Employee V Contractor
Fact Sheet

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It is important to understand the differences between an employee and contractor so that you fulfill your tax, super and legal obligations.

You are responsible for classifying your worker for tax and super purposes and you need to get it right. If you make an incorrect decision, you may face penalties.

What is an employee?

Employees work in and are part of your business, and performs their work as a representative of your business.

The following workers are **always** treated as employees:

- Apprentices
- Trainees
- Labourers
- Trades assistants

Apprentices and trainees do both work and recognised training to get a qualification, certificate or diploma. They can be full-time, part-time or school-based and usually have a formal training agreement with the business they work for. This is registered through a state or territory training authority or completed under a relevant law.

In most cases they are paid under an award and receive specific pay and conditions. You must meet the same tax and super obligations as you do for any other employees.

If your worker is an employee you'll need to:

- Withhold tax (PAYG withholding) from their wages and report and pay the withheld amounts to us
- Pay super, at least quarterly, for eligible employees
- Report and pay fringe benefits tax (FBT) if you provide your employee with fringe benefits.

Note: If you hired your worker through a labour hire firm and pay that firm for the work undertaken by the worker in your business, your business has a contract with the labour hire firm and not the worker.

What is a contractor?

Independent contractors provide services to your business and performs work to further their own business.

If you are engaging a worker who you believe is an independent contractor, you can choose to pay them super to ensure you're not liable for the superannuation guarantee charge (SGC). You will need to pay any super contributions directly to their chosen superannuation fund and should include this in your contract with the worker.

In certain circumstances, you must pay superannuation for independent contractors who are deemed to be employees for superannuation purposes.

These circumstances include if the worker:

- Works under a contract that is wholly or principally for their labour
- Performs work that is wholly or principally of a domestic nature for more than 30 hours per week
- Is a sportsperson, artist or entertainer paid to perform, present or participate in any music, play, dance, entertainment, sport, display or promotional activity, or similar activity
- Is a person paid to provide services in connection with any performance, presentation or participation in these activities
- Is a person paid to perform services related to the making of a film, tape, disc, television or radio broadcast.

If your worker is an independent contractor:

- They generally look after their own tax obligations, so you don't have to withhold from payments to them unless they don't quote their ABN to you, or you have a voluntary agreement with them to withhold tax from their payments
- You may still have to pay super for independent contractors if the contract is principally for their labour
- You don't have FBT obligations.

Note: Companies, trusts and partnerships are always contractors.

How do you know which to use?

To work out if your worker is an employee or independent contractor, you need to determine whether your worker is serving in your business. You do this by reviewing the legal rights and obligations in the contract you entered into with your worker.

It is crucial that you accurately characterise the nature of the business that you carry out. You should examine the essential activities of the business that you operate and compare them with the legal rights and obligations contained in the contract you entered into with the worker.

Although the old multifactorial test is no longer used, the same indicia are still relevant in considering whether the worker is working in your business, taking into account only the legal rights and obligations (that is, the terms of the contract) agreed to between you and your worker.

Employee or independent contractor traits

The following table outlines each indicium and some features that may point towards or against a finding of employment. No single indicium is determinative and they should not be applied as if they are a checklist. Analysis of the indicia must be done by reference only to the legal rights and obligations that arise from the contract you enter into with your worker. Conduct and work practices are not relevant, unless they are, among other things, sufficient to vary the contractual terms agreed to.

Table: Employee and independent contractor indicium and traits

Employee	Independent contractor
Control: your business has the legal right to control how, where and when the worker does their work.	Control: the worker can choose how, where and when their work is done, subject to reasonable direction by you.
Integration: the worker serves in your business. They are contractually required to perform work as a representative of your business.	Integration: the worker provides services to your business. The worker performs work to further their own business.
Mode of remuneration: the worker is paid either: • For the time worked • A price per item or activity • A commission	Mode of remuneration: the worker is generally contracted to achieve a specific result, and is paid when they have completed that result, often for a fixed fee.
Ability to subcontract or delegate: there is no clause in the contract allowing the worker to delegate or subcontract their work to others. The worker must perform the work themselves and cannot pay someone else to do the work for them.	Ability to subcontract or delegate: there is a clause in the contract allowing the worker the right to delegate or subcontract their work to others. The clause must not be a sham and must be legally capable of exercise.
Provision of tools and equipment: your business provides all or most of the equipment, tools and other assets required to complete the work; orthe worker provides all or most of the tools, but your business provides them with an allowance or reimburses them for expenses incurred.	Provision of tools and equipment: the worker provides all or most of the equipment, tools and other assets required to complete the work, and you do not give them an allowance or reimbursement for the expenses incurred. The work involves the use of a substantial item that your worker is wholly responsible for.

Risk: the worker bears little or no risk. Your business bears the commercial risk for any costs arising out of injury or defect in their work. Risk: the worker bears little or no risk. Your business bears the commercial risk for any costs arising out of injury or defect in their work.	Risk: the worker bears the commercial risk for any costs arising out of injury or defect in their work.
Generation of goodwill: your business benefits from any good will arising from the work of the worker.	Generation of goodwill: the worker's business benefits from any goodwill generated from their work, not your business.
Leave Generally entitled to sick leave, annual leave, long service leave and other benefits and allowances	Leave A contract will usually not contain any leave provisions for a contractor
Expenses Any work-related expenses paid by the employee are generally reimbursed or they may receive an allowance	Expenses Incurs their own costs in relation to performing their service
Appointment Generally recruited through an advertisement by the employer or a recruitment agency	Appointment Contractor will usually advertise their services to the public
Termination An employer can dismiss an employee at any time (subject to the State and Federal laws)	Termination Contractor arrangement will end on completion of the task in the contract. The payer may be able to terminate the contract if the contractor has not completed the task under the conditions of the contract.

Consequences of employees treated as independent contractors

It's against the law for a business to incorrectly treat their employees as independent contractors. Businesses that do this are illegally lowering their labour costs by:

- not meeting their tax and super obligations
- denying workers their employee entitlements.

Businesses that behave this way can often undercut their competitors and obtain an unfair competitive advantage.

Myths vs facts

Here are some myths to consider about contractors:

- if a worker has an ABN or business name they are a contractor
- employees can't be used for short jobs or to get extra work done during busy periods
- if a worker is an independent contractor for one job, they will be an independent contractor for all jobs
- my business should only take on independent contractors so we don't have to worry about super
- if a worker submits an invoice for their work, they're an independent contractor

See the full list of myths here:

Australian Government
Australian Taxation Office

Industry examples

You can find examples of employees vs contractors in the building and construction, cleaning, painting, IT and transport industries here.

Written contracts

If you have determined that the worker is a contractor you will need to prepare a written agreement for contractors.

Things to cover off in the contract:

- Contractor has been engaged to produce a result
- Payments made to a contractor should be based on the successful performance of the tasks
- The work can be delegated by the contractor (where they see fit)

Check contractor details before engaging

Confirm the ABN provided by the contractor is valid by using the ABN lookup government website http://abr.business.gov.au/

- If the ABN is not quoted by the contractor or it is an invalid ABN – you are required to withhold 49% of payment and report and pay this amount to the ATO
- It is your responsibility to ensure all contractors provide a valid ABN, as penalties for failing to withhold and all reporting obligations are imposed on the purchaser and not the contractor

IMPORTANT NOTE: The ATO is continually updating this area so please refer to the ATO website for most recent information at all times.

Thank You

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