



Independent contractor or employee?

Source: Australian Government, Office of the Employment Advocate, *Independent contractor or employee?* Referred to in paragraph 2.14

Question	Employee relationship indicators	Independent contractor relationship indicator
Is the individual operating under a business name, sole trader, company or partnership arrangement?	<ul style="list-style-type: none"> An employee is less likely to operate under a business name, sole trader, company or partnership. However these devices may be used as a mere “sham” to manipulate the appearance of the relationship. 	<ul style="list-style-type: none"> Contractors are more likely to operate under one of these arrangements.
How is the work arrangement set up? What is the practical working arrangement?	<ul style="list-style-type: none"> An employee is normally employed under specific terms and conditions which are often governed by an award, industrial instrument or employment contract. 	<ul style="list-style-type: none"> The working arrangements for contractors (usually set out in a contract for services) are more likely to focus on the work to be performed including the specifications, time to complete, contract cost, and liability of the person performing the work.
Where is the work performed?	<ul style="list-style-type: none"> The work is more likely to be conducted at the employer’s place of business or other specified locations as directed by the employer. 	<ul style="list-style-type: none"> The work is more likely to be performed at the specified and agreed location(s). The Contractor may have its own place of business (although is not essential).

<p>Who provides the tools, equipment and resources for the job?</p>	<ul style="list-style-type: none"> • The employer is more likely to provide materials incidental to the performance of the duties (including office space and equipment) and it is less likely that an employee would incur significant expenditure on materials, plant and equipment. 	<ul style="list-style-type: none"> • The contract will specify who is required to provide tools and equipment. However it is usually the responsibility of the contractor. • The contract may be either for the supply of labour or materials. It may also specify the terms upon which the materials are supplied. • A contractor is more likely to make its own arrangements regarding offices space and equipment, particularly in relation to managing its separate business.
<p>Who is responsible for exercising control over the manner and time in which the work is to be performed?</p>	<ul style="list-style-type: none"> • The employer normally directs or has the right to direct the manner in which work is to be performed. • There is an obligation on the employee to obey the lawful directions of the employer. 	<ul style="list-style-type: none"> • The work may be subject to performance management/indicators, inspection and supervision as provided in any contract for services/goods. • The contractor normally has freedom in the ways tasks are performed, subject to job specifications.
<p>Does the contract require the work to be performed personally?</p>	<ul style="list-style-type: none"> • There is an implied or express agreement that the work allocated is to be performed by the employee. • There may be a power of delegation of duties to other employees of the employer. 	<ul style="list-style-type: none"> • A contract for services may contain a provision allowing work to be performed by persons other than the contractor such as a subcontractor or employees of the contractor.

<p>Does the job relate to a specified period or specific tasks within which the job is to be performed or is it of a continuing duration?</p>	<ul style="list-style-type: none"> • The employee/employer relationship is likely to require a person to perform work on a continuous or systematic basis. A fixed term contract may be indicative of an employee employer relationship where it relates to the person performing general duties of a specific type rather than any specified tasks. 	<ul style="list-style-type: none"> • A contract for services or terms of the engagement would normally describe or specify the work and the time within which it is to be performed.
<p>Who determines the working hours and leave requirements?</p>	<ul style="list-style-type: none"> • Working hours and the granting of leave is more likely to be subject to the discretion of the employer and may be subject to a person's entitlements under their relevant industrial instrument or statute. • An employee is generally expected to attend to work during specific times unless they are on approved leave or leave entitled to them under their industrial instrument or statute. 	<ul style="list-style-type: none"> • A contractor does not necessarily require permission to take leave, or to work set working hours. • A contractor can within the confines of the contract attend work at their discretion, but is often legally bound by the contract to ensure that the contracted work or service is completed at the specified time.
<p>Is the person performing the work, in his or her activities, part of the principal's business?</p>	<ul style="list-style-type: none"> • The work is performed as an integral part of the business of the employer. The employee may also be described as a member/representative of the principal's business. 	<ul style="list-style-type: none"> • The work although performed for the principal business is not necessarily integrated into it.
<p>Is the work relationship continuing?</p>	<ul style="list-style-type: none"> • A contract of employment may be of continuing duration, requiring the employee to perform ongoing duties and tasks. This however does not exclude fixed, short term or casual engagement which is common in professional or specialised fields of employment. 	<p>The work is undertaken to produce a given result. The contractor whilst undertaking the work is not necessarily under the direct order or control of the principal. The contractor can use their discretion on matters not specified in the contract for service.</p>

<p>Is the person performing the work free to accept work from other employers/principals and or to conduct business on their own accord?</p>	<ul style="list-style-type: none"> • An employee's ability to undertake other employment or business activities may be hindered if those ventures conflict with their duty to undertake their employment duties. 	<ul style="list-style-type: none"> • The contractor is more likely to be at liberty to accept work from others and to solicit and conduct other business, subject to their current commitment to fulfil existing contractual arrangements.
<p>Does the person performing the work have the right to refuse to undertake a particular job or task?</p>	<ul style="list-style-type: none"> • An employee does not generally have the right to refuse lawful and appropriate directions from the employer to perform allocated tasks. The persistent refusal to perform task may constitute grounds for dismissal. 	<ul style="list-style-type: none"> • The tasks to be performed by a contractor are normally agreed prior to entering into the contract for service. The contract will govern what tasks will be performed. The principal may seek remedies for the failure to perform under the contract.
<p>Is income tax being deducted from the individual's remuneration?</p>	<ul style="list-style-type: none"> • It is likely that income tax will be deducted from an employee's wages. 	<ul style="list-style-type: none"> • It is less likely that income tax will be deducted from contractor's payment, although the contractor and principal may enter into an agreement where PAYG payments may be withheld by the principal. Where this is not the case, a contractor will charge the principal GST for goods or services provided as part of the service.

Subject	Employee	Independent contractor
Superannuation	<ul style="list-style-type: none"> The employer must pay superannuation contributions on behalf of employees. 	<ul style="list-style-type: none"> Contractors will make their own arrangement concerning superannuation.
Taxation implications Professional taxation advice should be sought for details on this issue.	<ul style="list-style-type: none"> The taxation implications for employees is calculated based on an employee's income in accordance with the <i>Income Tax Assessment Act 1997</i>. 	<ul style="list-style-type: none"> Contractors have different taxation responsibilities in relation to goods and services tax (GST) and personal services income. For example, in certain circumstances "contractors" earning 80% of their income from the one principal may be deemed to be employees for the purposes of tax law, and should seek advice from the ATO, financial or tax planner on this issue.
Termination of the agreement	<ul style="list-style-type: none"> The employee's service may be terminated in accordance with relevant law and the industrial instrument they are employed under. 	<ul style="list-style-type: none"> The services may be terminated in accordance with the terms of the contract for service/goods.
Liability for losses resulting from substandard work	<ul style="list-style-type: none"> It may be likely that the employer will be vicariously liable for damage or loss suffered from work performed by an employee. 	<ul style="list-style-type: none"> The principal will not be vicariously liable for any losses resulting from substandard work. <p>The principal's liability may be reduced where loss or damage results from the contractor's poor performance, but this may not be always the case where the principal retains a duty of care to ensure that the work is performed properly (for example).</p>

Remedy available to employer/principal where the work performed is substandard.	<ul style="list-style-type: none"> The services of an employee may be terminated in accordance with relevant law and the instrument under which the employee is engaged. 	<ul style="list-style-type: none"> The termination provisions of the contract may allow for the principal to terminate the contract. Damages may also be payable if the contractor has breached the contract (by default).
Tax invoices	<ul style="list-style-type: none"> Payment is more likely to be made by reference to the relevant law or the industrial instrument setting the terms of employment. 	<ul style="list-style-type: none"> A contractor would normally render a Tax invoice or payment request on an account payable by the principal in accordance with its obligations under GST legislation.
Workers compensation	<ul style="list-style-type: none"> The employer is liable to cover employees for workers compensation, and must take out insurance to protect against this situation. 	<ul style="list-style-type: none"> A contractor may be more likely to undertake their own workers' compensation cover.
Other entitlements	<ul style="list-style-type: none"> An employee has in accordance with relevant law and their industrial instrument an entitlement to payment for leave, holidays and other benefits. Payment is normally made on a regular basis (weekly, fortnightly, monthly, hourly or piece work rate). 	<ul style="list-style-type: none"> The contract is more likely to provide for the specified work to be performed for an agreed sum identified in, and payable in accordance with, the contract.

Source: Australian Government, Office of the Employment Advocate, *Independent contractor or employee?* accessed 22 June 2005, www.oea.gov.au/docs/contractorvsemployee.pdf.