

Independent Contractor Assessment

BACKGROUND

Under the Closing Loopholes changes a definition of “employee” and “employer” for the first time has been inserted into the Fair Work Act. This new definition will apply from **26 August 2024**.¹

Under this new definition, in order to determine whether a worker is an ‘employee’ (as opposed to an independent contractor) consideration must be given to:

- the *‘real substance, practical reality and true nature of the relationship’*; and
- the whole relationship between the parties, including the terms of the contract and how the contract is performed in practice.²

Critically, this means to determine whether a worker is an employee or an independent contractor, it will no longer be sufficient to simply look to the terms of the written contract. Instead, what is required is an assessment of the totality of the relationship and other factors, including how the contract is actually being performed in practice.

Employers who utilise any independent contractors in their business should therefore consider reviewing their current arrangements to assess the likelihood that any contractors they engage may be considered ‘employees’ under the new definition from 26 August 2024.

ASSESSING WHETHER A WORKER IS AN ‘EMPLOYEE’ OR ‘INDEPENDENT CONTRACTOR’

Characterising a worker as an ‘employee’ or independent contractor under the new definition is not a straightforward, tick box exercise. The test as to whether someone is an employee or contractor is now a broad ranging one. It requires consideration of the contract, as well as the totality of the relationship and how the contract is being performed in practice to determine the *‘real substance, practical reality and true nature of the relationship’*. As a result each assessment will vary from business to business and from worker to worker, depending on the specific arrangements in place, as well as the day-to-day reality of operations with each worker.

This document has been prepared to assist you with this process by taking you through a range of factors to consider as part of an assessment of your terms of engagement document (e.g. contract) if you have one. As well as other factors related to how the contract might be being performed in practice. For each factor the table summarises and contrasts how it might tend to indicate a worker is an employee versus how it might tend to indicate a worker is a contractor.

There are no rules as to the weighting given to each of the factors in the decision-making process, with no one factor necessarily determinative. The factors are just a guide,³ with the ultimate question being *‘the real substance, practical reality and true nature of the relationship’* i.e. the ultimate question is whether the person is an employee or a contractor.

¹ Or earlier by proclamation.

² *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023*, section 15AA.

³ The factors provided in this document are a guide only. The Closing Loopholes legislation does not provide an exhaustive list of relevant factors as it is intended to ensure a flexible approach. Accordingly there may be other factors which may exist or arise which may also be relevant considerations.



IMPORTANT: Existing and future independent contractors who earn above the 'contractor high income threshold', have a right to 'opt out' of being employees under the new employee / employer definition through a notification process. The contractor high income threshold hasn't been set yet.

A. TERMS OF THE ENGAGEMENT DOCUMENT

(Contract, purchase order, professional services agreement, consultancy letter)

If you currently engage a worker under a written document to perform work, consider whether the terms of that document currently indicate your workers is a contractor or an employee by considering and weighing up the below factors. If you do not have a written agreement skip to section B.



The 'label' provided to the worker in the contact (e.g. statement that a person is an independent contractor in the contract) is of no assistance and does not add any weight either direction, as to whether a worker is an employee or contractor.⁴

CONTRACT TERMS THAT INDICATE AN EMPLOYMENT RELATIONSHIP	CONTRACT TERMS THAT INDICATE A CONTRACTOR RELATIONSHIP
Remuneration and tax	
The worker is to be remunerated by reference to time worked or by salary.	The worker is to be remunerated for the services/job performed or goods/product delivered or paid based on results.
	The workers company will issue invoices for services performed.
The company will deduct income tax from the workers remuneration.	GST is paid pursuant to invoices issued by the worker.
Obligation and delegation of work	
The worker is not permitted to work or perform services for others without the company's prior consent.	The worker is expressly permitted to work for others.
The worker is not permitted to delegate their work to others.	The worker is expressly permitted to subcontract and delegate work.
The worker can act on behalf of the company.	The worker is not permitted to act on behalf of, make decisions for, or in any other way bind the company.
Provision and maintenance of equipment	
Tools and equipment will be provided by the company to the worker.	The worker is required to provide a level of equipment and tools required to perform their service/job.
Hours of work	
The worker's ordinary hours of work are set out in the contract.	The worker is notionally able to select the hours of work to perform the necessary tasks.

⁴ ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

Leave	
The worker is entitled to paid leave (e.g. personal leave, annual leave, compassionate leave).	The worker is not entitled to any paid leave.
Disciplinary Action	
The company has the right to suspend or dismiss the worker.	The contract with the worker may be terminated for breach.
Commercial risk	
The company remains liable for remedying any faulty work of the worker.	The worker is responsible for work that does not go as planned (e.g. takes longer, is more expensive, any faulty work) in their own time and at their own expense.
Direction and Control	
Company to determine when, how and where the services of the worker are performed.	The worker controls or exercises discretion over how, when and where the task or service is performed.

B. HOW THE CONTRACT IS ACTUALLY BEING PERFORMED IN PRACTICE

Now that you have considered the terms of any written agreement between your company and the worker, the next step is to consider how things are actually operating in practice.

In completing this assessment, we are interested in the day-to-day arrangements that operate with the contractor (even if in practice this differs from the terms of any written agreement or contract in place).

FACTORS THAT INDICATE AN EMPLOYMENT ('EMPLOYEE') RELATIONSHIP	FACTORS THAT INDICATE A CONTRACTOR RELATIONSHIP
Type and consistency of service	
The worker works regular hours and/or there is a regular expectation as to when the worker will attend for work e.g. 9am – 5pm Monday – Friday.	The service/job performed by the worker are on 'as needed' basis.
The worker has an expectation of consistent, ongoing work with the company with no anticipated end date.	The worker does not have an expectation of consistent, ongoing work with the company and there is a clear end date.
The work being performed does not involve a profession, trade or distinct calling on the part of the worker.	The work involves a profession, trade or distinct calling on the part of the worker.
The worker is providing a service that is central to the company.	The worker is providing a service that is unrelated to the main business operations.
Leave	
The worker takes leave (holidays, sick leave, compassionate leave etc.) and it is paid for by the company.	The worker does not receive and/or take any paid leave (annual leave, personal leave, compassionate leave etc.)

When the worker is sick the business simply waits for the worker to recover.	When the worker is sick the work is performed by somebody else.
Direction and Control	
The company exercises, or has the right to exercise, control over <u>how, when and where</u> work is performed by the worker etc. This might be evidenced by: <ul style="list-style-type: none"> the worker reporting into someone at the workplace the worker being directed to complete tasks by someone employed by the company the worker being provided instructions either in writing or by training or supervision. 	The worker possesses a large degree of autonomy, control, and discretion as to how, when and where their work is performed.
The company monitors/supervises the worker's work.	The worker performs their work/service without supervision/monitoring by the company.
The worker works solely for the company.	The worker performs work for other businesses.
The company can determine what work of the worker can be delegated or sub-contracted out and to whom.	The worker actually delegates, or sub-contracts work to other persons to complete.
The company monitors and provides feedback to the worker during the performance of work e.g. performance review process or similar.	The company provides feedback on completion of work to the worker.
How does the worker present to the world at large	
The worker is held out/presents to the world as if they are part of the company.	The worker appears as if they are running their own separate business.
The worker does not have any opportunity to build up a reputation about their service separate to the company.	The worker has the opportunity to build up a reputation amongst the public about their business.
The business advertises the goods or services of the worker to the world.	The worker has a separate place of work and/or advertises his or her services to the world at large separate to the company/has his own website.
The worker does not have businesses cards and/or is issued business card by the company.	The worker has their own business cards which advertise their services/business.
The worker has and/or uses a company email address in the course of, or for the purposes of performing the services.	The worker has his own separate email address (separate to the company).
Equipment, uniform, PPE	
The company provides the worker with a uniform and/or compensates the worker for their uniform.	The worker wears their own uniform or other clothing of their choice
The company provides the worker with personal protective equipment.	The worker is required to provide their own personal protective equipment (PPE).
The company provides and maintains significant tools, assets or equipment used by the worker.	The worker provides and maintains significant tools, equipment and/or assets.
The worker does not spend a significant portion of their pay on business expenses.	The worker spends a significant portion of their remuneration on business expenses.

Remuneration, tax and reward	
The worker is remunerated by reference to time worked or on salary e.g. they are paid by the hour/week/month.	The worker is remunerated for services/job or goods/product delivered or paid based on results.
The worker is a sole trader.	The worker performs work through a Pty Ltd company.
The worker is paid based on time worked e.g. timesheets provided.	The worker is paid through invoices for services performed issued by their Pty Ltd company.
The company deducts income tax from remuneration paid.	The worker responsible for own tax affairs. GST is paid pursuant to invoices issued by the worker.
Insurance (e.g. public liability insurance, workers compensation insurance) is provided by the company.	The worker is required to obtain their own insurances e.g. public liability insurance, workers compensation.
The work of the worker creates goodwill or saleable assets for the company.	The worker creates goodwill or saleable assets for their own business.
Commercial Risk	
The company bears the cost and/or remains liable for any work that does not go as planned including remedying any faulty work.	The worker is liable for work that does not go as planned (e.g. takes longer, is more expensive, any faulty work) at their own time and expense.

C. WEIGHING UP THE FACTORS TO DETERMINE IF THE WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

It is now time to weigh up and balance all of the above factors in sections A and B to come to an overall position as to whether or not it is more likely than not that the worker/s are employees or contractors.

- There are no strict rules as to the weighting given to the factors in the decision-making process. The factors are just a guide, with the ultimate question being whether the '*real substance, practical reality and true nature of the relationship*' reflects that of an employee an employer or contractor.
- Of all of the above factors above, those dealing with the direction and control exercised by a company over how work is performed by the worker is often given particular consideration.⁵

Whilst reflecting on your answers to the factors above, consider your answer to the following questions:

- Practically speaking, is the person performing the work an entrepreneur who owns and operates a business; and
- In performing the work, is that person working in and for that person's business as a representative of that business, and not of your business receiving the work?

⁵ *Ace Insurance v Trifunovski* [2013] FCAFC 3 at [103], *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 at [89]].

If the answer to those questions is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.'

If after doing this assessment you conclude that any of your contractors are more likely than not to be considered an employee under the new 'employee' definition from 26 August 2026 then unless the worker will have the right to 'opt out' and exercises it, this presents a significant risk, that will likely require you to take action.

You should also be aware that if an employee is found to have been misclassified as a contractor, they may have a claim for backpay for employment-based entitlements (e.g. leave, overtime, superannuation) that have been arising since 27 February 2024 (the date the Closing Loopholes Bill received royal assent). In addition, if it is found that the employee was recklessly or knowingly incorrectly characterised as a contractor, this could also give rise to pecuniary penalties under the Fair Work Act for engaging in sham contracting.

NEED HELP?

If the above assessment has raised any issues or concerns for you and you would like further assistance or a second opinion, Australian Business Lawyers & Advisors is here to help.

Get in touch with one of the team at info@ablawyers.com.au or call 1300 565 846.