



# DEFINITION OF EMPLOYEE

Interpretations, Policies and Guidelines

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Cat. No.: HR4-59/2021E-PDF

ISBN: 978-0-660-40636-7

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# INTERPRETATIONS, POLICIES AND GUIDELINES

## Definition of an employee

### 1. Purpose

This document provides interpretative guidance on the term “employee” defined in section 3(1) of the Pay Equity Act (the Act).

To foster a common understanding of who is an “employee” under the Act, the following guideline addresses:

- Who is an **employee** in the public sector, the private sector and parliamentary institutions?
- Who is **not an employee** in the public sector, the private sector and parliamentary institutions?
- What are **the human rights and common law** criteria to determine whether a person is an employee?

\* This document does not replace seeking out expert legal advice. This document is technical in nature and should not be used as a plain language resource. Plain language resources are available at <https://www.payequitychrc.ca/en>.

\*\* The Act does not currently apply to employees of the governments of Yukon, the Northwest Territories and Nunavut, or Indigenous governing bodies, including First Nations Governments. Pay equity in these workplaces is still protected through section 11 of the Canadian Human Rights Act or territorial legislation.

\*\*\* The term “employer” in this document can also refer to a “group of employers” that has been recognized by the Pay Equity Commissioner.”<sup>i</sup>

### 2. Issue

Section 3 (1) of the Act outlines who is and who is not an “employee”.

Understanding who is and who is not an employee under the Pay Equity Act is important.

From an employer’s perspective:

- positions held by employees covered by the Act are analyzed through the pay equity plan process;
- employees covered by the Act are also part of the employer’s employee count (s.6 to 9), which determines whether and when an employer becomes subject to the Act, and how the Act applies.

From an employee perspective, it is important that they know whether they can assert their rights under the new Act or whether they must rely on section 11 of the Canadian Human Rights Act.

### 3. Interpretation and Examples

The term “employee” must be interpreted consistently with the purpose of the Act, which is to redress systemic gender-based discrimination in the compensation practices and systems of employers.

The Pay Equity Act is human rights legislation. As such, a liberal interpretation of the term “employee” is applied.

#### 3.1. Employees in the public sector, the private sector and parliamentary institutions

The following types of employment relationships are included in the Act:

- Non-management and management employees, which generally include executives and Chief Executive Officers;
- Unionized and non-unionized employees;
- Full-time and part-time employees;
- Permanent, casual and temporary employees, including seasonal workers;
- Dependent contractors<sup>ii</sup>;
- Employees performing federally regulated activities as part of a separate unit for a provincial employer; and,
- Employees on long-term leave (e.g. sick leave, maternity leave).

##### 3.1.1. Employee in the Public Sector

In the public sector<sup>iii</sup>, the following persons are employees under the Pay Equity Act:

- **federal public servants** employed in the core public administration and separate agencies. This includes public servants employed at the Department of National Defence and the Royal Canadian Mounted Police.
- **members of the Royal Canadian Mounted Police** as defined in subsection 2(1) of the Royal Canadian Mounted Police Act;
- **officers and non-commissioned members** of the **Canadian Forces**; and,
- **ministerial staff** appointed pursuant section 128 of the Public Service Employment Act.

In the core public administration (Schedules I and IV of the Financial Administration Act) persons appointed as public servants under the Public Service Employment Act are employees covered by the Pay Equity Act.

In the separate agencies (Schedule V of the Financial Administration Act) persons appointed by as public servants under the Public Service Employment Act or other applicable Acts regulating appointments, are employees covered by the Pay Equity Act.

### **Example – Casual workers**

Mei has been working for a Government of Canada organization on contract as a casual worker for the past 90 days. Mei has signed another casual contract with a different Department. Her new position is part of the Government of Canada's pay equity plan.

### **3.1.2. Employee in the Private Sector**

In the private sector, the following employees are included:

- A person employed by a federally regulated private-sector employer as defined in section 2 of the Canada Labour Code
  - This includes *private constables* appointed as a police constable under Part IV.1 of the Railway Safety Act;
- A person employed by a corporation established to perform any duty or function on behalf of the Government of Canada (e.g. Crown corporations).

Should a question arise in terms of whether a person is an employee, common law tests would generally apply. Given that the Pay Equity Act is a human rights law, a broad interpretation of "employee" will be considered, and the factors of control and dependency will be given more weight than others. See section 3.3 for more information.

### **Example – Executives**

Saanvi has worked for Company A as the Chief Executive Officer for four years. Company A has control over Saanvi's hours and tasks and pays her. Company A supplies the equipment Saanvi uses for her daily work. Saanvi has signed a contract of services. Saanvi is likely an employee and should be included in Company A's employee count.

### **Example – Dependent contractor**

Amir is a truck driver who works on a contractual basis for Company A. Company A owns the truck Amir is driving. While Amir works from time to time for another company, the majority of his working hours are spent working for Company A. As a result, Amir is economically dependent on Company A. Amir is likely an employee and should be included in Company A's employee count.

### **Example – Casual or temporary workers**

Akira has worked 8 months out of each of the past five years for Company A. Company A exercises *de facto* control over the conditions of Akira's employment (e.g. day-to-day control over the work done, selection process, hiring, discipline, training, evaluation and compensation). Akira is likely an employee and should be included in Company A's employee count.<sup>iv</sup>

**Example – Employees performing federally regulated activities as part of a separate work unit for a provincial employer**

Jack is a telecommunications installer working for Company A, a large manufacturer and supplier of telecommunications equipment. The installers of the telecommunications equipment are separate from Company A's other operations. In particular, employees of Company A's other operations report to work on their premises in Ontario and are provincially regulated. Installers, on the other hand, report to work on the premises of their customers all across Canada. The customers are federally regulated telecommunications companies. Installers have no real contact with the rest of Company A's operations and are integrated into the operations of the customer companies.<sup>v</sup> Given that Jack is performing a federally regulated activity as part of a separate work unit for Company A, Jack and the other installers are likely employees and should be included in Company A's employee count for the Pay Equity Act.

**Example – Workers on extended leave**

Arjun is a full-time employee in a federally regulated company, but has been on long-term leave for the past six months. Arjun is an employee and his position should be included in the employee count.

**3.1.3. Employee in Parliamentary Institutions**

Part II.1 of the Parliamentary Employment and Staff Relations Act outlines new pay equity provisions. In these provisions, "employee" "means a person employed by an employer and includes the person occupying the recognized position of Clerk of the Senate, Clerk of the House of Commons, Gentleman Usher of the Black Rod, Sergeant-at-Arms or Law Clerk and Parliamentary Counsel of the House of Commons."

This means that, should an employment relationship exist between a worker and a parliamentary institution, this person is an "employee" for the purposes of the Pay Equity Act, and should be included in the employee count.

**Example – House of Commons**

Marie works as an administrative assistant for the House of Commons. Her employment falls under the Parliamentary Employment and Staff Relations Act. Marie is likely an employee and should be included in the employee count.

## **3.2. Exclusions in the public, the private sector and parliamentary institutions**

A few persons are not covered by the Act.

### **3.2.1. Exclusions in the Public Sector**

The Act outlines that the following types of workers in public sector workplaces are excluded from the definition of employee:

- governor in Council appointees (e.g. deputy ministers, heads and members of agencies, boards and commissions);
- a person who is locally engaged outside of Canada (for example, non-diplomatic locally hired staff working in one of Canada's foreign missions);
- a person who is employed through a student employment program (such as the Federal Student Work Experience Program, or a post-secondary co-op or internship program); and,
- independent contractors.

The jobs of these individuals will not be included in the employee count or pay equity plan.

### **3.2.2. Exclusions in the Private Sector**

The Act outlines that the following types of workers in private sector workplaces are excluded from the definition of employee:

- a person who works for the employer as part of a student employment program (such as a post-secondary co-op or internship program);
- a person who works only during their school vacation periods; and,
- independent contractors.

The jobs of these persons will not be included in the employee count or pay equity plan.

### **3.2.3. Exclusions in Parliamentary institutions**

The Act does not outline the types of workers in parliamentary institutions that are excluded from the definition of the employee.

For the purposes of the Act, if an employer-employee relationship is not determined to exist, then the person would not be an employee.

The jobs of these persons will not be included in the employee count or pay equity plan.

### 3.3. Human rights and common law criteria to determine whether a person is an employee

The following human rights and common law tests and factors may apply in the private sector and parliamentary institutions.

The Pay Equity Act is human rights legislation. In a human rights context, the Supreme Court of Canada has indicated that the determination of whether a person is an employee is largely based on two factors: control and dependency.<sup>vi</sup> This is about “[the] control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of the worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations?”<sup>vii</sup>

Common law criteria and factors can also assist in determining whether a worker is an employee.

The Supreme Court of Canada has noted that the fundamental question that should be asked when determining the employment status of a worker is whether the person is performing services as a person in business on his or her own account or on the account of someone else.<sup>viii</sup> In other words, when determining employment status, the courts inquire into whether the worker is an independent contractor or whether the worker is an employee.

There have been several tests used by different courts to determine whether a worker is an employee. Listed below are some tests that could be considered when determining whether a worker is an employee:

- **the intention of both parties**<sup>ix</sup>
  - The intention of both the employer and person in question is an important factor to consider. The intention must reflect factual context for the worker to be considered as an employee. Otherwise, intention will be disregarded.
    - Were both parties aware the worker was an employee?
    - Was the status of the worker stated in the contract?
- **the control of the employer over the employee**
  - Does the employer give the worker orders or instructions regarding the manner in which to carry out his work? This can include:
    - control over scheduling;
    - control over location; and,
    - control over the worker’s tasks and activities.

- **the ownership of tools**
  - If the employer owns the tools, there is a higher chance of the worker being an employee.
  - Tools can include equipment of all sorts such as computers, vehicles, and office supplies.
  
- **the chance of profit and the risk of loss**
  - There is a stronger probability that the worker is an employee if they do not share the chance of profit or the risk of loss. Therefore, if a worker was careless, and had to redo the work at their own expense, this would suggest they were not an employee.<sup>x</sup>
  - Can the individual make more money if more efficient? Less if they make mistakes?
  
- **the integration test**
  - This test examines the degree to which an individuals' work is an integral part to the business.
  - Looking at the type of contract in place can help distinguish between whether an individual is an employee or an independent contractor:
    - A contract **of service** is where a person is employed as part of a business, making their work integral to the business. This type of contract is one of employment. This means that the person would be considered an employee; while,
    - A contract **for services** is where a person is hired and their work is not integral to the business, but merely an accessory. This type of contract is one of an independent contractor. This means that the person would not be considered an employee.

## 4. Referenced Pay Equity Act Provisions

### Definitions

**3 (1)** The following definitions apply in this Act.

**employee** means

- (a)** a person employed in the public service, other than
  - (i)** a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act,
  - (ii)** a person locally engaged outside Canada, or
  - (iii)** a person employed under a program designated by the employer as a student employment program;
- (b)** an officer or non-commissioned member of the Canadian Forces;
- (c)** a person employed by an employer referred to in paragraph (2)(e) on or in connection with the operation of any federal work, undertaking or business, as defined in section 2 of the Canada Labour Code, including a private constable, as defined in subsection 3(1) of that Act, other than
  - (i)** a person employed under a program designated by the employer as a student employment program, or
  - (ii)** a student employed by the employer solely during the student's vacation periods;
- (c.1)** a person employed by an employer referred to in paragraph (2)(e.1), other than
  - (i)** a person employed under a program designated by the employer as a student employment program, or
  - (ii)** a student employed by the employer solely during the student's vacation periods;
- (d)** in respect of an employer referred to in paragraph (2)(f), a dependent contractor;
- (e)** a person employed by the government of Yukon;
- (f)** a person employed by the government of the Northwest Territories; and
- (g)** a person employed by the government of Nunavut. (employé)

## **Employers**

**(3)(2)** For the purposes of this Act, each of the following is considered to be an employer:

**(e.1)** a corporation established to perform any duty or function on behalf of the Government of Canada, other than a corporation named in Schedule IV or V of the Financial Administration Act;

### **Employers subject to Act on coming into force**

**6** The following employers become subject to this Act on the date on which this section comes into force:

**(a)** an employer referred to in any of paragraphs 3(2)(a) to (d) that

**(i)** is considered under subparagraph 8(a)(i) to have 10 to 99 employees, or

**(ii)** is considered under subparagraph 8(b)(i) to have 100 or more employees; and

**(b)** an employer referred to in any of paragraphs 3(2)(e) to (i) that

**(i)** is considered under subparagraph 9(a)(i) to have 10 to 99 employees, or

**(ii)** is considered under subparagraph 9(b)(i) to have 100 or more employees.

### **Later date in public sector — 10 to 99 employees**

**7 (1)** An employer referred to in any of paragraphs 3(2)(a) to (d) that is considered under subparagraph 8(a)(ii) to have 10 to 99 employees becomes subject to this Act on the first day of the fiscal year immediately after the fiscal year in which the average of the number of the employer's employees was at least 10 but less than 100.

### **Public sector — 100 or more employees**

**(2)** An employer referred to in any of paragraphs 3(2)(a) to (d) that is considered under subparagraph 8(b)(ii) to have 100 or more employees becomes subject to this Act on the first day of the fiscal year immediately after the fiscal year in which the average of the number of the employer's employees was 100 or more.

### **Private sector and territorial governments — 10 to 99 employees**

**(3)** An employer referred to in any of paragraphs 3(2)(e) to (i) that is considered under subparagraph 9(a)(ii) to have 10 to 99 employees becomes subject to this Act on January 1 of the calendar year immediately after the calendar year in which the average of the number of the employer's employees was at least 10 but less than 100.

### **Private sector and territorial governments — 100 or more employees**

**(4)** An employer referred to in any of paragraphs 3(2)(e) to (i) that is considered under subparagraph 9(b)(ii) to have 100 or more employees becomes subject to this Act on January 1 of the calendar year immediately after the calendar year in which the average of the number of the employer's employees was more than 100.

### **Determination of number of employees**

**8** For the purpose of sections 6 and 7

**(a)** an employer referred to in any of paragraphs 3(2)(a) to (d) is considered to have 10 to 99 employees if

**(i)** the average of the number of the employer's employees in the fiscal year immediately before the fiscal year in which this section comes into force is at least 10 but less than 100, or

**(ii)** the average of the number of the employer's employees in the fiscal year in which this section comes into force or in any subsequent fiscal year is at least 10 but less than 100; and

**(b)** an employer referred to in any of paragraphs 3(2)(a) to (d) is considered to have 100 or more employees if

**(i)** the average of the number of the employer's employees in the fiscal year immediately before the fiscal year in which this section comes into force is 100 or more, or

**(ii)** the average of the number of the employer's employees in the fiscal year in which this section comes into force or in any subsequent fiscal year is 100 or more.

### **Determination of number of employees — private sector and territorial governments**

**9** For the purpose of sections 6 and 7

**(a)** an employer referred to in any of paragraphs 3(2)(e) to (i) is considered to have 10 to 99 employees if

**(i)** the average of the number of the employer's employees in the calendar year immediately before the calendar year in which this section comes into force is at least 10 but less than 100, or

**(ii)** the average of the number of the employer's employees in the calendar year in which this section comes into force or in any subsequent calendar year is at least 10 but less than 100; and

**(b)** an employer referred to in any of paragraphs 3(2)(e) to (i) is considered to have 100 or more employees if

**(i)** the average of the number of the employer's employees in the calendar year immediately before the calendar year in which this section comes into force is 100 or more, or

**(ii)** the average of the number of the employer's employees in the calendar year in which this section comes into force or in any subsequent calendar year is 100 or more.

## 5. Public Service Employment Act Definition of Employee

2 (1) The following definitions apply in this Act.

**employee** means a person employed in that part of the public service to which the Commission has exclusive authority to make appointments. (*fonctionnaire*)

## 6. Parliamentary Employment and Staff Relations Act Definition of Employee

86.1 The following definitions apply in this Part.

**employee** means a person employed by an employer and includes the person occupying the recognized position of Clerk of the Senate, Clerk of the House of Commons, Gentleman Usher of the Black Rod, Sergeant-at-Arms or Law Clerk and Parliamentary Counsel of the House of Commons. (employé)

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<sup>i</sup> See Pay Equity Act section 4(1).

<sup>ii</sup> As per Canada Labour Code section 3(1).

<sup>iii</sup> See Pay Equity Act section 3(2)(e.1).

<sup>iv</sup> Soma Ray-Ellis, *Halsbury's Laws of Canada – Employment* (LexisNexis Canada: Toronto, 2019), HEM-92 No automatic exclusion from “employee” status.

<sup>v</sup> Northern Telecom Canada Ltd v Communication Workers of Canada, [1983] 1 SCR 733.

<sup>vi</sup> McCormick v Fasken Martineau DuMoulin LLP, [2014] 2 SCR 108

<sup>vii</sup> Guy Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002), 52 U.T.L.J. 357, at pp. 377-94; Arthurs, at pp. 89-90; International Woodworkers of America v. Atway Transport Inc., [1989] OLRB Rep. 540; Pointe-Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015.

<sup>viii</sup> 671122 Ontario Ltd v Sagaz Industries Canada Inc, 2001 SCC 59, at para 47 [“Sagaz”].

<sup>ix</sup> 1392644 Ontario Inc (cob Connor Homes) v Canada (Minister of National Revenue - MNR), [2013] FCJ No 327, at para 37 [“Connor Homes”] at 38-40.

<sup>x</sup>Wiebe Door Services Ltd v MNR.