an active shareholder can elect to receive compensation by way of salary or dividends.
  - (b) In the income tax regime, the quantum of an individual’s contribution to a company, and any dividends received from that corporation, are mutually independent of one another; and each is taxed under a different provision of the *Income Tax Act*.
  - (c) The *Workers Compensation Act* has no principle or provision analogous to the *Income Tax Act*’s principle of legitimate tax minimization.

## **ADJUDICATIVE GUIDELINES**

### **I WAGES AND SALARIES**

8. “Wages and salaries” comprise all remuneration paid to a worker and include salary, commissions, bonuses, allowances, gratuities, and vacation and holiday pay.

### **II PRINCIPALS’ EARNINGS**

9. *Assessment Manual Item: API-1-1* describes a principal as,

*... a person who has the direct or indirect power or ability to control or influence the operations of a corporation or similar entity, through the ownership of voting securities, by contract, or otherwise. An officer, director or shareholder active in the operation of a corporation or similar entity is presumed to be a principal of that firm. However, the Board may find that such a person is not a principal where it is shown that the person does not possess direct or indirect power or ability to control or influence the firm's operations.*

10. Accordingly, it is presumed that each active principal of a corporation is a worker in the employ of that corporation; and thus the total remuneration paid to each active principal, shareholder, director, or officer of a corporation is assessable.

#### **A Active in the company**

11. An individual is active in a company if that individual,
- is charged with maintaining, or the oversight of maintaining, the company in good standing under British Columbia’s *Business Corporations Act* or equivalent legislation;
  - undertakes action or effort in or on behalf of or at the behest of the company;
  - does, or is required to, or is charged with effectuating direction or policy of the company; or
  - does, or is required to, or is charged to manage or supervise the management of the business and affairs of the company.

12. A sole shareholder of a company is of necessity active in the company.

#### **B Official income tax statements – presumption**

13. An individual who is issued either a *T4 Statement of Remuneration Paid* or a *T4A Statement of Pension, Retirement, Annuity and Other Income* which includes “self-employed commissions” or “other income” is presumed to be active in the business of the firm.

14. Other than for a family member of a principal, shareholder, officer, or director, this presumption may be rebutted by a preponderance of evidence that the individual is not active in the business of the firm. The individual or firm seeking to rebut the presumption bears the onus of adducing the evidence necessary to rebut the presumption.

## **C Directors**

15. A director is charged in both the common law and by statute to oversee and manage the direction of a company. A director may be independent – that is, an individual whose directorship constitutes his or her only connection to the company – or may be in the service of the company.
16. An independent director of a publicly traded company – that is, an individual who is not a worker or officer of the company and who only attends the periodic and scheduled meetings of the company’s board of directors – is not a worker in the employ of the company; and, therefore, directors’ fees paid to any such independent director are not included in the company’s assessable payroll.
17. A director of a non-publicly traded company who is paid a directors’ fee is deemed to be a worker of the company; and, therefore, all such directors’ fees are included in the company’s assessable payroll.

## **D Dividends**

18. A shareholder of a company who is not a director or officer of, or in the employ of, the company and who does not undertake any activity on the behalf or at the behest of the company is not a worker of that company; and, therefore, dividends paid to any such shareholder are not included in the company’s assessable payroll.
19. *API-38-2* directs that, “[d]ividends are not considered part of payroll unless paid as remuneration for activity in the company.” The following are some of the factors that the Board may consider in determining whether dividends are paid as remuneration for activity in a company:
- the nature and extent of the work performed by the recipient;
  - whether the recipient receives a salary commensurate to the work performed (or conversely, whether the dividend amount reasonably reflects what the recipient would have received as salary for the work performed as a worker, rather than a payment of corporate profits to a shareholder of a company);
  - the recipient’s experience and any special skill in relation to the company’s business;
  - whether the dividend was arranged at arm’s length; and, in particular, whether the dividend was made pursuant to the direction of, or with the concurrence of, the recipient or a family member of the recipient (such direction or concurrence need not be active: it may be passive or implicit and may be inferred from all the

circumstances (e.g., the degree of control which the recipient is entitled to exercise over the company));

- the timing of the dividend; and
- the extent of the company's compliance with the filing and other procedural requirements of the *Business Corporations Act* or equivalent legislation (e.g., whether the declaration of dividend is appropriately and contemporaneously recorded).

20. A capital dividend paid out of a capital dividend account as defined in subsection 89(1)(d) of the *Income Tax Act* is not included in the company's assessable payroll.

### **E Spouse, child, or other family member of a principal**

21. Per *Assessment Manual Item: API-1-4*, the spouse, child, or other family member of a principal, shareholder, director, or officer for whom a company reports earnings for income tax purposes or otherwise remunerates is a worker of that company.

22. Therefore, all earnings recorded in an official income tax statement issued by a company to a family member of a principal or a shareholder are included in payroll and are assessable. Any such earnings recorded in an official income tax statement issued by a company are exceptionalized in *API-38-2(3)*, such that the general requirement in policy that the recipient be active in the company is obviated.

### **III CONTRACTORS' EARNINGS**

23. Section 38(1) of the *Act* requires that every "employer must ... keep at all times ... complete and accurate particulars of the employer's payrolls". This charge creates an onus on every employer to identify with sufficient specificity in its payrolls each payment to a subcontractor which the employer asserts should not be included in its assessable payroll.

24. At a minimum, sufficient specificity includes the subcontractor's name and Board account number, and an explanation as to why payment to that subcontractor should not be included in the employer's assessable payroll (e.g., either the named subcontractor was already registered as an employer with the Board, or there are invoices or other records proving that payments made to that subcontractor by the employer were not for labour contractors).

### **IV PERSONAL OPTIONAL PROTECTION**

25. *Practice Directive 1-2-3(A) – Personal Optional Protection* provides guidance on, and sets forth certain of the Terms of, Personal Optional Protection coverage.

## SCHEDULE “A” – WAGES AND SALARIES AND EQUIVALENT

Additional guidance on payroll categories and principles for determining payroll can be found in *Assessment Manual Items 1-38-2 and 1-38-3*

ITEM	INCLUDED	EXCLUDED
Accommodation	<ul style="list-style-type: none"> <li>• Housing - Rent-free and low-rent housing where it is the principal form of remuneration</li> <li>• Housing subsidies and housing loss reimbursements provided by an employer</li> <li>• Living out allowances included on a T4</li> </ul>	<ul style="list-style-type: none"> <li>• In general, boarding, lodging, and transportation costs for a worker at or to a special work site or remote location</li> <li>• Meal costs subsidized by the employer(s)</li> <li>• Meal vouchers</li> <li>• Moving expenses</li> </ul>
Clothing		<ul style="list-style-type: none"> <li>• Reasonable amount allowed or granted during a defined period for uniforms and special clothing</li> </ul>
Debt and loans		<ul style="list-style-type: none"> <li>• Interest free or low interest loans, and any benefit arising from such loans</li> <li>• Repayment of a shareholder loan</li> </ul>
Education	<ul style="list-style-type: none"> <li>• Bursaries provided directly to a worker or his or her family. (In other circumstances bursaries are not remuneration)</li> </ul>	<ul style="list-style-type: none"> <li>• School services for the children of a worker subsidized by the employer(s) in remote or unorganized areas</li> <li>• Tuition fees included on a T4</li> </ul>
Health, wellness and recreation	<ul style="list-style-type: none"> <li>• Sick leave credits included on a T4</li> <li>• Maternity or Workers' Compensation benefit top-up</li> </ul>	<ul style="list-style-type: none"> <li>• Employee benefit plans</li> <li>• Use of an employer's recreational facilities provided by an employer</li> <li>• Long Term Disability Benefits</li> </ul>
Miscellaneous fees, gifts and payments	<ul style="list-style-type: none"> <li>• Gifts of cash or cash equivalent</li> <li>• Merchandise or other items, which can be readily converted into cash</li> <li>• Gratuities/tips disbursed by the employer</li> <li>• Honorariums</li> <li>• Cash or cashable incentive prizes and awards</li> <li>• Signing or competition bonus</li> </ul>	<ul style="list-style-type: none"> <li>• Death benefits paid to a beneficiary or an estate</li> </ul>
Pension and Retirement	<ul style="list-style-type: none"> <li>• RRSP contributions made by an employer to a worker's RRSP if cashable</li> </ul>	<ul style="list-style-type: none"> <li>• Payment of pension, annuity, or superannuation benefits</li> <li>• Contributions to, or premiums for a registered pension plan (RPP)</li> <li>• Retiring allowances, including termination allowances and</li> </ul>

ITEM	INCLUDED	EXCLUDED
		payment for sick leave credits
Profit sharing, stocks and dividends	<ul style="list-style-type: none"> <li>• Employer profit sharing plan contributions</li> <li>• Exercise of stock options</li> <li>• Dividends paid as remuneration for activity in the company</li> </ul>	<ul style="list-style-type: none"> <li>• Dividend payments which do not relate to activity in the company</li> </ul>
Tax	<ul style="list-style-type: none"> <li>• Tax on a property or service paid on behalf of a worker</li> </ul>	
Termination		<ul style="list-style-type: none"> <li>• Pay in lieu of notice, which is required to be included on an employee's T4 slip</li> <li>• Salary continuance</li> <li>• Severance or termination pay</li> </ul>
Travel and Transportation	<ul style="list-style-type: none"> <li>• Vehicle allowance</li> <li>• Vacation trips and other travel benefits which can be converted to cash</li> </ul>	<ul style="list-style-type: none"> <li>• Reimbursement for work related travel</li> <li>• Personal use of an employer's automobile (box 34)</li> </ul>
Wages and salary	<ul style="list-style-type: none"> <li>• Salary deferral arrangements (self-funded leave)</li> <li>• Wages, salaries, commissions, holiday pay, bonuses, and piecework</li> <li>• Director's or other fees, except as outlined in AP1-38-2</li> </ul>	<ul style="list-style-type: none"> <li>• Expenses</li> <li>• Remuneration paid to any employee who is regularly employed at a permanent establishment of the employer outside of British Columbia</li> <li>• Non-cash taxable benefits are generally excluded. This includes contributions to or premiums for: <ul style="list-style-type: none"> <li>○ A private health services plan</li> <li>○ Employee counselling services</li> <li>○ Employment insurance/disability plan</li> <li>○ Group term life insurance premiums</li> </ul> </li> </ul>