

'Employee' or 'Independent Contractor'

OVERVIEW

The legal rights and obligations of a worker depend on whether they are characterised as an 'employee' or an 'independent contractor'.

The distinction between an 'employee' and an 'independent contractor' can be complex and sometimes blurred.

A worker may legally be an employee even though they are described as an independent contractor. The test applied by courts in determining the issue is not always straightforward.

The way in which the working relationship is characterised is important in determining whether a worker is protected by Australia's employment laws such as minimum employment conditions and unfair dismissals protections.

This is particularly so given that independent contractors are not entitled to the protection of unfair dismissal laws, so businesses have greater freedom to terminate the independent contractor engagement.

WHAT FACTORS DETERMINE WHETHER A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR?

There is no one decisive factor to determine whether a working relationship is one of employment or one of independent contractor. However, there are some common factors that the courts and tribunals consider in determining whether a worker is an employee or independent contractor:

FACTOR	EMPLOYEE	INDEPENDENT CONTRACTOR
Amount of control and right to exercise control	Performs work on an ongoing basis under the direction and control of their employer.	Has a high level of control in how the work is performed and completed.
Power to delegate	Cannot delegate to non-employees although may be able to delegate some duties to fellow employees.	Unlimited power to delegate.
Hours of work	Hours of work set by employer.	Some level of flexibility to decide what hours to work to complete the specific task (which could be stipulated in the contract for services).
Who they work for	Usually work for one entity i.e. employer.	Able to advertise their services to the public at large and to work for more than one entity.
Expectation of work	Typically has an ongoing expectation of work (NB: some employees may be subject to a specific task or specific period contract).	Usually engaged for a specific task.
Risk	Generally, has no direct financial risk (the employer bears the financial risks).	Bears the risk of reconciling profits or losses upon completion of a contract or project. Usually assumes responsibility and liability for poor work or injury sustained while performing the task.
Superannuation	Entitled to have superannuation contributions paid by their employer, into a nominated superannuation fund.	Responsible for their own superannuation contributions (NB: in some circumstances independent contractors may be entitled to be paid superannuation contributions).

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Supply and maintenance of any tools or equipment	The employer generally provides tools and equipment, or a tool allowance may be payable.	Responsible to supply and maintain their own tools and equipment (NB: alternative arrangements may be made within a contract for services).
Taxation	The employer deducts income tax on behalf of the employee.	Accounts for their own tax and GST to the Australian Taxation Office.
How the worker is paid	Paid regularly (for example, weekly/fortnightly/monthly).	Has obtained an ABN and remits invoices upon completion of a contract or project.
Workers' compensation	Entitled to workers' compensation in the case of accident or injury at the workplace.	Not entitled to workers' compensation unless they have arranged their own accident protection insurance. Some contractors may be covered by WorkCover.
Occupational Safety and Health (OSH)	Entitled to a safe and healthy workplace under OSH laws and must comply with duties set out in the <i>Occupational Safety and Health Act 1984 (WA)</i> .	Entitled to a safe and healthy workplace under OSH laws and must comply with duties set out in the <i>Occupational Safety and Health Act 1984 (WA)</i> .
Leave	Permanent employees are entitled to receive paid accrued leave including annual leave, personal/carer's leave, and long service leave. Casual employees receive a loading in lieu of leave entitlements.	Not entitled to receive paid leave.

WHAT ARE THE RISKS OF INCORRECTLY CHARACTERISING AN EMPLOYMENT RELATIONSHIP?

An employment relationship that is incorrectly characterised as an independent contractor relationship gives rise to a number of risks to the 'employer' including:

- The imposition of penalties for failing to comply with superannuation and income tax obligations;
- Claims for wages, superannuation and other entitlements that the worker would have received if they had been treated as an employee; and
- Penalties for breaching relevant provisions of the *Fair Work Act 2009* (Cth) and any applicable awards or enterprise agreements.

FURTHER INFORMATION

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