



Employee or independent contractor

which one are you

YOUR RIGHTS

As a worker, your rights depend on whether you are an employee or an independent contractor. An independent contractor provides services to a business or another person rather than being employed by that business or person.

Many workplace laws provide protection and rights for employees, but not independent contractors. You may legally be an employee even though you are described as an independent contractor.

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

ARE YOU AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR?

A court will consider the real substance, practical reality and true nature of the relationship in deciding whether you are an employee or an independent contractor.

The court will consider the totality of the relationship and how the contract is performed in practice. This includes having regard to the indicators in the Table below.

The terms of the contract you are working under and whether the rights and obligations you have under the contract indicate you are an employee or contractor will also be considered.

If you would rather work as a contractor than an employee and you expect you will earn above the contractor high income threshold (currently \$175 000 per year), you can give the principal contracting company an 'opt

out notice' stating that you do not wish for the definition of employment to apply to your services being provided to the company.

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 are unsure about whether you are an employee or an independent contractor, you should also seek advice.

YOUR RIGHTS AND OBLIGATIONS

Insurances

Employees are covered under their employer's workers compensation insurance policy and entitled to apply for workers compensation in the case of an accident or injury at the workplace. Employers will also have public liability and professional indemnity insurance in place that covers their employees (where applicable).

Independent contractors may be responsible for arranging their own insurances, including workers compensation, public liability and professional indemnity insurance, which can be expensive.



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Table 1: Indicators for employees and independent contractors

Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work under the direction and control of their employer, including the requirement to comply with the employer's policies and procedures.	Has a high level of control over how the work is done and is usually not required to comply with policies or procedures (exceptions may be site-based policies that apply to all persons on site).
Who the person is 'in business for'	Performs work as a representative of their employer and can only further the employer's business and reputation. Is regarded as working in the employer's business.	Is regarded as being in business for themselves and providing services for the business of the engaging entity. Has the ability to generate goodwill and establish their own business, reputation and clientele.
Hours of work	Generally has little say over what hours the work is to be performed.	Likely to have discretion in choosing when work is performed, subject to some limits such as operating hours of a business.
Ability to work elsewhere	May be prevented from working for another business, particularly a competitor, during employment.	Is usually free to accept other work from any person or business at the same time as performing work under the contract.
Expectation of work	Usually has an ongoing expectation of work (some employees may be engaged for a specific task or period).	Usually engaged for a specific task or project, knowing that services will no longer be required on its completion.
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 rectifying poor performance or work defects.
Equipment and materials	Viewed by public as an employee (e.g. required to wear company uniform). Equipment and materials are provided by the company.	Viewed by public as an independent contractor. Equipment and materials are generally provided by the independent contractor.
Expenses	Generally will be reimbursed for expenses validly incurred in the course of their employment.	Incurs their own expenses.
Superannuation	Entitled to have superannuation paid into a nominated superannuation fund by their employer.	Typically pays their own superannuation.
Insurance cover	Does not provide their own public liability and workers compensation or accident insurance cover.	May provide their own public liability and workers compensation or accident insurance cover.
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Method of payment	Paid regularly (e.g. weekly, fortnightly or monthly).	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.



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However, some contractors may be covered by their principal's (i.e. the head contractor) WorkCover insurance as a 'worker' if the contractor:

- performs work under a contract with the principal and that work is not merely incidental to a trade or business regularly carried on by the contractor (individually or by way of a partnership)
- does not sublet the contract
- does not employ a worker or, if the contractor does employ a worker, performs part of the work themselves.

Work health and safety

Work health and safety laws apply to independent contractors as well as employees. This means the person or business you are working for must provide a safe and healthy workplace for all persons, regardless of whether you are an employee or independent contractor.

It also means you are required to comply with the duties in the Work Health and Safety Act 2011 (Qld), to:

- take reasonable care for your own health and safety
- take reasonable care that your acts or omissions do not adversely affect the health and safety of other persons
- comply, so far as you are reasonably able, with any reasonable instruction given by the person or business
- cooperate with any reasonable policy or procedure of the person or business relating to health or safety at the workplace.

Contact WorkSafe for more information.

Superannuation

Employees are entitled to compulsory superannuation employer contributions, currently 11% of their salary or wages.

Independent contractors may be entitled to receive superannuation if their contract is wholly or principally for the provision of labour, as they are deemed to be employees for superannuation purposes. For more information contact the Australian Taxation Office (ATO). If you are an independent contractor who is not entitled to receive employer superannuation contributions, you are responsible for arranging your own superannuation contributions.

Taxation

Employers are responsible for withholding income tax from an employee's salary or wages.

Independent contractors are usually responsible for their own income tax arrangements and may also be required to pay GST to the ATO. For more information contact the ATO Business Tax Enquiries or speak with an accountant.

Termination

Employees have access to a range of remedies upon the termination of their employment, including claims for breach of contract, unfair dismissal, breach of the general protections provisions of the Fair Work Act 2009 (Cth) (Fair Work Act) or discrimination.

An employee can only be dismissed from their employment for certain reasons such as the end of a fixed-term contract, changed business requirements, poor performance or misconduct.



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An independent contractor's engagement may be terminated in accordance with the terms of the contract. This may include:

- either party giving notice of termination as specified in the contract
- automatic termination because each party has performed its obligations under the contract
- by agreement between the parties
- by the operation of certain laws
- by breach of the contract by one party which is accepted by the other party
- by frustration of the contract.

Unlike employees, independent contractors cannot make unfair dismissal claims but can bring claims under the general protections provisions of the Fair Work Act, discrimination legislation and for breach of contract. Caxton Community Legal Centre has produced [factsheets on these topics](#) should you require further information.

Wages and conditions

Employees are entitled to a minimum rate of pay in accordance with the national minimum wage or applicable Modern Award. Employees receive payment for the hours they work on a weekly, fortnightly or monthly basis. Employees may also be eligible for other entitlements such as annual leave, sick and carers leave, parental leave, long service leave, redundancy entitlements or rest breaks.

[The Fair Work Ombudsman](#) (for national system employees) can assist employees in recovering unpaid monies or entitlements where these have not been provided by the employer.

These minimum wages and entitlements do not apply to independent contractors. If you

are an independent contractor, your pay and conditions are determined by the negotiation and agreement between the person or business for which you perform work. This agreement is often (but not always) set out in the terms of a written contract. Contractors have the ability to dispute terms of their contract that they consider unfair in the Fair Work Commission's unfair contracts jurisdiction.

Independent contractors usually receive payment based on completed work or projects, although the hours worked may also be a factor in determining payment. Contractors will usually need to have an ABN and issue an invoice to the principal for payment in respect of the work completed.

Where independent contractors wish to recover unpaid monies due under a contract, they may need to commence legal proceedings. This can be expensive and legal advice should be sought prior to taking this step.

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.

If a contract has been signed that clearly identifies you as an independent contractor, you will need to be able to show how your working relationship in practice is an employment relationship, having regard to the indicators in the Table above. This could include showing that you have limited control over the work you do and how you do it, and that you are performing work on behalf of the business you are working for.



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YOUR EMPLOYMENT RELATIONSHIP WAS MISREPRESENTED AS AN INDEPENDENT CONTRACTING ARRANGEMENT

If you think your working relationship was misrepresented as an independent contracting arrangement, you may be able to seek a remedy under the Fair Work Act on the basis that your employment is a 'sham arrangement'.

The Fair Work 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 Fair Work Act provides that an employer must not:

- represent to a person that their 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 them as an independent contractor to perform the same work under a contract for services
- 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, as an independent contractor, the same work for the employer.

If you believe that the person or business you are working for has breached one of these requirements, you can apply to the [Fair Work Commission](#) (FWC) for assistance to deal with the dispute. If your dispute involves dismissal then the time limit to commence a claim is 21 days from the date of dismissal.

If it does not involve dismissal, then generally the time limit is six years from the action you are complaining about. If no resolution

is reached in the FWC, you can apply to the Federal Circuit and Family Court of Australia or the Federal Court of Australia for a remedy, as long as this application is made within 14 days of the FWC certifying that attempts at resolving the dispute were unsuccessful.

You can also contact the Fair Work Ombudsman for more information or to make a complaint.



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CONTACT POINTS

Australian Taxation Office

www.ato.gov.au

Fair Work Commission

Level 14, Central Plaza 2

66 Eagle Street

Brisbane Qld 4000

P 1300 799 675

W fwc.gov.au

Fair Work Ombudsman

25/400 George Street

Brisbane Qld 4000

P 13 13 94

W fairwork.gov.au

Workplace Health and Safety Queensland

GPO Box 69

Brisbane Qld 4001

P 1300 362 128

W worksafe.qld.gov.au

CAXTON COMMUNITY LEGAL CENTRE

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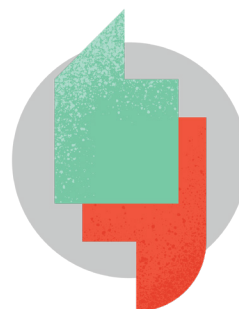
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This information is current at August 2024.



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