

Employees or Contractors/Freelancers

Fair Work Commission (since 2013, previously FWA) - Independent body that serves as the national workplace relations tribunal. Responsible for maintaining minimum wages and employment conditions for the majority of workplaces in Australia. www.fwc.gov.au

Fair Work Ombudsman - The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. Provide education, information and advice, help to resolve workplace complaints, conduct investigations, and enforce relevant Commonwealth workplace laws. www.fairwork.gov.au

Work Health and Safety Legislation requires every Australian workplace to ensure the health and safety of its workers. A worker is a person who carries out work in a workplace including employees, volunteers, freelancers, contractors, subcontractors. A Person Conducting the Business or Undertaking (PCBU) of the company/business has a responsibility and a duty of care to provide a safe work place.

Determining whether a person is an employee or contractor may not always be clear cut (i.e. that it is written in a contract or engagement letter). The following factors need to be considered:

- Degree of control over how the work is performed – contractor decides how and can subcontract
- Hours of work – contractor can determine their hours
- Expectation of work – contractor is usually engaged for a specific task/project
- Risk – contractor bears risk
- Superannuation – contractor is liable
- Tools and equipment – contractor usually provides their own
- Tax – contractor pays their own GST and income tax to ATO
- Method of payment – contractor has ABN and submits invoice at periods
- Leave – contractor does not receive paid leave.

Invoices issued for services provided with an ABN does not necessarily indicate that a contractor relationship exists.

Do they pass the “duck” test?

“An independent contractor who looks like an employee or is treated like an employee, may well be an employee. Making this mistake can be very expensive to businesses”

Reference: <http://www.hcamag.com/hr-news/do-your-workers-pass-the-duck-test-191626.aspx> accessed 24/9/2014.

It is an offence under the FW Act to represent that you have an independent contractor arrangement with a worker when you are actually in an employment relationship. This is known as ‘sham contracting’.

More information on independent contractors can be obtained from www.business.gov.au and www.fairwork.gov.au



Employees vs Contractors The merits of both

Employees

Control over:

- Hours worked
- Way things are done
- Wages/superannuation/tax payments
- Compliance with company policies and procedures
- Tools used
- How mistakes are rectified (and risk/cost)

Disadvantages:

- Possibility of unfair dismissal claim if terminate employment without due process
- Responsible for WorkCover levy (required for all employers from 1/7/2015)
- Responsible for ongoing payments

Contractors

Benefits:

- No expectation of ongoing work (termination clause in letter of engagement/contract may apply)
- No training required (standards may differ)
- Greater flexibility over who does the job
- Contractor is responsible for their own tools and licences
- On-hire specialists
- Bears cost of rectifying mistakes

Disadvantages:

- Can work for more than one company
- Can own intellectual property over tools/resources developed
- Commitment to you
- Higher costs
- Can subcontract (no guarantee of who provides services)

Perhaps the first thing to consider is what is required, from whom and when. Without the understanding of what your requirements are, whether you need ongoing or project based assistance or what the issues could be in relation to confidentiality and intellectual property, it is difficult to know.

Information you will need to consider prior to engaging an employee or subcontractor is:

Considerations you should make to decide will include:

- Types of tasks that are required
- Frequency of tasks
- Responsibility of key result areas
- Determination of key performance indicators

“Making the decision to hire or contract out the required services is one not to be taken lightly and each case should be considered on its own merits”

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