

ENGAGING YOUR OWN SUPPORT WORKERS

EMPLOYEE OR INDEPENDENT CONTRACTOR?

Deciding if your worker is an Employee or an Independent Contractor

Please note that this is intended as a general information guide. It is recommended that this is used in conjunction with the *WaiS Engaging Your Own Support* booklet, which provides general information about your legal considerations when Hiring Your Own Workers or you can get your own legal advice.

➔ <http://waindividualisedservices.org.au/home/national-disability-insurance-scheme/self-management/engaging-your-own-supports/>

TAXATION AND SUPERANNUATION

If you hire a worker you must check if they are an employee or contractor. This is important because:

- it affects your tax, superannuation and other obligations; and
- penalties and charges may apply if you get it wrong.

To check if your worker is an employee or contractor, you need to review the whole working arrangement.

Australian Taxation Office (ATO)

The ATO has an Employee Contractor tool that you can use to assist you to decide if you have an employee or a contractor.


➔ <https://www.ato.gov.au/business/employee-or-contractor/how-to-work-it-out--employee-or-contractor/>

Important: It is against the law to incorrectly treat an employee as a contractor. If this is done you may not be meeting your tax and superannuation obligations and may be denying the worker their employee entitlements. You risk penalties and charges.

➔ <https://www.ato.gov.au/Business/Employee-or-contractor/Employees-treated-as-contractors/>

The ATO's tool is based on the ATO table below that outlines six factors. When considered altogether, these factors determine whether a worker is an employee or contractor for tax and superannuation purposes:

| Employee | Contractor |
|--|---|
| <p>Ability to subcontract/delegate: the worker can't subcontract/delegate the work – they can't pay someone else to do the work</p> | <p>Ability to subcontract/delegate: the worker can subcontract/delegate the work – they can pay someone else to do the work</p> |
| <p>Basis of payment – the worker is paid either:</p> <ul style="list-style-type: none"> • for the time worked • a price per item or activity • a commission | <p>Basis of payment: the worker is paid for a result achieved based on the quote they provided – a quote can be calculated using hourly rates or price per item to work out the total cost of the work</p> |
| <p>Equipment, tools and other assets:</p> <ul style="list-style-type: none"> • your business provides all or most of the equipment, tools and other assets required to complete the work; or • the worker provides all or most of the equipment, tools and other assets required to complete the work, but your business provides them with an allowance or reimburses them for the cost of the equipment, tools and other assets | <p>Equipment, tools and other assets:</p> <ul style="list-style-type: none"> • the worker provides all or most of the equipment, tools and other assets required to complete the work • the worker does not receive an allowance or reimbursement for the cost of this equipment, tools and other assets |
| <p>Commercial risks: the worker takes no commercial risks – your business is legally responsible for the work done by the worker and liable for the cost of rectifying any defect in the work</p> | <p>Commercial risks: the worker takes commercial risks, with the worker being legally responsible for their work and liable for the cost of rectifying any defect in their work</p> |
| <p>Control over the work: your business has the right to direct the way in which the worker does their work</p> | <p>Control over the work: the worker has freedom in the way the work is done, subject to the specific terms in any contract or agreement</p> |
| <p>Independence: the worker is not operating independently of your business – they work in and are considered part of your business</p> | <p>Independence: 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</p> |

 <https://www.ato.gov.au/business/employee-or-contractor/difference-between-employees-and-contractors/>

INDUSTRIAL RELATIONS

It is also important to decide if you have an employee or contractor because there are rules about what an employee gets at work, such as leave entitlements, hours of work and breaks.

➔ <https://www.commerce.wa.gov.au/labour-relations/key-features-wa-industrial-relations-system>

Department of Mines, Industry, Regulation and Safety (WA) (DMIRS): Labour Relations Division

DMIRS has developed a guidance document and the table below to assist you to decide whether you have engaged an employee or contractor.

The information from the DMIRS website applies to employers and employees in the **WA** state industrial relations system.

➔ <https://www.commerce.wa.gov.au/labour-relations/guide-who-wa-state-system>

The difference between an employee and an independent contractor is based on many different factors. No one factor in itself determines whether someone is an employee or contractor. It is the totality of the relationship between you and your worker that will determine whether your worker is an employee or contractor.

According to the information provided by DMIRS, the main differences between a contractor and employee are:

| Contractor | Employee |
|--|---|
| Contractor is in control over the hours worked and when and how the work is performed | The employer is in control of how and when work is performed |
| Contractor can accept and perform work for other businesses while engaged by an employer | The employee is an integral part of the business and will usually be working for that business on a regular and ongoing basis |
| Contractor provides a rate for a specific job and an invoice for work performed | The employer pays the employee in accordance with the relevant WA award, or contract of employment |
| Contractor supplies their own plant, materials and equipment | The employer supplies the employee with materials and equipment |
| Contractor is responsible for their own tax and superannuation arrangements* | The employer is responsible for tax and superannuation and workers' compensation for the employee |
| Contractor presents as their own business/enterprise | The employee represents somebody else's business |

*Please note, in some circumstances you may have to pay superannuation to a contractor. Please go to <https://www.ato.gov.au/calculators-and-tools/super-guarantee-eligibility/> to check.

➔ <https://www.commerce.wa.gov.au/labour-relations/employee-or-subcontractor>

Please note: The national 'fair work' system covers Pty Ltd businesses that are: trading or financial corporations or incorporated associations; other non-profit bodies (that are trading or financial corporations); and other not-for-profit organisations that are trading or financial corporations. If the business or organisation is in the national 'fair work' system visit the Fair Work Ombudsman website.

➔ <https://www.commerce.wa.gov.au/labour-relations/guide-who-wa-state-system>

This general information guide is current as at May 2018. Please note that over time some of the links provided may not work as governing bodies change their website layouts. If a link does not work, we recommend you source the relevant document using a title search with an Internet search engine.

Disclaimer: This checklist is provided as general information only. It is not legal advice. Please consult a professional advisor (for example, a lawyer or accountant) if you require legal or financial advice in relation to your own individual circumstances.

