

## Contractors v Employees: What's the Difference? – Fact Sheet

Independent contractors now comprise an important share of the workforce in Australia. This form of engagement provides workers with much more autonomy in their working arrangements, and allows them to change their wage rates to maximise their returns. Contractors generally receive different pay and entitlements to ongoing employees. Given the sham contracting provisions of the *Fair Work Act 2009* employers must take care when classifying workers as independent contractors.

### What are 'sham' contracting arrangements?

Genuine employees are protected from 'sham' independent contracting arrangements sometimes used by employers to avoid paying entitlements.

A 'sham' contracting arrangement occurs when an employer deliberately masks an actual employment relationship as an independent contracting arrangement, when in fact the worker is an employee under workplace relations law and is therefore entitled to a range of entitlements as set out in the National Employment Standards.

It is unlawful for an employer to misrepresent an employment relationship, or employment offer, as an independent contracting arrangement. It is also unlawful to dismiss, or threaten to dismiss, an employee with the main purpose of re-hiring that person as an independent contractor to do much the same work.

### Who is an employee? Who is an independent contractor?

There are a number of factors which may be relevant in determining the difference between an employee and an independent contractor. Employers should be mindful that there is no single indicator that will determine if a worker is a contractor or an employee. Courts look at the totality of the relationship between the parties when determining the exact nature of a person's employment.

Below are some common indicia that may help determine whether a person is an employee or independent contractor:

Indicator	Employee	Independent Contractor
<b>Level of control over how work is performed</b>	Performs work under the direction and control of their employer, on an ongoing basis.	Has a high level of control over how work is done.
<b>Hours of work</b>	Generally works standard or set hours (note: a casual employee's are likely to vary from week to week).	Under agreement, decides what hours to work to complete the required task.
<b>Expectation of work</b>	Generally has an ongoing expectation of work (note that some employees may be engaged for a specific task or specific period).	Generally engaged for a specific task, rather than an ongoing expectation of work.

<b>Requirement to wear a uniform</b>	Employees are commonly required to wear uniforms branded with their employer's name, or required to adhere to uniform/dress policies.	Generally are not required to wear any uniform.
<b>Superannuation</b>	Entitled to superannuation contributions paid for the benefit of the employee into a nominated superannuation fund.	Pays their own superannuation (note that in some circumstances independent contractors may be entitled to be paid superannuation contributions for their benefit).
<b>Tools and equipment</b>	Tools and equipment are typically provided by the employer, or a tool allowance is provided.	Generally uses their own tools and equipment (note that alternative arrangements may be made within a contract for services).
<b>Tax</b>	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
<b>Method of payment</b>	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 a project or contract for service.
<b>Leave entitlements</b>	Entitled to receive paid leave (including annual leave, personal/carer's leave, long service leave) or in the case of casual employees, receive a loading in lieu of leave entitlements.	Does not receive paid leave.

### What penalties can Employers face?

The maximum penalty for contraventions of the sham contracting provisions is \$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.