

Fact Sheet – Employee or independent contractor: which one are you?

As a worker, your rights depend on whether you are an “employee” or an “independent contractor”. Many laws protect the rights of employees, but not those of independent contractors.

You may *legally* be an employee even though you are *described* as an independent contractor.

This Fact Sheet helps you to determine which category you fall into and what effect that has on your rights and obligations.

1. Are you an employee or an independent contractor?

A court may consider a number of factors in deciding whether you are an employee or an independent contractor. No single factor is determinative, and the court will review the “totality of the relationship” between the parties.

You are more likely to be seen as an **employee** if:

- your employer directs the manner in which your work will be performed;
- your employer bears the commercial risk in relation to your work, eg. the risk of loss caused by your poor workmanship or negligence;
- you receive benefits such as annual leave, sick or personal leave and long service leave;
- your employer determines when and where your work will be performed;
- your remuneration is in the form of a salary or wages;
- your employer provides the majority of equipment and materials for the work;
- any use of your own equipment or materials is compensated for by reimbursement or by an allowance;
- your employer has discretion in relation to task allocation and termination of the engagement; and
- you cannot delegate tasks to non-employees, even though you may be able to delegate some duties to fellow employees.

You are more likely to be seen as an **independent contractor** if:

- you provide your own tools and equipment;
- you have control over when and how you do your work (the less control you have, the more likely it is that an employment relationship exists);
- your payment is based upon your output rather than the hours you work;

- you choose the hours you work;
- you are able to advertise to the public and work for more than one boss;
- you have registered your own business and have an Australian Business Number (**ABN**);
- you are free to delegate work to other people;
- your contract is for a given result and may only be terminated without penalty where you have not fulfilled the conditions of the contract; and
- you bear the commercial risk in relation to your work, the risk of loss caused by your poor workmanship or negligence.

You should always seek advice before agreeing to an arrangement where you would be engaged as an independent contractor. Advice can be sought from a union representative or a legal practitioner.

If you have started working and you are unsure about whether you are an employee or an independent contractor, you should also seek advice.

2. What rights and obligations do you have as an employee and an independent contractor?

Workers' compensation

Employees are entitled to workers' compensation in the case of accident or injury at the workplace.

Independent contractors may not be entitled to compensation unless they have arranged their own accident protection insurance, which can be expensive. Some contractors may be covered by WorkCover.

Occupational safety and health (OSH)

OSH laws usually apply to independent contractors as well as employees. This means that your boss must provide a safe and healthy workplace, regardless of whether you are an employee or independent contractor.

It also means that you are required to comply with the duties set out in the *Occupational Safety and Health Act 1984 (WA)*. Contact WorkSafe WA for more information.

Superannuation

Employees are entitled to superannuation contributions of 9.5% of their salary or wages.

Independent contractors may be entitled to receive superannuation. For more information, contact the Australian Taxation Office's (**ATO**) Superannuation Infoline. If you are not covered, you will have to arrange your own superannuation contributions.

Taxation

Employers are responsible for deducting taxation from an employee's salary or wages.

Independent contractors may have to pay tax at a different rate. You may have to arrange to pay your own tax. Contact the ATO Business Tax Enquiries for more information.

Termination

Permanent employees have access to a range of remedies upon the termination of their employment, including breach of contract, unfair dismissal, unlawful termination or discrimination.

An independent contractor's contract may be terminated in a number of ways, including:

- because each party has performed the obligations imposed by the contract;
- by agreement between the parties;
- by the operation of certain laws;
- by breach of the contract by one party, which alters the other party's obligations under the contract; or
- by "frustration" of the contract due to unforeseen circumstances.

Unlike employees, independent contractors cannot make unfair dismissal or unlawful termination claims.

Wages and conditions

Unlike employees, independent contractors are not entitled to a minimum rate of pay or conditions such as annual leave, parental leave, sick and carer's leave, long service leave, redundancy entitlements or rest breaks.

If you are an independent contractor, your pay and conditions are solely a matter for negotiation between you and your boss. Further, contractors are not guaranteed regular payment of wages in the way that employees are. You may have to wait until the job is completed before being paid.

The Fair Work Ombudsman (for national system employees) or Wageline (for state system employees) can assist employees in recovering unpaid monies. Where independent contractors wish to recover unpaid monies, they may need to commence legal proceedings. This can be expensive and you should get legal advice prior to taking this step.

3. What can you do if you are employed as an independent contractor but believe you are an employee?

You should seek legal advice if you are working as an independent contractor but believe you should be classed as an employee.

National system employees may have a legal claim if their employer misrepresents to them that they are engaged as an independent contractor when they are, in fact, an employee (see section 4 below).

For further information on whether you are a national system employee, see our Fact Sheet titled "National system employee or state system employee - which one are you?"

4. What can you do if your employment relationship was misrepresented as an independent contracting arrangement?

If you are a national system employee and your employment relationship was misrepresented to you as an independent contracting arrangement, you may be able to seek a remedy under the *Fair Work Act 2009* (Cth) (**FW Act**) on the basis that your employment is a "sham arrangement".

The FW Act prohibits sham arrangements where an employer treats an employee as an independent contractor in order to avoid having to meet its obligations to that employee. The FW Act provides that an employer must not:

- knowingly represent to a person that his or her contract of employment is a contract for services under which the person performs work as an independent contractor;
- dismiss, or threaten to dismiss, an employee in order to engage him or her as an independent contractor to perform the same work under a contract for services; or
- make a statement that the employer knows is false in order to persuade or influence an employee to enter into a contract for services under which the employee will perform the same work for the employer as an independent contractor.

If you believe that your employer has breached one of these provisions, you should seek legal advice. You may be able to make a general protections claim to the Fair Work Commission. For further information on this claim, see our Fact Sheet titled "General protections for national system employees" and our Information Kit titled "Making a general protections claim for national system employees".

5. Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111
Web www.elcwa.org.au

Wageline

Tel 1300 655 266 or 08 6251 2100
Web www.dmirs.wa.gov.au/wageline

Western Australian Industrial Relations Commission

Tel 08 9420 4444
From outside Perth Metropolitan area (FREECALL 1800 624 263)
Web www.wairc.wa.gov.au

Fair Work Commission

Address Level 16
111 St George's Terrace, Perth 6000
Tel 1300 799 675
Web www.fwc.gov.au
Email perth@fwc.gov.au

Fair Work Ombudsman

Tel 13 13 94
Web www.fairwork.gov.au

WorkCover WA Advisory Services:

Tel 1300 794 744 (WA Only)
Web www.workcover.wa.gov.au

ATO's Superannuation Infoline: 13 10 20

ATO Business Enquiries: 13 28 66

6. Disclaimer

By using this publication and the information* contained within it, you agree that:

The Employment Law Centre of WA (Inc), and its directors, employees and agents (**ELC**), do not accept responsibility for any consequences, including loss and/or damage, arising from your access to, or use of, the information contained in this publication, or from your reliance on any materials contained within this publication.

While the information has been formulated with all due care, ELC does not guarantee the accuracy, currency, reliability or correctness of any of the information, nor that the information provided is exhaustive. This publication, and all the information therein, is intended to be for informational purposes only and is not intended to provide or replace specialist legal advice.

ELC does not accept responsibility for the accuracy, currency, reliability or correctness of any information included within the publication that has been provided by third parties, including third party website links.

None of the information or materials provided within this publication may be used, reproduced or transmitted, in any form or by any means, without written permission from ELC.

Ultimately, you use this publication, and the information contained within it, at your own discretion and risk. You accept as a condition of your use of this publication and the information contained therein that you will make no claim for any loss, damage or expense that may arise from your use of publication, or your reliance on any of the information contained within it.

If you have concerns or questions about any of the above, you should contact ELC for assistance on 1300 130 956.

*Information includes any and all data, documents, pages and images.