

Employee or Contractor Assessment Tool

Instructions: Use the above assessment ascertain whether the engagement (future or current) is a genuine employee or contractor engagement.

In the absence of sham contracting or other relevant contractual issues being raised (e.g. disputing how the contract was formed), a comprehensive written contract will primarily determine whether a person is an employee or a contractor. The courts will review the terms as a whole (i.e. the totality of the relationship) to characterise it as either an employment or contractor relationship.

If reviewing the conduct of the parties in line with the many factors outlined above, there is no single factor, nor hard and fast rule on the number of factors that determines whether someone is an employee or independent contractor. An employee can have an ABN and invoice for work done and still be an employee, while an independent contractor may carry out the same work as an employee. To make the right distinction, all factors should be considered as a whole.

Where necessary, consider appropriate business measures which would be required to further confirm the engagement as a genuine contractor if the assessment flags potential risks and both parties wish to continue a contractor arrangement (e.g. have a signed contractor agreement, ask for ABN, proof of insurance, evidence of advertisement of services, request an ABN etc).

Element	Employee	Contractor	Assessment
Intention	The parties' intention is to create an employment relationship. This intention could be shown by the worker providing a tax file number (TFN) and signing an employment contract.	The parties' intention is for the worker to be engaged as an independent contractor. This intention could be shown by the worker providing an Australian business number (ABN) or Australian Company Number and signing an independent contractor agreement.	
Control – how work is performed	Tasks are performed at the request of the employer. Work is controlled by the employer including hours, location and how work is done.	The contract is for a specific task(s) or service. The worker has freedom in the way the work is done, subject to the specific terms in any contract or agreement.	
Independence/Integration	The worker is not operating independently of your business. They work within and are considered part of the business. Dual employment may be possible but is generally subject to the consent of the employer.	The worker is operating their own business independently of your business. The worker performs services as specified in their contract or agreement and is free to accept or refuse additional work with other businesses.	
Risk	Bears little or no risk. Is not exposed to any financial or commercial risk. This is borne by the employer. The employer is generally responsible for any loss resulting from poor work.	Stands to make a profit or loss on the task. Bears the commercial risk. Bears the responsibility and liability for any poor work or injury sustained in the performance of the task. Should carry own insurance policy.	

Place of Performance	Subject to the direction and discretion of the employer and is generally expected to work from the employer's place of business unless expressly directed otherwise.	May work at a number of locations and is subject to negotiation between the parties.	
Hours of Work	Hours are as directed by the employer.	By agreement between both parties, the Contractor decides what hours to work to complete the specific task.	
Leave Entitlements	Employees receive annual leave, long service leave, sick leave and other benefits under the National Employment Standards and State legislation.	Not entitled to annual leave, long service leave, sick leave and other benefits under the National Employment Standards. Can take periods where they do not accept or perform work under a contract or agreement but are not paid by the business who is contracting them to provide services.	
Payment	Paid on a regular basis and may be based on hourly, weekly, monthly, yearly rates of pay for time worked (an hourly rate, piece rates, salary) under either the National Minimum Wage, Modern Awards or Enterprise Agreements for work performed as part of the role and duties as an employee.	If fees are not fixed and are resultsbased, linked to the product or service, or paid at the end of the project or on achieving certain benchmarks. Not paid on a regular basis. Quotes can be calculated using hourly rates or price per item etc and payment is generally subject to the provision of a valid invoice.	
Expenses	Generally reimbursed for expenses incurred in the course of employment.	Responsible for their own expenses.	
Termination	Subject to the termination provisions of the National Employment Standards and includes dismissal for serious misconduct as defined by the Fair Work Act.	The engagement may be terminated subject to the conditions of the contract. Termination is not subject to the National Employment Standards and the contract usually contains terms dealing with defaults made by either party. The clause must only provide limited rights and must not be employee-like (eg, failing to comply with lawful and reasonable directions). It may also have commercial-type arbitration provisions.	
Delegation	No inherent right to delegate tasks to another i.e. an employee cannot pay someone else to do the job for them.	May delegate all or some tasks to another person or business and may employ other persons. The fact that a company may retain a right to approve or refuse sub-contracting under certain circumstances will not void an independent contracting arrangement as the Courts views this to be a sensible commercial approach by a company which has an interest in its goods or services.	
Equipment	Plant and equipment is usually provided by the employer (or a 'tool allowance' or similar is paid to an employee who is required to provide their own).	Usually, the responsibility of the contractor to supply all or most equipment, tools and other assets to complete the job	

		(and no 'allowance' payable for this). (Note: alternative arrangements may be made within a contract for services)	
Scheduling of Work	Employer determines or controls the time frame within which the work is to be performed and employee may be subject to performance improvement or disciplinary processes where work is not performed to specific timeframes set at the direction of the employer.	The work would be performed in accordance with agreed schedules and consistent with the obligations under the contract. Delay may give rise to financial penalties being payable by the contractor depending on the terms of the contract between the parties.	
Expectation of Work	Usually has an ongoing expectation of work.	No expectation of ongoing work and is usually engaged for a specific task.	
Taxation	The employer pays PAYG tax on behalf of the employee.	Pays their own tax and GST (if applicable).	
Ability to Work for Others	Whilst casual employees are generally free to work for others, a full-time employee is usually restricted to working for the one employer during normal business hours.	Can accept as many contracts as they wish.	
Right to Refuse Work	Does not have the right to continually refuse a reasonable task.	Usually agrees to the tasks beforehand. The contract governs the tasks that must be performed.	
Superannuation	Is entitled to Superannuation Guarantee in line with the relevant legislation.	Only entitled to Superannuation Guarantee in certain circumstances as set by the ATO (currently if the Contractor is engaged primarily for labour rather than a specified result; performs the work personally; and is an individual not company).	