

CONTRACTORS AND EMPLOYEES – WHAT’S THE DIFFERENCE?

Before you enter into a work agreement or contract with a worker, you need to check whether the arrangement is one of employment or contracting.

Unless it's exactly the same working arrangement, including the specific terms and conditions under which the work is performed, there could be a different outcome in relation to whether the worker is an employee or contractor. Minor variations in working arrangements can result in different outcomes.

You should ***check every time you engage a new worker***, unless the working arrangement is identical to that of another worker which you've already checked.

It's important to check whether your workers are employees or contractors, as your tax, super and other government obligations are different depending on whether the working arrangement is employment or contracting.

If you get it wrong and fail to meet your obligations, ***you risk having to pay penalties and charges***.

It is recommended that a process be utilised when a worker is being considered to be engaged as a contractor.

Your business will need to keep records to support your decision on whether your worker is a **contractor** and the factors you relied on.

The following websites of Fair Work Australia and the Australian Taxation Office (ATO) provide guidance to ensure that workers are engaged correctly.

<https://www.fairwork.gov.au/find-help-for/independent-contractors>

<https://www.ato.gov.au/calculators-and-tools/employee-or-contractor/>

Some useful information from the ATO link above:

Employees work in your business and are part of your business. Contractors are running their own business.

To correctly determine whether a worker is an employee or contractor, you need to look at the whole working arrangement. A worker isn't automatically a contractor just because they have an ABN or specialist skills or you only need them during busy periods. Our Employee/contractor decision tool makes it easy to get the right answer.

We strongly recommend that you use the ATO Online Decision Tool which can be accessed via the link above. If you still are unsure whether the worker is an employee or a contractor then you should obtain specialist advice or engage the worker as an employee (this should be the default position).

There is no single factor that will be conclusive in determining whether the worker is an employee or contractor.

Again, if you have done the tests and are unsure then engage the worker as an employee. Do not be persuaded by the worker to engage them as a contractor if you are unsure – the risks are too great for your business.

Some useful information from the Fair Work Australia link above:

There are some common indicators that may contribute to determining whether a person is an employee or independent contractor:

Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	Has a high level of control in how the work is done.
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week).	Under agreement, decides what hours to work to complete the specific task.
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	Usually engaged for a specific task.
Risk	Bears no financial risk (this is the responsibility of their employer).	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.
Superannuation	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation contributions).
Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Uses their own tools and equipment (note: alternative arrangements may be made within a contract for services).
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Method of payment	Paid regularly (for example, weekly/fortnightly/monthly).	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.
Leave	Entitled to receive paid leave (for example, annual leave, personal/carers' leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees.	Does not receive paid leave.

Sham contracting arrangements:

A sham contracting arrangement occurs where an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done for the purposes of avoiding responsibility for employee entitlements.

Under the sham contracting provisions of the Fair Work Act 2009, an employer cannot:

- misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor
- make a knowingly false statement to persuade or influence an employee to become an independent contractor.

The Fair Work Act 2009 provides serious penalties for contraventions of these provisions. Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel their rights have been contravened.