

INDEPENDENT CONTRACTOR V EMPLOYEE CHECKLIST

This checklist will help you determine whether someone you have engaged to perform work is a genuine independent contractor or whether they are really an employee.

The legal test as to whether someone is a contractor or an employee is not straightforward. The important point to bear in mind is that it does not really matter whether you have agreed with the worker that they are an independent contractor, or that they are providing you with an invoice with an ABN. If they do not meet the legal test of who is a genuine independent contractor, they will be an employee – whether you like it or not!

The Fair Work Act 2009 contains an offence of “sham contracting” which means that if a company wrongly classifies someone as an independent contractor (when they should have been classified as an employee), the business could be subject to heavy fines. In addition, the worker may be able to make a claim for backdated entitlements such as paid leave. Both the Government and the Opposition indicated in the 2019/2020 federal budget that targeting sham contracting would be a major focus going forward.

Another point to remember is that even where you have engaged a genuine independent contractor **there is an obligation to pay their superannuation in some circumstances** (discussed further on page 3).

The legal test for whether someone is an employee or contractor looks at the working arrangements **as a whole**. We have compiled a checklist of factors that point to an employment relationship v independent contractor relationship below.

Working Arrangements	Employee <input checked="" type="checkbox"/>	Independent Contractor <input checked="" type="checkbox"/>
How much control do you have over the worker?	Company has lots of control over how the work is done, for example sets worker's hours <input type="checkbox"/>	Worker has lots of control over how the work is done, for example they choose their hours <input type="checkbox"/>
Is there an expectation of ongoing work?	Yes – no fixed end date <input type="checkbox"/>	No – engaged for a particular project <input type="checkbox"/>
Does the worker bear any financial risk if something goes wrong?	No – if the worker made a mistake and had to put something right they would still get paid for their time <input type="checkbox"/>	Yes - if the worker made a mistake and had to put something right they would have to do it in their own time (and not get paid extra for doing so). <input type="checkbox"/>
Does the worker provide their own tools and equipment?	No – this is all provided for by the company (or the worker is paid a tool allowance) <input type="checkbox"/>	Yes – the worker provides tools and equipment at their own cost <input type="checkbox"/>
Does the worker perform work for other businesses? Do they advertise their services to others?	No <input type="checkbox"/>	Yes <input type="checkbox"/>
Is the worker integrated into your business – for example do they have a company uniform, email address or business card?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Can the worker delegate performance of their work to others?	No <input type="checkbox"/>	Yes - if they cannot perform the work they are able to contract with someone else to do it at their own expense <input type="checkbox"/>
Do you provide the worker with paid leave?	Yes	No
How is the worker paid and taxed?	Paid regularly (weekly/ monthly), company deducts payroll tax <input type="checkbox"/>	Paid when they issue an invoice under their ABN, worker charges GST <input type="checkbox"/>
How is the worker's pay calculated?	They are paid based on the time they spend doing the work (eg an hourly rate or a salary based on a set amount of hours per week) <input type="checkbox"/>	They are paid to achieve a particular result. They get paid the same regardless of how long the project takes <input type="checkbox"/>

Have you selected any factors which point to an employment relationship for your contractors? If so we recommend that you seek advice from **Employment Innovations**. We can give you guidance about how to arrange matters to give you the best chance of arguing the workers are contractors, or can help you transition the contractors to an employment relationship.

Contractors and Superannuation

Businesses are liable to pay superannuation to contractors in certain circumstances, this includes where the contractor is engaged 'wholly or principally for labour'. This generally means:

- they are paid mainly for their personal labour and skills (rather than to provide materials or equipment);
- they are required to perform the work personally (rather than being able to delegate the work to others, such as their own employees or sub-contractors);
- they are paid for hours worked, rather than to achieve a result.

Contractors are also generally entitled to superannuation when they are contracted to perform or provide services in relation to music, plays, films, TV, radio, dancing, entertainment, sport or promotional activities.

Need advice in this area? Contact Employment Innovations today.

Independent Contractor Agreements

If you are engaging independent contractors it is highly advisable to have a written independent contractor agreement in place. This can set out details about the standard of work the contractor is required to perform, how their fees are calculated, how the agreement can be terminated and any restrictions placed on the contractor regarding competing with the business or contacting the customers of the business. If you would like your current contractor agreement reviewed or need a new contractor agreement, please get in touch with **Employment Innovations**.

Disclaimer

The information provided in this checklist is general in nature and is not intended to be a substitute for professional advice. If you are unsure about how this information applies to your specific situation we recommend you contact **Employment Innovations** for advice.

ABOUT EMPLOYMENT INNOVATIONS

Employment Innovations provides workplace advice and documents, outsourced payroll software and processing, HR software and migration / visa services. We can also provide you with a dedicated HR Partner to work within your business to help with all your HR needs. Should you need the services of an employment lawyer, our partner firm EI Legal offers employment law advice and representation.