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Who is an Independent Contractor?

Independent contractors are an increasing occurrence in the workplace. Australian legislation recognises the role independent contractors play in the workplace but there are strict laws in place to ensure that employees are not disguised as independent contractors.

Businesses are advised to ensure that they do not misclassify employees and independent contractors as despite what any written agreement may state, it is the true nature of the relationship that will be examined in case of an audit, dispute or complaint.

How do I know if a person is an independent contractor?

Most independent contractors run their own business, control their own working times and decide how and where they undertake work. Many independent contractors also advertise their business, provide their own tools and equipment and may pay others to carry out work for them.

The Courts have adopted a multi-factor test to determine whether a person is an employee or independent contractor. No single issue will be determinative. However, the Courts will place greater weight on some matters, in particular, on the right to control the manner in which the work is performed. In applying the test, the Courts will look at all aspects of each particular working relationship and make individual determinations. Any written agreement stating the nature of a relationship as either an employment or contracting relationship is relevant but not conclusive. A table summarising the common law test is provided on this fact sheet and can be used as an indicative guide.

What if the person is an independent contractor under taxation laws?

An individual may be called a contractor according to the taxation laws, but this will not necessarily mean that they are a contractor under employment law or independent contractors legislation. Some State laws also treat contractors as employees in particular workers compensation legislation.

What if a person has an ABN?

Having an ABN does not automatically mean that a person will be classed as an independent contractor for the purposes of employment law or independent contractors legislation.

Sham contracting arrangements

A sham contracting arrangement occurs where an employer attempts to disguise an employment relationship as an independent contracting arrangement. Under the sham contracting provisions of the Workplace Relations Act 1996 (Cth.), a person cannot:

- intentionally disguise an individual's employment or an offer of employment, as an independent contracting arrangement
- dismiss or threaten to dismiss an individual for the sole or dominant purpose of re-engaging the individual as an independent contractor
- make a knowingly false statement for the purpose of persuading an individual to become an independent contractor.

Penalties

Workplace Inspectors can seek the imposition of penalties for breaches of sham contracting. The Courts may impose a maximum penalty of \$33,000 per breach (per worker). Workplace Inspectors may also apply to the courts to grant an injunction if an employer seeks to dismiss, or threatens to dismiss, an employee for the sole purpose of re-engaging the employee as an independent contractor. The purpose of the injunction may be to prevent the dismissal from occurring, have the employee reinstated, compensated or otherwise remedy the consequences. The worker will also have a claim for unpaid employee entitlements such as annual leave, long service leave and superannuation. There may also be other penalties under taxation laws.

Summary of Common Law Test		
Factor	Indicative of Employment	Indicative of Independent Contracting
Does the worker have control over the way they perform a task?	No	Yes
Does the worker supply/maintain their tools or equipment?	No	Yes
Does the worker work standard hours?	Yes	No
Does the worker incur any loss or receive any profit from the job?	No	Yes
Is the worker free to work for others at the same time?	No	Yes
Is the worker paid according to task completion, rather than receiving wages based on times worked?	No	Yes
Does the worker accept that work lasts for the term of each particular task or contract?	No	Yes
Does the worker accept responsibility for any defective or remedial work which was their doing?	No	Yes
Does the worker have the right to employ or subcontract any aspect of the work to another person?	No	Yes
Does the worker have the right to employ an apprentice or trainee in the execution of contracts?	No	Yes
Does the worker understand the arrangement as a contract for services?	No	Yes
Does the worker provide their own public liability and sickness and accident insurance cover?	No	Yes
Does the worker receive paid holidays or sick leave?	Yes	No
Does the worker render tax invoices for payment?	No	Yes
Does the worker file GST returns?	No	Yes
Is tax deducted from the worker's pay?	Yes	No

NOTE: The outcome of this test is not determined by adding the number of factors and no single factor will be conclusive. This is not legal advice but a general guide only. For advice relating to your business, contact HR Navigation Pty Ltd on 1300 669 747.