

Workplace Relations Checklist

Employees and independent contractors – a spotter's guide

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Are you considering engaging an independent contractor? Have you considered whether they should instead be engaged as an employee? Are you aware of the risks of getting it wrong?

We frequently see cases where an individual argues that they were wrongly engaged as an independent contractor. The Fair Work Ombudsman has also prosecuted a number of businesses on this basis. With penalties of up to \$54,000 for a company and up to \$10,800 for an individual, there is a strong incentive to get it right.

Initially, you should consider whether there is a benefit to your business in engaging a person as a contractor rather than an employee. In our experience, this is often a decision made without a great deal of thought. In some cases, a person is engaged as a contractor because it is believed to be industry practice or more tax effective. In other cases, a contractor is engaged so as to avoid the complexity of dealing with employment laws.

However, a contractor arrangement is not always as cheap or easy as it seems. Depending on the nature of the arrangement, you may have an obligation to make superannuation contributions on behalf of your contractor. They may also be covered by your workers' compensation insurance.

If you are satisfied that there is a genuine benefit to engaging a person as an independent contractor, you need to consider the following questions when engaging a contractor, or reviewing an existing contractor arrangement:

- Is the person genuinely independent from your business, providing their services to other businesses?
- Is the person paid based on the completion of a task or a project, or on sales or units of work?
- Does the person stand to make a loss if the task or project is not completed, or if the sales are not made, or if the work is unsatisfactory?
- Will the person look like an independent business to an outsider?
- Are you comfortable with having a relatively low level of control over the way the services are provided?
- Are you comfortable with the person delegating the work to someone else?

If the answer to all of these questions is "yes", then it may be appropriate for you to engage a person as an independent contractor. However, you should obtain legal advice regarding the best way to structure the relationship, and use a contract which clearly reflects the relationship.

If the answer to any of these questions is "no," then engaging the person as an independent contractor could present a significant risk to your business. A court may consider the person to be an employee. You should seek legal advice regarding the way forward.

Please contact the [Russell Kennedy Workplace Relations, Employment and Safety team](#) if you would like advice about independent contractor arrangements, or if you would like help with drafting a contract.