



Employee or Contractor - Do you know the difference?

It's important for all businesses to have systems in place to determine whether workers should be classified as employees or independent contractors, as tax, super and other government obligations are different depending on whether the working arrangement is employment or contracting.

Employees generally have PAYG withholding, super and fringe benefits tax paid by the employer. Contractors generally look after their own tax obligations.

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

What factors do you need to consider?

There are a number of factors which need to be taken into account which help determine whether a worker could be classed as an employee or an independent contractor.

It is important to realise that no single factor can determine if a person is an independent contractor or an employee. 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.

Courts will look at the whole relationship between the parties when determining the status of a person's employment.

The Fair Work Ombudsman has produced a table of 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, decided 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

A simple way to help tell the difference

The Australian Taxation Office on its website uses the following simple descriptions:

- **Employees** work in your business and are part of your business.
- **Contractors** run their own business and provided services to your business.

Why is the distinction important?

Employment relationships are regulated by specific labour protection laws and various awards and workplace agreements. These laws generally provide a higher degree of protection to employees than the general commercial laws that regulate contractor relationships.

This protection includes minimum conditions and standards of employment for employees including minimum entitlements for leave, public holidays, notice of termination and redundancy pay.



Adopt good business processes

Business owners need to keep records to support any decision on whether a worker is an employee or contractor, and the factors relied on to make that decision.

Most of the information needed to support the decision can be found in a service contract for independent contractors or an employment contract for employees, which should accurately reflect the actual conditions of the working arrangement.

All contracts should:

- be in writing;
- specify whether it is a contract for services or an employment contract;
- set out the period of engagement and the remuneration;
- include dispute resolution provisions;
- specify if/how the relationship can be terminated.

Penalties

It is illegal for an employer to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement or make a knowingly false statement to persuade or influence an employee to become an independent contractor. These are known as 'Sham Contracts'.

Under the Fair Work Act, inspectors can:

- Seek the imposition of penalties for contraventions of sham contracting arrangements.
- Apply to the courts to grant an injunction or an interim injunction if an employer seeks (or threatens) to dismiss an employee for the purpose of engaging them as an independent contractor. The purpose of the injunction would be to prevent the dismissal from occurring, or otherwise remedy the effects. Courts can also make other orders to have the employee reinstated or compensated.

If you need more information or if you need assistance or advice on how to proceed please contact [Ken Gray](#), our experienced Lawyer in this field, on (02) 4731 5899 or email kengray@batemanbattersby.com.au.