

Sub-contractor or employee

November 2007

This fact sheet explains the key differences between employees and sub-contractors and why it is important to ensure employers or workers are correctly classified.

A checklist is provided to help assess current arrangements to ensure they are correct.

People who work for businesses may be employees or sub-contractors. The legal rights and obligations which apply to employees are quite different to those for sub-contractors.

Whether a worker is an employee or a sub-contractor is determined by the nature of the arrangement, not by the label the employer gives the person. Employees cannot be made into sub-contractors simply by calling them such, they must fit within the legal definition of a sub-contractor.

The law treats each relationship quite differently and if employers get it wrong it can be very costly. If a court determines the sub-contractor is an employee covered by an industrial award, employers may face paying expensive back payments.

What is the difference?

A sub-contracting arrangement is a business to business relationship, with the worker providing a service which usually includes providing labour, tools and expertise. Contractors undertake to produce a given product or service and are not under the direction and control of an employer in the execution of their work. Contractors can use their discretion and may delegate tasks to others.

In an employment arrangement workers provide labour and work under the control and direction of the employer. The employer determines who does the work as well as when, how and where it is done.

It is this element of control which is crucial to determining the nature of the arrangement. Workers who are primarily providing their labour and who are working under direction and control of the employer, will usually be employees.



Other factors to consider

Other factors which may distinguish an employee from a sub-contractor are:

- Employees usually work for only one employer. Sub-contractors are usually free to offer their services to anyone.
- Employees are an integral part of a business and usually work on an ongoing basis. Sub-contractors operate as their own business or on their own account.
- Employees are usually paid according to the relevant industrial agreement, employer-employee agreement, award, or contract of employment. Sub-contractors usually agree on a rate for a specific job.
- Employees usually receive benefits in addition to wages, such as paid leave. Sub-contractors do not have these entitlements.
- Employees usually work with the employer's plant, equipment and materials. Sub-contractors usually provide much of this themselves.

The various pieces of employment-related legislation contain different definitions of an "employee" which can be specific to that legislation. There are different definitions for workers' compensation, superannuation, fringe benefits tax, income tax, payroll tax and occupational safety and health. For details on these definitions contact the relevant agency, such as WorkCover, the Department of Consumer and Employment Protection's WorkSafe Division and the Australian Taxation Office.

A point to note

It is important when assessing whether a worker is an employee or a sub-contractor to consider all the relevant factors which distinguish these employment arrangements.

Taxation arrangements, annual or sick leave, pay rates and workers' compensation arrangements are only indicators of a particular type of arrangement. They do not independently determine whether a worker is an employee or sub-contractor. The element of control in the working arrangement is one of the most significant factors.

Getting the arrangements right

Potential problems can be avoided by ensuring that workers are correctly determined to be employees or sub-contractors. If workers who are legally employees are treated as sub-contractors, the employer may be liable for unpaid leave entitlements, penalty rates and superannuation.

If the appropriate workers' compensation insurance for workers is not paid, employers risk being liable for the cost of any claim, the back payment of any avoided premiums, fines and legal costs. Employers and employees may also be exposed to taxation problems.

After determining the correct nature of any work arrangement, employers and employees must ensure that they understand all their legal obligations.

The checklist is designed to assist employers and employees in determining whether a worker is a sub-contractor or employee. It is a guide only and is not intended to provide a definitive assessment of the status of the arrangement.

Regional Offices

Great Southern	(08) 9842 8366
South-West	(08) 9722 2888
Mid-West	(08) 9964 5644
Goldfields/Esperance	(08) 9021 5966
North-West	(08) 9185 0900
Kimberley	(08) 9169 2811

Checklist

This checklist is provided to help assess workers' current arrangements to ensure they are correct.

In any arrangement there will be a person who is the worker and a person wanting to hire that worker. This arrangement may be between an employee/employer or a sub-contractor and principal contractor, depending on the existence of certain factors.

A tick placed in any of the shaded boxes indicates that an employer/employee arrangement may exist. The more shaded boxes ticked the higher the probability that it is an employment relationship.

	Yes	No	Unsure
1. Is the work being performed as part and parcel of the hirer's business?			
2. Are the tasks performed at the discretion and control of the hirer?			
3. Does the hirer have the right to direct the worker to perform specific tasks?			
4. Does the hirer bear the costs for any sub-standard or poor work that the worker performs?			
5. Does the worker perform the work with the hirer's assets and equipment?			
6. Does the worker perform the work within hours defined by the hirer?			
7. Does the worker receive paid leave entitlements?			
8. Is the worker paid an hourly rate?			
9. Is the worker reimbursed for expenses in the course of performing the work, eg fuel, travelling?			
10. Did the worker come to work for the hirer through an advertisement that the hirer placed?			
11. Does the hirer reserve the right to terminate the worker at any time?			
12. Does the worker have the right to delegate the work to someone else?			
13. Does the worker continue to work for the hirer past the completion of the job the hirer is working on?			
14. Is the worker able to accept similar work from other businesses while engaged by the hirer?			
15. Does the worker conduct his or her own business?			
16. Does the worker refuse to do certain jobs due to other commitments?			
17. Can the worker profit from the sound management of their work?			
18. Does the worker tender an invoice for work performed?			

PLEASE NOTE – Workers' compensation can also apply to sub-contractors as well as employees. For more information contact WorkCover Infoline 1300 794 744.



Need more information?

More information on employment arrangements and obligations can be obtained by contacting Wageline on 1300 655 266 or visiting our website at www.docep.wa.gov.au

Department of Consumer and Employment Protection

Wageline: 1300 655 266
8.30am - 5.00pm weekdays
except Wednesdays 9.00am - 5.00pm.

Labour Relations Division

Dumas House
2 Havelock Street
West Perth, Western Australia 6005
Telephone: 9222 7700
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The Department of Consumer and Employment Protection is not responsible for any actions taken or not taken based on this information.

