

7.2 Contractors

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> *Employee or independent contractor?*

> *Factors to consider*

Employee or independent contractor?

It is not uncommon for some employers to engage staff as independent contractors rather than employees because it can save payroll tax and other statutory costs which apply to employees but not to independent contractors. However, whether a person is an employee or an independent contractor depends on a range of factors, not simply a handshake agreement.

Industrial and civil courts can go behind any written document purporting to set up an independent contractor agreement to ascertain the real facts.

Operating on the basis that an employee is an independent contractor, when in fact the law considers them to be an employee, can expose you to expensive litigation where the status of a person's employment is challenged, and lead to significant penalties under taxation, industrial relations and occupational health, safety and welfare legislation.

Factors to consider

The table on the next page highlights the differences between employment and contracting relationships. Other matters which should be addressed include

- > Is there a written contract/agreement?
- > Are the terms of the agreement supported by the facts?
- > Does the contract require work to be performed by a specified person?
- > Who is responsible for scheduling the work?
- > Is the relationship a continuing one or does it exist to procure a specific result?
- > What is the basis for calculating payment for the work performed?
- > Are invoices required to be submitted by the person performing the work?
- > What provisions relate to termination of the contract or agreement between the parties?
- > What remedy is available if the person performing the services fails to carry out the work in a satisfactory manner?
- > Is the person performing the work, in his/her activities, part and parcel of the employer's business or merely an accessory to it?

- > Is Workers Compensation insurance provided by the independent contractor?
- > Does the person performing the work have the right to refuse the performance of a particular task or job?
- > Has the person performing the work the opportunity to profit from sound management in the performance of work?
- > If it is determined by using the criteria referred to above, that the person is an independent contractor, it is advisable to have that arrangement in a written contract/agreement. That agreement should incorporate at least the following matters:
 - The independent contractor will supply the necessary equipment, tools and materials, where appropriate, to enable performance of the work in accordance with a work program jointly agreed between the parties to the agreement.
 - The company will pay the independent contractor the amount agreed for the work performed by the independent contractor, and payment will be made upon completion of the work or by appropriate progress payments as the case may be, on presentation of an invoice. The independent contractor will be responsible for payment of all government taxes.
 - The independent contractor is to start and complete the work at times agreed.
 - The independent contractor is independently to take out any insurance cover (including WorkCover, sickness, health or disability insurance, public liability and professional indemnity insurance) necessary in respect of himself or herself and his or her employees.
 - The independent contractor is to keep books, receipts, and records where expenditure is outlaid for the work to be performed. Evidence must be produced to the company before the independent contractor is reimbursed for such expenditure.

This information is general, and if you are proposing to enter into a subcontracting arrangement, you should check with your accountant or lawyer.

Websites

Independent Contractors Association
(www.contractworld.com.au)

Office of the Employment Advocate (www.oea.gov.au)

Key question	Employee	Independent contractor
<i>How is the work performed?</i>	An employee is normally engaged to do work on a continuing basis and at the direction of the employer.	The contract or agreement will require the performance of the work or specific jobs.
<i>Where is the work performed?</i>	The work is normally performed at one of the places of business of the company or wherever the company otherwise directs.	The work is normally performed at a place identified in the contract or agreement or as otherwise agreed by the parties.
<i>Who provides the plant, equipment and material?</i>	Plant and equipment is normally provided by the employer, although an employee may provide certain hand tools. An employer usually provides materials necessary for the performance of work by the employee. It would not be usual for an employee to incur significant expenditure on materials, plant or equipment without reimbursement by the employer.	The contract or agreement will specify who is required to provide the plant and equipment but it is usual for the independent contractor to supply the necessary equipment to enable him/her to carry out the work. The contract may be for the supply of labour only or both labour and materials.
<i>Who provides the floor space, power, telephone etc?</i>	These are not normally provided by the employee. An employee may in some circumstances, provide a telephone facility for contact after normal working hours, but in this case, the employer may reimburse some or all of the costs.	The contractor is responsible, in most cases, for the supply of floor space, the cost of power and telephone services and other like matters.
<i>Who is responsible for exercising control over the manner in which the work is to be performed?</i>	An employer will normally direct, or have a right to direct, the manner in which the work is to be performed; and the employee is obliged to obey the reasonable directions of the employer.	An independent contractor normally has freedom in the way the work is performed subject to the requirements in the contract agreement or specifications.
<i>Does the contract or agreement relate to a specified period within which a job is to be performed or is it of continuing duration?</i>	Work is normally performed on a continuous basis unless a fixed term contract is agreed upon, or if the employment is sporadic. It is to be done at times convenient to the employer.	The contract or agreement would specify the work to be performed and the time within which it is to be completed.
<i>What is the arrangement with respect to leave of absence from work?</i>	This is normally at the discretion of the employer but will be subject also to the employee's entitlement under an award, statute, or enterprise agreement.	Leave of absence does not apply to independent contractors.
<i>Are there any payment entitlements over and above those relating to the work performed?</i>	An employee may be entitled to payment for leave and holidays as prescribed by provisions of the relevant award, statute or by an enterprise agreement or contract of service, if one exists. Superannuation payments may apply.	An independent contractor is not entitled to payment for leave or holidays.
<i>Who has the responsibility for losses occasioned by poor workmanship or negligence?</i>	These are the responsibility of employer. The employee may be disciplined for poor workmanship or negligence at the discretion of the employer because the employee has a fundamental obligation to exercise due skill and care.	An independent contractor is responsible and has to bear any financial loss for poor workmanship or negligence. He/she is responsible for the reasonable performance of the work specified in the agreement.