



Contractor vs Employee

Contractor or Employee?

One of the most important issues that both principals and providers of services in the building and construction industry need to establish is whether they are setting up an employer-employee relationship or a principal-contractor relationship. The distinction is vital because the legal rights and obligations of those who engage subcontractors are significantly different from those applying to people or firms that employ staff.

To take one example, employers are required to provide benefits such as annual leave, personal leave, parental leave and long service leave to their employees, but principals are not required to provide these benefits to independent contractors.

Recent decisions made by the High Court have held that, under the 'common law test', in most cases, the question of whether a relationship is one of employment should be answered solely by reference to the terms of the contract. However, amendments to the Fair Work Act 2009 (Cth) which took effect from 26 August 2024 nevertheless require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor.

These amendments revive the 'multi-factorial test' previously applied by courts and tribunals in characterising a relationship as one of employment or as principal and contractor.

There is no exhaustive list of factors that will be relevant to a 'multi-factorial' assessment. However, the following questions should assist businesses to understand whether or not a worker is either a Contractor or an Employee.

If the answer to most of the questions in the list below is Yes, it is highly probable the person is an independent contractor and should be engaged as a subcontractor. If the answer to most of the questions is No, the person is very probably an employee and should be engaged as an employee.

QUESTION	YES / NO
1	The person is being engaged to achieve an end result. When the job is done they will leave.
2	The person is paid for doing the job rather than by the hour.
3	The person can decide how to perform the work so long as the job gets done.
4	There is no obligation to accept work and the person can reject work if they so wish.
5	The person can determine when they do the work so long as the job gets done.
6	The person is responsible for any mistakes made and must fix them at their own expense.
7	The person can delegate some or all of the work to another person so long as the job gets done.
8	The person can employ others to perform the work or some of the work.
9	The person provides their own tools and machinery and is responsible for their upkeep, fuel etc.
10	The person is paid based on invoices not wages.
11	The hirer does not pay holiday pay, sick pay or other entitlements.
12	The person pays their own tax.
13	The person has an ABN.
14	The person pays for their own accident and public liability insurance.
15	The person works for other people as well.
16	The person says they are an independent contractor and advertises this fact.



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Opt out notices

Individual workers may, if they choose, 'opt out' of the application of the statutory 'multi-factorial test' and have the old 'common law test' cover them instead. If you consider that an individual may be an 'Employee' for the purposes of the 'multi-factorial test', the Fair Work Act 2009 (Cth) allows you to give that individual, a written notice stating that the worker may give you an 'opt out notice'.

Workers may only be provided with such written notice if their earnings for work performed under the relationship exceed the contractor high income threshold (currently \$175,000).

An individual may give you an 'opt out notice':

- If you notified the individual that they could provide an 'opt out notice' – within 21 days of the giving of such notice;
- If you did not notify the individual that they could provide an 'opt out notice' – at any time from 26 August 2024.

An individual may only give one opt out notice in respect of the relationship.

The opt out notice must state that the individual considers that their earnings for work performed under the relationship exceed the contractor high income threshold when the opt out notice is given.

Any individual may revoke an 'opt out notice' at any time before or after its application. A 'revocation notice' will have the effect of applying the 'multi-factor test' to the relationship. Only one 'revocation notice' may be given in respect of a particular relationship.

Sham Contracts

The Commonwealth Fair Work Act 2009 (**FW Act**) makes sham contracting arrangements unlawful. A sham contract arrangement arises where an employer deliberately treats an employee as an independent contractor or coerces employees into signing contracts that represent them as being contractors rather than employees. An employer may try to do this in order to avoid meeting the normal obligations towards employees, such as leave, sickness benefits or superannuation entitlements.

Employers who are convicted of creating sham contract situations may be subject to substantial penalties. The following are offences under the FW Act:

- Misrepresentation of genuine employment: A person misrepresents an employment relationship, or a proposed employment arrangement, to be an independent contracting arrangement. A defence applies if the employer proves that, when the representation was made, the employer reasonably believed that the contract was a contract for services. In determining whether the belief was reasonable, regard may be had to the size and nature of the employer's enterprise and any other relevant matters.
- Re-engagement: An employer dismisses, or threatens to dismiss, an employee in order to engage that employee as an independent contractor to perform substantially the same work.
- False and Misleading Statements: An individual knowingly makes a false statement with the intention of persuading or influencing a worker to become an independent contractor to do the same or substantially the same work.

Further information

The Master Builders Association publishes Fact Sheets on a number of other relevant topics. For further information, please see the relevant fact sheets at www.mbansw.asn.au login with your MBA member details, click on Industrial Relations and member downloads.

Should members have any additional enquiries regarding this Fact Sheet please do not hesitate to contact the Master Builders Workplace Relations Department on (02) 8586 3555.

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