

Backing-Out of Deals

" השוכר את הפועלים וקזרו באמצע היום "

We live in a world where we are heavily reliant on the work of others, and vice-versa. Agreements between individuals, organizations, and company's occupy a significant portion of our daily lives. Problems can – and often do – arise when one of the parties of an agreement 'back out' of a deal before its completion.

In this session we'll attempt to understand some of the underlying *halachik*-principles governing these sort of situations.

Here are some of the essential issues we'll explore on the topic of 'backing out of a deal':

- Does it make a difference whether or not the work has commenced?
- Are there differences between the employer and the employee's rights? Does either one of them have the 'upper hand'?
- What if other, comparable labor is readily available at the same cost? At a greater cost?
- In situations where there is no financial recourse, is one nevertheless *allowed* to 'bear a grudge', or have feelings of animosity?
- If a worker backs out, and thereby causes the employer major financial loss, how much can be demanded?

IMPORTANT GENERAL PRINCIPLE IN MONETARY MATTERS: Almost any stipulations explicitly agreed upon between 2 parties – in our cases, employer & employee – must be abided by, and a breach of contract by either party would be entirely that party's responsibility.

*We will **not** be dealing with such explicit arrangements, but, rather, **scenario's in which no explicit stipulations were made**, which would have clearly defined the parameters of the deal.*

1 – PRIMARY SOURCES: GEMARA

Note: Take your time to get this Gemara clear!

Baraisa, Bava Metziah 76b – Four general scenarios of rescinding from an agreement

<p>It was taught is a Baraisa: One who hires workers, and they deceive the one who hired them – or, if the one who hired them deceives them – the only rights (of compensation) they have on one another is ‘complaints.’</p>	<p>תְּנִינָא הַשׁוֹכֵר אֶת הָאוֹמְנִין וְהִטְעוּ אֶת בַּעַל הַבַּיִת אוֹ בַּעַל הַבַּיִת הִטְעָה אוֹתוֹן אִין לְהֵם זֶה עַל זֶה אֵלָא תַרְעוּמַת</p>
<p>In what context was this said? Only when they didn’t yet show up to work. However, if, for example, wagon-drivers arrived and didn’t find any produce (which need transporting), or workers arrived and found a wet field (which was unworkable), then the employer must pay them full wages. (That having been said,) it’s not comparable one who transports a full wagon versus an empty one; or one who works hard all day versus sitting and doing nothing.</p>	<p>בְּמָה דְבָרִים אָמוּרִים שְׁלֵא הִלְכוּ אַבְל הִלְכוּ חֲמֵרִים וְלֹא מִצָּאוּ תְבוּאָה פּוֹעֲלִין וּמִצָּאוּ שְׂדֵה כְּשֶׁהִיא לְחָה נּוֹתֵן לְהוֹן שְׁכָרָן מְשֻׁלָּם אַבְל אֵינּוּ דּוֹמָה הַבָּא טְעוּן לְבָא רִיקָן וְאוֹמְדִים אֶת הַחֲמֵרִים כִּמְהָ אָדָם רוֹצֵה לְפַחֲוֹת מִשְׁכָּרוֹ שֶׁל אוֹתָהּ הַדֶּרֶךְ לְבֹא רִיקָם מִלְּבֹא טַעוּ עוֹשֶׂה מְלָאכָה לְיוֹשֵׁב וּבִטֵּל וְאוֹמְדִין אֶת הַפּוֹעֲלִים כִּמְהָ אָדָם רוֹצֵה לְיִטּוֹל שְׁכָרוֹ פַּחוֹת וְלִישֵׁב בַּטֵּל מִלְּעֲדוֹר כֹּל הַיּוֹם וְלִישׁוֹל כֹּךְ וְכֹךְ</p>
<p>In what context was this said? Only when they (the workers) had not begun their work. However, if they’ve begun to work, we assess the value of the work they’ve done. For example: they agreed to cut down a stalk (of produce) for 2 <i>selah</i>, and they only cut half; or, they agreed to weave an article of clothing for 2 <i>selah</i>, and they only wove half of it -- we assess the value of the work they’ve done: even if the remaining work cost 6 <i>dinnar</i> (for, to find a new worker to do half a job will cost more), they still receive 1 <i>selah</i>, or complete the work... R’ Dosa says that we assess the value of the remaining work: If the remaining work costs 6 <i>dinnar</i>, they receive 1 <i>shekel</i> or complete the work...</p>	<p>בְּמָה דְבָרִים אָמוּרִים שְׁלֵא הִתְחִילוּ בְּמְלָאכָה אַבְל הִתְחִילוּ בְּמְלָאכָה שְׁמִין לְהוֹן מָה שְׁעָשׂוּ כִּי צָד קָבְלוּ קָמָה לְקַצֵּר בְּשָׁנֵי סְלָעִים קָצְרוּ חֲצִיָּה וְהִנִּיחוּ חֲצִיָּה כְּגַד לְאַרְגָּל בְּשָׁנֵי סְלָעִים אָרְגּוּ חֲצִיָּה וְהִנִּיחוּ חֲצִיָּה שְׁמִין לְהוֹן אֶת מָה שְׁעָשׂוּ הִיָּה יָפָה שְׁשָׂה דִּינָרִים שְׂאָם הִיָּה בֹא לְשִׁכּוֹר שְׁכִיר לְחֲצִיָּה אֵינּוּ מוֹצֵא בַּפַּחוֹת מִשְׁשָׂה דִּינָרִים וְנִמְצָא נִפְסָד בַּעַל הַבַּיִת בַּמָּה שְׁעֵתִיד לְהַעֲשׂוֹת אַפ"ה אִין הוֹלְכִין אַחַר הַעֲתִיד לְהַעֲשׂוֹת אֵלָא שְׁמִין לְהוֹן אֶת מָה שְׁעָשׂוּ לְפִי חֲשׁוֹן תְּנִאוּ וְנוֹתֵן לְהֵם סְלַע נּוֹתֵן לְהוֹן סְלַע אוֹ יִגְמְרוּ מְלָאכְתָּן וְיִטְלוּ שְׁנֵי סְלָעִים וְאִם סְלַע נּוֹתֵן לְהֵם סְלַע ר' דוֹסָא אוֹמֵר שְׁמִין לְהוֹן מָה שְׁעֵתִיד לְהַעֲשׂוֹת רַבִּי דוֹסָא סְבִירָא לֵיהּ כִּתְנֵא דִּידָן דְּאָמַר הַחֹזֵר בּוֹ יָדוּ עַל הַתְּחִתּוּנָה וְיַעֲכֹב שְׁכָר מָה שְׁעָשׂוּ כְּדִי לְשִׁכּוֹר פּוֹעֲלִים וְלִגְמוֹר כְּפִי תְנֵאֵי הָרֵאשׁוֹן הִיָּה יָפָה שְׁשָׂה דִּינָרִים נּוֹתֵן לְהֵם שְׁקָל אוֹ יִגְמְרוּ מְלָאכְתָּן וְיִטְלוּ שְׁנֵי סְלָעִים וְאִם סְלַע נּוֹתֵן לְהֵם סְלַע</p>
<p>In what context was this said? Only where there is no loss (of product). However, if there will be a financial loss (as a result of their backing-out) then the employer may hire new workers at their expense, or he may deceive them. How so? He can say to them “I’ll pay you double if you finish the job!” What is the limit of the option of hiring new workers at their expense? 40-50 <i>zuz</i>!</p>	<p>בְּמָה דְבָרִים אָמוּרִים בְּדָבָר שְׂאִין אַבּוּד אַבְל בְּדָבָר הָאָבּוּד שׁוֹכֵר עֲלֵיהֶן אוֹ מְטַעֵן כִּי צָד מְטַעֵן אוֹמֵר לְהוֹן סְלַע קְצָצְתִּי לְכֶם בְּאוֹ וְטָלוּ שְׁתֵּימִים נְעַד כְּמָה שׁוֹכֵר עֲלֵיהֶן עַד אַרְבַּעִים וְחֲמֵשִׁים זוּז בְּמָה דְבָרִים אָמוּרִים בְּזָמַן שְׂאִין שְׁם פּוֹעֲלִים לְשִׁכָּר אַבְל יֵשׁ שְׁם פּוֹעֲלִים לְשִׁכָּר וְאָמַר צָא וְשִׁכּוֹר מֵאֵלוֹ אִין לוֹ עֲלֵיהֶן אֵלָא תַרְעוּמַת</p>

(1 selah = 2 shekel = 4 dinnar/zuz)

2 – SUMMARIZING THE VARIOUS SCENARIOS OF BACKING-OUT

Scenario	Halacha
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1) Worker backs-out before the commencement of work, where other workers are available, albeit with some aggravation	Complaints (תרעומת) ¹
2) Worker shows up for work, but finds that none is available (where the employer was negligent for not informing)	“Lazy-day” payment ² (פועל בטל)
3) Worker backs-out half-way through the job, and the remaining labor costs more money	Sages – Worker gets paid the value of his work regardless R’ Dosa – Additional costs are deducted from the worker’s pay
4) Worker backs-out half-way through the job, and the employer will lose all the work that has already been done	<ol style="list-style-type: none"> 1. The workers do not get paid at all; or, 2. The remaining costs are deducted from their pay; or, 3. The employer can purposely deceive them to complete the work

3 – CLARIFYING THE OPINION OF THE SAGES

The opinion of the Rabbi’s seems difficult to understand: given that the remaining labor costs 6 *dinnar*, shouldn’t that come at the expense of the workers who backed-out of the deal?!? (*Again, we’re dealing with scenario’s in which a clause to back-out was not stipulated*)

The Gemara sheds light on their opinion:

Gemara Bava Metziah 77a – The worker has the upper-hand

¹ The concept of ‘complaints’ is a unique phenomenon in halacha, wherein one who’s been wronged is given the right to bear animosity in lieu of the fact that no other form of compensation is available to them. R’ Yisroel Salanter [עיין נתיבות אור מאת] explains that the Torah recognizes human nature and therefore grants them this emotional leeway.

² The Gemara [76b-77a] qualifies that this applies only when there was no foreseeable reason for them to believe that there would be no work available. If, however, there *was* good reason for them to believe that there would be no work available (for example, there was a torrential downpour the night before on the very field that they were scheduled to work), then they do not get paid at all, since it was their own ‘misfortune’ which is to blame [רש"י ד"ה פסידא דבעלים]

The Rabbis maintain that the worker has the upper-hand	קא סבֿרי רבֿנן יד פֿועל על העליונה
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What does it mean that the worker has the ‘upper-hand’? Can he do whatever he wants? Why should this be so??

Rashi explains:

<i>The worker has the upper-hand</i> – Even if he retracts, he’s entitled to do so, as it’s written in the verse [Vayikra 25:55] “ <i>For the children of Israel are unto Me as servants ...</i> ” – (which implies) they therefore cannot be servants to other servants (i.e. other employers). This is derived in the first chapter of Tractate Kiddushin [22b]	יד פֿועל על העליונה – ואפילו הוא חוזר בו דיכול לחזור בו דכתיב (ויקרא כה:נה) "פי לי בני ישראל עבדים עבדי הם" ולא עבדים לעבדים ומהכא יליף לה בפ"ק דקדושין כב:
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Rashi explains, based on an explicit Gemara in Maseches Kiddushin, that the worker has the ‘upper-hand’, and can therefore back-out at his discretion without incurring any penalty. This is based on a stated verse: Since a Jew is already a servant of G-d, he cannot make himself a ‘servant of a servant’ ...i.e. an employee!

An employer, hiring a Jewish worker, is responsible to be aware of this concept – i.e. that this Jew which he’s hiring is, so to speak, ‘previously employed’ (by G-d!), and is therefore entitled to return to his previous obligations at his leisure.³ Therefore, even if no such explicit arrangement was specified, this is nevertheless considered to be previously self-understood by both parties!

4 - CLARIFYING R’ DOSA

Having clarified the opinion of the Sages – that Torah itself says that a Jew is ‘previously employed’, and therefore has the upper-hand – the question now really turns to R’ Dosa: why indeed does a worker have the ‘lower-hand’; isn’t he a servant of G-d?!?

We can begin to answer this question by employing a classic Talmudic technique:

Something Really Jewish:

³ See end of section 5 below for an elaboration of this.

Answering a question...with a question!

Bava Metziah 77a – What’s the halacha: can a worker back-out or not?

<p>Rav said: the <i>halacha</i> follows R’ Dosa (i.e. that the worker cannot retract). Could Rav really have said this!? But wait, Rav said elsewhere that a worker is allowed to back-out in the middle of a job!!...(the answer is that) there is a difference between <i>schirus</i> and <i>kablanus</i></p>	<p style="text-align: right;">אמר רב הלכה כר' דוסא ומי אמר רב הכי והאמר רב פועל יכול לחזור בו אפילו בחצי היום...שאני ליה לר' דוסא בין שכירות לקבלנות</p>
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The Gemara resolves the contradiction between the ruling of Rav (which follows R’ Dosa – the workers are not allowed to retract in the middle of the job) and the other statement of Rav (that a worker may retract in the middle), by differentiating between a ‘קבלן’ and a ‘שכיר’: A *kablan* may retract in the middle, a *sachir* may not. What is the difference? Rashi explains:

Rashi, Bava Metziah 77a

<p><i>There’s a difference between שכירות and קבלנות</i>— In regard to a <i>sachir</i>, he (R’ Dosa) agrees to the reasoning of “<i>For the children of Israel are unto me as servants</i>”, and not servants to servants. However, a by-the-job-worker is only a servant to himself, and this is the type of worker that R’ Dosa was referring to, as was alluded “they agreed to cut down a stalk (of produce),” whereas Rav was referring to a <i>sachir</i></p>	<p style="text-align: right;">שאני ליה בין שכירות לקבלנות – דגבי שכירות איתא להאי טאמא דעבדי הם ולא עבדים לעבדים אבל בקבלנות אין זה עבד אלא לעצמו, ורבי דוסא בקבלנות מיירי כדקתני קיבלו קמה לקצר ודרך בשכיר יום</p>
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The difference between a *sachir* and a *kablan* is that a *kablan* gets paid **by the job**, whereas the *sachir* gets paid **by his time**. Since a *kablan* is a “slave to himself” – and not to his employer – his agreement to participate in a given job is less of a contradiction to his previous-standing ‘employment’ to G-d. Therefore, he’s obligated to stick to the deal, and is not entitled to back-out.

R’ Dosa agrees, however, in regards to a *sachir*, who, given the nature of his employment is more of a ‘servant’ to his employer, that this type of employment is more of a contradiction to his previous employment to G-d, and he’s therefore entitled to back-out at any point during the job.

In other words, according to all opinions the Torah conveys the concept of “*For the children of Israel are unto Me as servants*,” which gives a worker the upper-hand to back-out from his job mid-way. The Sages hold that this applies to every type of worker (both a *sachir* and a *kablan*), whereas R’ Dosa maintains that the verse applies only to a *sachir*, whose nature of employment is very demanding, but not a *kablan*.

5 – THE PRACTICAL HALACHA

The Shulchan Aruch rules according to R’ Dosa, with the clarification of Rav, differentiating between a *sachir* and a *kablam*

Shulchan Aruch, Choshen Mishpat 333:3-4

<p>3 – If A worker begins a job, and backs-out midway, he’s entitled to do so. And even if he’s already received his payments, and he’s currently incapable of paying back the extra funds to the employer, he’s nevertheless still entitled to back-</p>	<p style="text-align: right;">ג' – התחיל הפועל במלאכה וחזר בו בחצי היום חזר. ואפלו קבל כפר דמי השכירות ואין בידו לשלם לבעל הבית יכול לחזור בו והמעות חוב עליו</p>
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<p>out, and he will simply owe the money, as it says in the verse “<i>For the Children of Israel are unto Me as servants...</i>”</p> <p>4 – What does this mean practically? Once he’s backed-out, we evaluate the work which has already been completed, and he’s paid accordingly, (Regardless of whether the remaining costs of labor are more or less this does not apply. However, if the reason for his backing-out is so that he can receive higher wages elsewhere, we do not listen to him) If, however, the worker is a <i>kablan</i>, we evaluate the value of work yet to be done...</p>	<p>שְׁנֵאמַר "כִּי לִי בְנֵי יִשְׂרָאֵל עֲבָדִים" וְלֹא עֲבָדִים לְעֲבָדִים</p> <p>ד' – פִּיצוּד דִּין הַפּוֹעֵל שְׁחֹזֵר בּוֹ? אַחַר שֶׁהִתְחִיל שָׁמִין לוֹ מָה שֶׁעָשָׂה וְנוֹטֵל, (בֵּין הַקָּרָה הַמְּלָאכָה אוֹ הַזְּנוּלָה וְנִקְאָ שְׁחֹזֵר סָתָם אֲבָל אִם חֹזֵר מִפֶּה יָקָר אֵין שׁוֹמְעִין לוֹ. טוֹר בְּשֵׁם ר"י) וְאִם קִבְּלָן הוּא שָׁמִין לוֹ אֶת שְׁעֵתִיד לַעֲשׂוֹת</p>
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Paranthetically, an addiotnal qualification is brought here in the Shulchan Aruch: the worker is only allowed to back out (since he’s ‘previously employed’ to G-d) if he’s indeed returning to his previous responsibilities; if, however, the reason for his backing-out is simply for his own benefit (i.e. to make more money elsewhere) then he is not entitled to do so!⁴

Practical Questions:

1. Joe is the lead-singer of an up-and-coming Jewish Wedding band called “ZZ: Zeidy’s Zmiros”. The night before a particular gig, he gets a call from a wealthy acquaintance who tells him that he desperately needs a band, last minute, for a Bar Mitzvah the following evening, and promises to reward him quite handsomely for his acquiescence (\$\$!)...*is Joe allowed to back-out of his 1st-agreement?*
2. Having arrived in Israel, you hail-down a taxi at the Ben-Gurion Airport to drive you to Jerusalem. Half-way there, the driver says “ehhh, listen, chabibi, I’m going to stop off here for some schwarma...you can get another cab the rest of the way.” *Do you have to pay him for the 1st-half of the trip?? What if the 2nd-cab is more expensive?*

⁴ ז"ל הב"ה [ד"ה ומ"ש בשם ר"י] בהסבר שיטת ר"י המובא בשו"ע: נראה דטעמו דכיון דשכיר יום לא מצי חוזר אלא משום דכתיב עבדי הם ולא עבדים לעבדים א"כ בחוזר סתם דתלינן שאינו הפץ לעבוד יותר אבל אם חוזר בו מחמת היוקר א"כ גלי דעתיה דניחא ליה בעבודות אם ישלם לו בעה"ה כפי היוקר ואין שומעין לו והכי מסתברא ע"כ

3. Your budding Kosher Chocolate-Moose company has recently hired a full-time graphic-designer, on a 1-year, 5d/w, 9-5, salary. Midway through the year, the employee informs you that he's decided to quit his job and go study in a Yeshiva in Israel. At this point in the game, filling his position will cost quite a bit more money: *can this be deducted from the outstanding pay-checks which have not yet been given to the employee?*
4. It was the night before Pesach, and the line at Burger Boys was out the door. One of the employee's, Mordechai, gets in to an argument with another co-worker about who burned the jumbo-burgers, and storms off the job in fury. As a result, many of the customers go home burger-less. *Was this allowed? What action(s) can the owner of Burger Boys take against Mordechai?*
5. You've hired Daniel to install the kitchen in your newly-renovated house, for \$2000. Half-way through the installation, Dan walks off the job, having been offered a much more lucrative opportunity at a much fancier kitchen...and he still has the chutzpah to demand \$1000! *Do you have to pay him? What if he was being paid by the hour?*
6. Shalom is an ambitious young-man who's decided to go work on a Kibbutz in northern-Israel for 2-weeks, during his summer vacation. When he arrives, he discovers that due to a severe drought in the country, most of the fruits have dried-out and there's simply no work to be done on the Kibbutz. His flight home is in 2 weeks, and he's now stuck tiddling his fingers: *is Shalom entitled to any payment? How much?*