IHSA SAFETY Podcast transcription

Episode 73:
Worker Misclassification (Part 3 of ESDC series)
Host: Ken Rayner
Guest: Liz Tavares, Michelle Roberts

Announcer:

It's time for the *IHSA Safety Podcast*.

Ken Rayner:

Welcome to the *IHSA Safety Podcast*. I'm your host, Ken Rayner. This is the third podcast in our three-part series on federal occupational health and safety and how it applies to a significant portion of IHSA's membership, particularly those in the transportation industry. Our three-part series looks at three foundational pieces. So first was part one, which was episode 71. It talked about with jurisdiction, what does your business fall under? Is it federal or provincial? We had part two, which was episode 72, and that talked about the first steps a federally regulated business should consider when building their occupational health and safety system. And now we're into part three, which is now episode 73, and worker misclassification, which can occur when drivers incorporate themselves and sell their driving services to a carrier.

And so for all three parts of this series, it's been very informative to have two occupational health and safety experts who both have extensive experience in the transportation industry joining us. So very pleased to welcome again to the *IHSA Safety Podcast*, Liz Tavares. Liz is an Occupational Health and Safety Officer with Employment and Social Development Canada, and the labour program there, as part of the Government of Canada. So Liz, thanks so much for joining us again on this three-part series for part three of the podcast.

Liz Tavares:

Thanks, Ken. And on behalf of ESDC, the labour program, and the federal minister of labour, thanks for having me here. It's great to be here and to provide such useful occupational health and safety information, especially for these federal employers out there.

Ken Rayner:

Great, thank you. And it's always a pleasure to partner with ESDC. And welcoming back certainly a regular on our podcast, who not only is one of IHSA's subject matter experts on transportation, she's also our Vice President of Stakeholder and Public Relations, Michelle Roberts. Welcome back Michelle.

Michelle Roberts:

Thanks again for having me, Ken.

Ken Rayner:

All right. Okay, so we're going to get into something called worker misclassification. Now I'm going to guess this has nothing to do with me being misclassified as a worker, sometimes being a good worker or a bad worker. We're not talking about that, right, Liz?

Liz Tavares:

No, no, we're not talking about that at all.

Ken Rayner:

Okay, so that's something completely different. So we're talking about worker misclassification. So Liz, what is it, why does it occur, and what is proper classification? Why is it important?

Liz Tavares:

Yeah, absolutely. So worker misclassification is the improper designation of an employee, so a worker either being an employee or identified as an independent contractor. So misclassification occurs when an employer intentionally treats a worker who meets the criteria to be an employee as someone other than an employee. So for example, if an employer misclassified a driver as a contractor, in this situation a worker would not receive any full benefits and protections to which they are entitled to under the *Canada Labour Code* if they were deemed to be an employee.

Ken Rayner:

Okay, so it sounds like misclassification can certainly have ramifications. Interesting. So Liz, what are the risks then associated with misclassification for all the parties involved?

Liz Tavares:

So the risks associated with misclassification for workers would be the lack of protection and benefits under the *Canada Labor Code,* parts two and three, which are occupational health and safety and labour standards. And the risks for employers associated with misclassification would be various enforcement and compliance measures up to and including public naming and administrative monetary penalties.

Ken Rayner:

So it sounds like there's some significant disadvantages for both an employee and also potentially an employer for having this misclassification of workers. Okay. Michelle, I think you and I have had conversations about this before, but I think you've used other terminology when you've referred to it. I want to say that I've heard you say Driver Inc. before. Is that the term I've heard you... Is it the same thing? Is that what we're talking about here?

Michelle Roberts:

Yeah, and I mean, yes, so Driver Inc. model is a business model that can be used, and it has been used in Ontario trucking industry. And I think what we're trying to capture here is when it's misused, right? So as

Liz has been saying the misclassification—so they're not properly classified. And so yes, the Driver Inc. model exists. We're more concerned when it's being abused or misused and typically it's when drivers and carriers enter into agreements where the driver incorporates themselves, so independent, and then they're selling the driver's services to the carrier. But essentially, as Liz had mentioned, are they really a separate independent contractor or should they be treated as an employee? And the concern that it's raised from us from an industry perspective is that those that are classified as independent contractor under the Driver Inc., they don't receive the same benefits and protections as an employee would.

So there's ramifications when it comes to deductions and financial contributions, but obviously most importantly is they don't have the same level of occupational health and safety benefits and/or the protections under the labour standards. So really this creates an unfair situation where the drivers are not afforded the same rights and protections as other employees in the trucking industry. So that's something we want to raise awareness of is making sure that the model itself is being used properly and we know right now that there is some concerns in the industry and the misuse of Driver Inc. could trigger an employee-employee relationship or any investigations.

And typically I think what we know is a true owner-operator might not be faced with those investigations, but a driver that's using that incorporated model may be subject to further scrutiny, and as Liz said, could lead to legal complications, potential penalties for both the driver and the carrier. And so overall, the misuse of the Driver Inc. model does raise concerns if they are misclassified. We want to create an environment in the industry that promotes fairness and compliance with not only employment standards and conditions, but certainly affording everyone with the appropriate level of health and safety protection, and that's really what we want to make sure that the model is used properly.

Ken Rayner:

And this is why obviously we're having a podcast about it, we're having discussions about it, ESDC is weighing in, we've got Michelle talking about it. This is obviously happening with some regularity. So Liz, how does ESDC address misclassification, because obviously you're doing it today?

Liz Tavares:

Yeah, absolutely. So the first thing we do is we address misclassification through counseling and voluntary compliance. So we have several compliance measures used to address the misclassification of employees. The first one, as I said, is guidance and counseling. So an employer will be informed of their obligations under the Code through a counseling session. Then after the counseling session, if they continue the business model of misclassifying workers, then we address this issue with an assurance of voluntary compliance, it's also referred to as an AVC. So this AVC is received when an employer acknowledges their non-compliance and agrees to remedy the misclassification voluntarily. So the AVC outlines corrective measures that the employer must implement to comply with the Code and the timeline by doing so. If that fails and the employer does not correct their business model at that point, we issue a compliance order.

So this tool, a compliance order, is used when an employer has failed to implement corrective measures and the non-compliance of misclassifying their workers continues. A compliance order orders an employer to terminate the contravention of part three of the Code or its regulations and to take the

necessary steps to ensure that the contravention will not continue or reoccur. And the employer affected by the compliance order does have the option to appeal the order to the Canadian Industrial Relations Board.

Again, the next step if a compliance order does not work is an administrative monetary penalty, so also referred to as an AMP. So an AMP imposes a financial penalty for failure to comply with a compliance order and it aims to prevent repeat violations. The amount of the AMP will depend on the classification of the violation and the size of the business. Continued contraventions can also result in increased severe financial penalties. An AMP will also include public naming of the employer. So if an AMP is issued, the employer will be publicly named on the Government of Canada website for a period of up to two years after payment or the AMP or correction of the contravention, which is latter.

Ken Rayner:

What happens, Liz, if a worker is being asked by their employer to consider changing the status of the working relationship. So today there is that true employer-employee relationship, but they're being asked to look into changing that, say to like an independent contractor. What's some of the important information that that worker should consider before they make such an important decision?

Liz Tavares:

So with respect to the *Canada Labuor Code*, the employment relationship is determined by examining the total working relationship between the parties. So simply calling a worker an independent contractor or a contractor does not mean that they're an employee. When the relationship is in question, the labour program uses several tests and jurisprudence. Independent contractors and incorporated drivers are valid employment models in the trucking industry. However, there is a long history of companies using the incorporated driver model whereby drivers are encouraged to self incorporate and claim to operate as independent contractors. For the purpose of the Code, these drivers would likely be considered employees.

Ken Rayner:

Okay, so can we get into this in a little bit more detail then, because I think there's some nuances here that might help? So let's just say we have an example of two different employees who have now become independent operators and they're in an incorporated driver model. The first driver is driving like exclusively for one carrier. If they're not completely exclusive, they're 99 per cent exclusive. And then you've got the second driver who has probably 10, 12, maybe 15 different carriers, has really spread their business out there. They're not looking, they're not associated with one. There's a wide variety of different businesses that they're working for. Is there a difference between those two?

Liz Tavares:

Well, Ken, as I said, simply calling a worker an independent contractor or a contractor doesn't mean that they're not an employee. And with every case it's a case-by-case basis. So we would have to examine the totality of that relationship. And as I indicated, the labour program does use several tests and jurisprudence. So some of the tests that we do use is called the control test and the fourfold test. So in the fourfold test, what are we looking at when we investigate that relationship? We're looking at

control, ownership of tools, equipment, chance of profit, and risk of loss. And I think you hit the nail on the head there when you gave the example of an exclusive for one company. That's not to say that that relationship would mean that that worker is in fact an employee, but the key word there is exclusive. When a driver has an exclusive and binding relationship to one company, that exclusive nature is now binding them under contract to one employer.

So that is something that the officer would look at when determining the control. How much control does that driver really have to operate as a contractor for their own business and on their own behalf? Drivers are not provided with the information on the downsides of this practice. And by not classifying drivers as employees, companies are denying them the access to important rights and protections under the Code. They're denied access to sick paid leave, health and safety standards, as well as employer contributions for employment insurance in the Canada Pension Plan, provincial and territorial workplace injury compensation. So again, Ken, to answer your question with respect to your example, I think it's very important for an employer to consider the exclusive relationship between the driver and their company.

Ken Rayner:

Some incredibly important points to consider for the worker if they're being asked these questions by the employer and I think for the employer to consider if they're looking to recommend that their drivers take on a incorporated driver model. So some important things to discuss is just doesn't seem to me to be so clear cut just to say, yeah, let's make the switch and it works for all parties. There's a lot of nuances to consider here and I would highly recommend after hearing the advice from both of you industry experts, that before you make any decision, whether you're a worker or whether your employer, do a bit more homework.

All right, so thank you very, very much. And this concludes our three-part series with ESDC on occupational health and safety. Liz Tavares and Michelle Roberts, thank you very, very much for being here for all three podcasts. Really enjoyed doing them with you and I know you provided a tremendous lot of value to our listeners, so thanks.

Liz Tavares:

Perfect. Thanks Ken, thanks Michelle.

Michelle Roberts:

Thanks Liz, really appreciate it.

Ken Rayner:

All right, and thank you to the listeners for listening to our three-part series with ESDC on the *IHSA Safety Podcast*. Be sure to subscribe and ”like” us on our podcast channel and visit us at ihsa.ca for a wealth of health and safety resources and information.

Announcer:

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