

Corporate Commercial Client Alert

Employment & Pensions

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Mirror, Mirror on the wall, whether dancers are employees after all?

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More than half a year has passed since the tragic accident that took place during a concert of a very popular Hong Kong pop boy group “Mirror”, causing personal injuries to some of its dancers.

According to recent news reports, the Labour Department has laid charges against the company which engaged the dancers for the concert (the “**Company**”), amongst others, for failing to enrol the dancers into an employees’ compensation scheme for work-related injuries or occupational diseases, and failing to report the injuries as required by law.

It is the Company’s view that the dancers are independent contractors, and therefore they are not subject to the protections provided under various employment-related legislations, e.g. the Employment Ordinance and Employees’ Compensation Scheme Ordinance. However, after considering the facts, the Labour Department considered otherwise and therefore commenced prosecution against the Company for failing to provide such employment-related benefits.

So, should dancers be considered as employees, independent contractors, or... does it depend?

Whether a worker is an employee or an independent contractor ultimately depends on the actual work arrangement. Even if a worker signed an agreement expressly stating himself to be an independent contractor, it is in fact not conclusive per se, and in case of dispute, the courts in Hong Kong will look at the overall picture to determine the parties’ relationship.

Over the years, the courts in Hong Kong have developed a number of tests to consider whether a worker is an employee or an independent contractor. They are:-

1. Control Test – the extent to which the worker can exercise control over his work

The higher the degree the worker can exercise control over his work e.g. when to work, where to work, how to work, etc., the higher the chance the worker will be considered an independent contractor.

2. Entrepreneur Test – the extent to which the worker can be considered as running a business on his own

If a worker seems to be running a business on his own, it is more likely that he will be considered an independent contractor. For example, does the worker hold a business registration certificate; is there a chance that the worker will be running his business at a loss, or he is simply receiving a fixed monthly payment; and/or is the worker required to provide his own tools and incur expenses when providing the service?

3. Integration Test – the extent to which the worker can be separated from the company’s structure or main business

If the worker can be easily separated from the engaging company’s employees or distinguished from the main business of the company, then it is more likely the worker will be considered an independent contractor.

None of the above tests prevail over the other, and the courts will consider the overall picture presented by the facts as to whether the relationship is one of employment.

A worker can also be considered as an employee even if the engagement period is short. There was a case where a company engaged individuals to fix the air-conditioning system in a large development. The individuals were engaged for only a day. Since the individuals were all skilled, minimal supervision was required. The Individuals used their own tools as well as the tools provided by the company to complete the work. They received a fixed fee for the day of work they provided. The court in this case ruled that the individuals were employees even though the engagement period was short.

With respect to the first-mentioned case of the dancers, at the current stage, the trial for the prosecution has not been heard yet, and details of the case have not been disclosed. It is therefore premature and unfair to make any comments on the case.

It is, however, also not safe to quickly conclude that all dancers belong to a specific category without considering the facts of each case. Let's consider the examples set out below.

Example A

A company engages a group of dancers to perform in a show. The company will arrange the choreography, and the dancers need to attend practice sessions arranged by the company and perform on stage at a specific time. The make-up and outfits for the performance will be prepared by the company as well. The dancers will receive a fixed payment, and they do not need to incur special expenses for the practices session and the show.

In the above case, it appears that the company has a high degree of control over the services provided by the dancers, and the dancers are to a large extent following the instructions given by the company. In addition, the dancers in this case do not seem to run their own business as they are only receiving a fixed amount of money. Therefore, looking at the picture as a whole, it appears that the dancers under the above scenario are more likely to be considered employees, and not independent contractors.

Example B

A company engages a solo dancer to perform in a show after he has won an international dance competition. The dancer will perform his winning piece and prepare his own makeup and costume. The dancer will arrange his own practice sessions and pay for the studio fees. He has to attend certain rehearsals arranged by the company and to perform on stage at a time specified by the company. He will share a portion of the money received for the tickets sold.

In this example, the dancer has a higher degree of control over how he provides his service. As he is responsible for certain costs and will share profit in the tickets sold, he seems more likely to be running his own business. Therefore, there is a higher chance that the dancer may be considered an independent contractor rather than an employee.

Of course, in real life, the working arrangement between parties may be more complex and it is hence more difficult to assess the working relationship. To protect the positions of all parties, it is important to understand the agreed intention and to make the work arrangement based on the tests adopted by the court. It is not at all an easy task.

At the end, let's wish all the injured dancers a speedy recovery.

Want to know more?

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