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• WILL 2026 SEE THE END OF DRIVER INC.? •

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Worker misclassification is an ongoing issue in many workplaces and industries. Both provincial and federal employment standards legislation include prohibitions against employers treating workers as independent contractors if they are employees. Section 5.1(1) of the *Ontario Employment Standards Act, 2000* provides that “[a]n employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act.” The *Canada Labour Code* includes a presumption that a worker is an employee, unless the employer can prove

otherwise. Section 167.01(1) states “[a] person who is paid remuneration by an employer is presumed to be their employee unless the contrary is proved by the employer.” Section 167.1 further states “[a]n employer is prohibited from treating an employee as if they were not their employee.”

In the trucking industry, there is a category of worker known as Driver Inc. These are drivers who provide truck driving services, but do not own or lease their own truck. They are paid through their corporation, and no deductions are made from their compensation for income tax, Canada Pension Plan, or Employment Insurance. The trucking company treats them as an independent contractor. The model is criticized because the companies who use Driver Inc. drivers are thought to have an unfair competitive advantage because they do not have to comply with employment standards requirements such as overtime pay, vacation pay, and termination pay, and there is also a concern that the Driver Inc. drivers are not paying their fair share of income tax.

There are two ways in which the federal government is addressing, and trying to dismantle, the Driver Inc. model. The first is by way of a significant increase in inspections carried out by Employment and Social Development Canada (“ESDC”) to determine whether a federally regulated trucking company (one whose trucks cross provincial or international borders) is misclassifying its workers. The second is a recent

• In This Issue •

WILL 2026 SEE THE END OF DRIVER INC.?

Carole McAfee Wallace 81

BRITISH COLUMBIA SUPREME COURT REAFFIRMS LIMITS OF THE “CHANGED SUBSTRATUM” DOCTRINE

Eleni Kassaris and Rachel Akinyemi 84

AI-ENABLED MONITORING SYSTEMS IN VEHICLES — HOW FAR CAN EMPLOYERS GO?

Jade Paquin-Robidoux 87



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decision of Canada Revenue Service ("CRA") to lift the moratorium on penalties for the failure to issue a T4A to the Driver Inc. drivers, which is effective for the 2025 tax year.

FEDERAL LABOUR PROGRAM INSPECTIONS

With respect to ESDC inspections, a labour affairs officer may appear on the trucking company's doorstep, without advance notice, and demand to review the company's payroll records and driver contracts. In some cases, the carrier is given a few days' advance notice of the inspection by way of letter that sets out the documents and records that must be made available for inspection.

Based on the labour affairs officer's review of records, and interviews of individuals at the workplace who are familiar with the carrier's labour standards, payroll systems, and employment records, the officer will make a determination as to whether there has been any misclassification of a driver as an independent contractor, when they are in fact employees. The officer applies the Supreme Court of Canada test set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61, 2001 SCC 59, which considers the following:

- How much control does the carrier have over the workers?
- Who owns the tools and equipment required to perform the work?
- Who has the chance of profit and who bears the risk of loss?
- To what extent is the worker integrated into the carrier's workplace?

The total working relationship between the parties is examined.

As a result of these inspections, most officers have found that Driver Inc. drivers are employees and not independent contractors. Once that determination has been made, the officer will issue a request that the carrier sign an Assurance of Voluntary Compliance, pursuant to which the carrier agrees to take corrective measures to treat these workers as employees, and to do so by a specified date. If a carrier does not sign the

Assurance of Voluntary Compliance, the officer will issue a Compliance Order. While there is a right to seek a review of the Compliance Order from the Head of Compliance and Enforcement (the “Head”), or appeal it to the Canada Industrial Relations Board (“CIRB”), it is unlikely that the Head, or CIRB, will arrive at a different determination as they will apply the same Supreme Court of Canada test. In addition to issuing a Compliance Order, the Labour Program can also take additional measures to ensure compliance, including issuing an Administrative Monetary Penalty or prosecution.

The more recent ESDC inspections also include a review of the carrier’s health and safety records, for compliance with Part II of the *Canada Labour Code*. As a reminder, a workplace with 20 or more employees is required to establish a workplace health and safety committee that has a number of duties including:

- Dealing with health and safety complaints
- Participating in all inquiries, investigations, studies, and inspections relating to employee health and safety
- Participating in the implementation and monitoring of a program for personal protective equipment, clothing, devices, or materials
- Participating in the implementation of changes that impact health and safety
- Inspection of all or part of the workplace each month with the requirement that all parts of the workplace are inspected at least once a year

A workplace with 300 or more employees in Canada must also establish a policy health and safety committee.

For those workplaces with fewer than 20 employees, the employer is required to appoint a health and safety representative who is responsible for addressing workplace health and safety issues. Non-managerial employees select a non-managerial person to be the health and safety representative, whose duties include:

- Considering and disposing of health and safety complaints
- Ensuring adequate records of work accidents, health hazards, and the disposition of complaints

- Meeting with the employer as necessary to address health and safety issues
- Inspection of all or part of the workplace each month so that all parts of the workplace are inspected at least once a year
- Participating in the development of health and safety policies and programs

As the health and safety requirements depend on the number of employees, a finding that the Driver Inc. drivers are employees, and not independent contractors, may trigger additional health and safety obligations for the carrier. Failure to comply with the obligations could lead to further compliance orders or enforcement.

T4A REQUIREMENT

In addition to ESDC inspections, on December 4, 2025, the CRA lifted the moratorium on penalties for the failure to issue T4As in the trucking industry, starting with the 2025 taxation year. A business is deemed to be operating in the trucking industry if more than 50% of its primary source of income is from “trucking activities”. The CRA’s website describes “trucking activities” as the transportation of goods (both general freight and specialized freight), as well as acting as an intermediary or broker, and arranging freight transportation between shippers and carriers.

If a business operates in the trucking industry and pays more than \$500 in a calendar year to a Canadian-controlled private corporation (“CCPC”), it must issue a T4A to that CCPC. The CRA recommends issuing a T4A even if the trucking company is unsure as to whether the company is a CCPC. A CCPC is a private corporation that is not listed on any stock exchange, is a Canadian resident corporation (incorporated in Canada, or resident in Canada since June 18, 1971) and is not controlled directly or indirectly by one or more non-resident persons or public corporations.

If a trucking business fails to issue a T4A when required to do so, it will face monetary penalties. The Driver Inc. company who receives a T4A will also be required to report on its own income and comply with the personal services business tax obligations.

For the 2025 tax year, the T4A reporting requirement must be completed by February 28, 2026 which falls on a Saturday. The CRA has confirmed that as long as it is received, or postmarked on or before March 2, 2026, it will be considered to have been reported on time.

CONCLUSION

It is expected that the combination of the ESDC enforcement activities to ensure compliance with the *Canada Labour Code*, and the CRA's imposition of penalties for failing to issue T4As to Driver Inc. drivers, will bring an end to this worker misclassification model. Given the increase

in ESDC inspections, including unannounced inspections, carriers must ensure that all of their documents, contracts, and payroll records are up to date and readily available.

[Carole McAfee Wallace's practice focusses on transportation law and employment law. She represents trucking companies on regulatory and licensing matters. She also represents transportation companies, and other businesses, on employment matters including drafting employment agreements, independent contractor agreements, and responding to wrongful dismissal claims, unjust dismissal complaints, employment standards issues, and human rights applications.]

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