



Independent contractors and employees

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

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

The *Independent Contractors Act 2006* in conjunction with the *Fair Work Act 2009* protects the rights and entitlements of independent contractors.

Who is an employee? Who is an independent contractor?

There are a number of factors which may contribute to determining the difference between an employee and an independent contractor. However, it is important to

note that no single indicator can determine if a person is a contractor or an employee. Each determination is based on the individual merits of the work arrangement in place. Courts always look at the totality of the relationship between the parties when determining the status of a person's employment.

There are some common indicators that may contribute to determining whether a person is an employee or independent contractor:

Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	Has a high level of control in how the work is done.
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week).	Under agreement, decides what hours to work to complete the specific task.
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	Usually engaged for a specific task.
Risk	Bears no financial risk (this is the responsibility of their employer).	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.
Superannuation	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation contributions).
Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Uses their own tools and equipment (note: alternative arrangements may be made within a contract for services).
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Method of payment	Paid regularly (for example, weekly/fortnightly/monthly).	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.
Leave	Entitled to receive paid leave (for example, annual leave, personal/carers' leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees.	Does not receive paid leave.

How can the Fair Work Ombudsman help independent contractors and employees?

Fair Work Inspectors can investigate alleged sham contracting arrangements and prohibited conduct in relation to reform opt-in agreements.

Sham contracting arrangements

A sham contracting arrangement occurs where an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done for the purposes of avoiding responsibility for employee entitlements.

Under the sham contracting provisions of the *Fair Work Act 2009*, an employer cannot:

- misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor
- make a knowingly false statement to persuade or influence an employee to become an independent contractor.

The *Fair Work Act 2009* provides serious penalties for contraventions of these provisions. Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel their rights have been contravened.

Prohibited conduct in relation to reform opt-in agreements

The *Independent Contractors Act 2006* provides a four-year and six month transitional period (from 1 March 2007 and ending on 1 September 2011) where certain state or territory laws may continue to apply to an independent contractor and their principal.

Parties to an existing contract for services can choose to sign a reform opt-in agreement. A reform opt-in agreement is an agreement in writing, signed by the independent contractor and their principal, which states that they no longer want the state or territory laws to govern their contract for services.

The *Independent Contractors Act 2006* provides protections for parties in making the choice to sign a reform opt-in agreement.

These protections are that a person must not:

- take or threaten to take any action or
- prevent, or threaten to prevent, from taking any action

with the intent to coerce another person into signing or not signing a reform opt-in agreement.

Further, a person must not knowingly make a false statement in order to persuade or influence another person into signing or not signing a reform opt-in agreement.

The *Independent Contractors Act 2006* provides serious penalties for contraventions of these provisions. Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel there has been prohibited conduct.

Penalties

Fair Work Inspectors can seek the imposition of penalties for contraventions of sham contracting arrangements and reform opt-in provisions. The courts may impose a maximum penalty of \$54,000 per contravention.

Fair Work Inspectors may also apply to the courts to grant an injunction or an interim injunction if an employer seeks (or threatens) to dismiss an employee for the purpose of engaging them as an independent contractor. The purpose of the injunction would be to prevent the dismissal from occurring, or otherwise remedy the effects. Courts can also make other orders to have the employee reinstated or compensated.

General protections

Some general protections provided under the *Fair Work Act 2009* extend to independent contractors and their principals.

Independent contractors and principals are afforded limited workplace rights, and the right to engage in certain industrial activities. An independent contractor or principal is protected from adverse action by any person in relation to the decision to exercise or potentially exercise their rights under these provisions.

For more information on workplace rights, industrial activities, and what constitutes adverse action, please see the *Fair Work Ombudsman Fact Sheet – General Protections*.

Need further information?

For further information, contact the Fair Work Infoline on **13 13 94**.

If you require further information on contracting and the provisions of the *Independent Contractors Act 2006*, please contact business.gov.au on **13 28 46** or visit www.business.gov.au/contractors.

If you are in the building and construction industry, Fair Work Building & Construction (FWBC) may investigate and seek penalties for sham contracts. Contact FWBC on **1800 003 338** or visit the Fair Work Building & Construction website at www.fwbc.gov.au.

Sham contracting arrangements are prohibited by sections 357–359 of the *Fair Work Act 2009*.

The Fair Work Ombudsman has a collection of fact sheets, Best Practice Guides and other resources. For further information and assistance, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94