

Practical guide... employee or contractor

When engaging a new worker, you should check if they're an employee or contractor / sub-contractor before entering into any agreement or contract as there are different tax and super obligations.

If you've previously engaged a worker without checking whether the arrangement is employment or contracting, it would be a good idea to review your earlier decision now to make sure you got it right.

How to determine if workers are employees or contractors

Employees work in your business and are part of your business. Contractors run their own business and provide services to your business. An employee works for a salary or wage whereas an independent contractor is usually paid on the completion of the task.

The key aspect of the employment relationship is the control exercised by you over the work of your employee and how that work is to be carried out. An independent contractor (subcontractor) undertakes to produce a given result but does not, in the actual execution of the work, come under your control.

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, specialist skills or you only need them during busy periods.

Checklist: employee or contractor

If the answer is 'yes' to any of the questions, the arrangement is most likely an employment relationship and not a contracting / subcontracting one.

	Yes	No
√ Do you have the ultimate right of control to direct how the work is to be done?		
√ Does the worker use tools or equipment owned by you or your company?		
√ Does the company supply all the materials used on the job?		
√ Are hours of work set and with minimal flexibility within set guidelines/ limitations?		
√ Does the worker only take leave or re-arrange his/her hours of work when he/she has your permission?		
√ Is the remuneration paid weekly or fortnightly rather than on the completion of the job?		
√ Are payments for overtime, public holidays, sick leave etc part of the arrangements?		
√ Does the company assume it can terminate the contract for reasons which employment contracts can be terminated?		
√ Is the worker forbidden to engage his/her own employees to do work he/she is performing for you?		
√ Does the worker need your consent in order to reassign work to another?		
√ Does the worker receive annual leave pay?		
√ Does your company pay workers compensation on behalf of the worker? (Note this is sometimes done as a precautionary step and principals negotiate a particular premium for independent contractors with insurers, but if there is no such special insurance in place then this indicator is indicative of an employment relationship.)		
√ Do you or your company make any deductions from, the worker's pay for tax and Medicare levy purposes?		
√ Do you pay the worker regularly without submission of an invoice or statement?		
√ Do you provide transport to and from work for the employee or do you provide an allowance to cover this?		
√ Do you provide superannuation guarantee payments for the worker? (Note that this is not a definitive indicator).		



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Records you need to keep

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

Much of the information you need to support your decision can usually be found in a written contract or agreement (if you have one). It's important the contract or agreement reflects the actual conditions of the working arrangement.

Records must be kept for five years, in English (or in a format that can be easily accessed and converted into English) and can be electronic or paper or a combination.

Your obligations

Your tax, super and other government obligations will vary depending on whether your worker is an employee or contractor.

For employees, you will generally have obligations for PAYG withholding, super and fringe benefits tax (if you provide fringe benefits).

Contractors generally look after their own tax obligations but you will have super obligations if you pay the contractor wholly or principally for their labour.

You may also have other federal, state and territory government obligations including workplace health and safety requirements, payroll tax and/or wages, conditions, awards and leave entitlements.

What happens if employees are incorrectly treated as contractors?

It's a 'sham' contract when an employee is incorrectly treated as a contractor and is against the law.

You might gain a short-term advantage in reduced wage costs; however you potentially face penalties and charges including PAYG withholding penalty and a super guarantee charge (for not meeting super obligations & IS NOT DEDUCTIBLE) and is comprised of super guarantee shortfall amounts (amount of super contributions payable into a complying fund) plus interest plus an administration fee.

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