



**W3IP**LAW

ARTS COMMERCE SCIENCE TECHNOLOGY

# Employee or Contractor: Are You Breaking the Law?



W3IP Law Pty Ltd  
Employment Law

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## IMPORTANT NOTICE

This guide should not be relied on as a substitute for obtaining legal, financial or other professional advice. It is intended to provide general information only and is not intended to be comprehensive. The contents do not constitute legal, financial or taxation advice and must not be relied upon as such. You must seek specific professional advice tailored to your personal circumstances before taking any action based on this publication.

Should you require legal advice, please contact us. Our contact details are on page 9.

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# Is it against the law to get it wrong?

Incorrectly treating your employees as contractors is against the law. If your business is making this mistake, then you are breaking the law by:

- not meeting your tax and superannuation obligations; and
- denying your staff their employee entitlement.

The law in this area is strict in order to prevent businesses from illegally reducing their labour costs and gaining an unfair advantage over their competitors.



## SERIOUS PENALTIES APPLY

Getting this wrong exposes your business to serious penalties and charges, including:

- a PAYG withholding penalty for failing to deduct tax from staff payments,
- a superannuation guarantee charge, made up of:
  - superannuation shortfall amounts, being the amount of the superannuation contributions that should have been paid; and
  - interest charges and an administration fee; and
- an additional superannuation guarantee charge of up to 200%.

# Employee vs Independent Contractor



Some employees, such as apprentices and trainees, are always employees. If you contract services from a company, that company is always a contractor (however, income of the person who actually does the work may still be treated as personal services income for that person). In all other cases, careful consideration of the particular circumstance is required and a lawyer should be consulted.

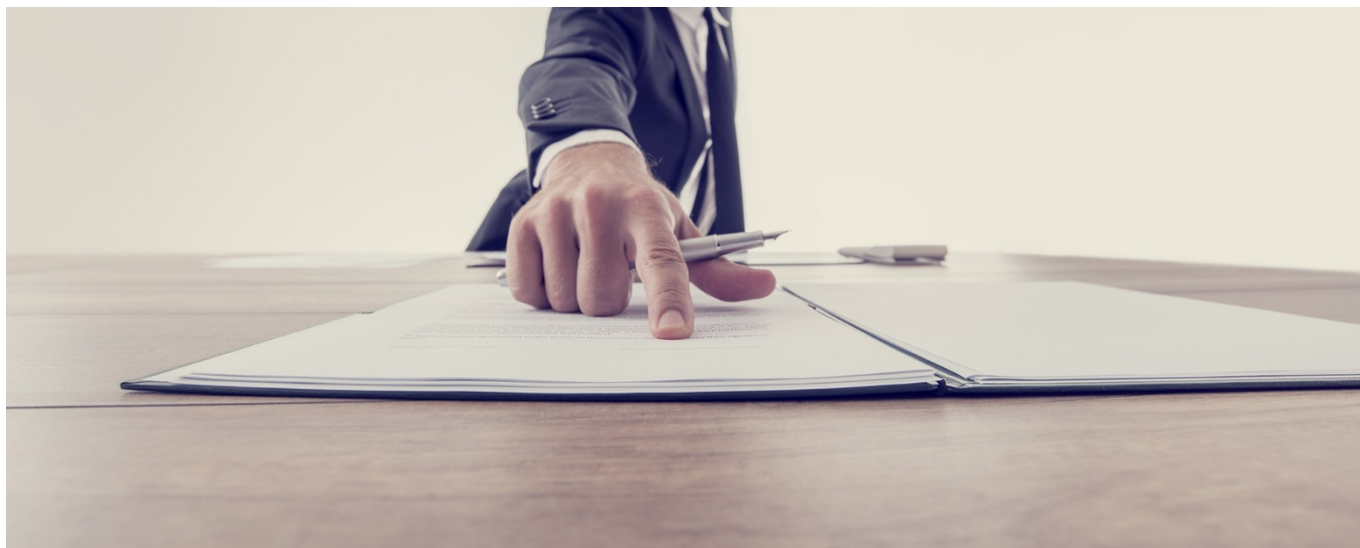
The following table highlights the key elements that need to be considered:

|                                    | Employee   | Contractor  |
|------------------------------------|--|---|
| Ability to subcontract or delegate | An employee can't pay someone else to do the work.   | A contractor can subcontract or delegate the work.  |
| Payment                            | An employee is usually paid for the time worked or a price per item/activity or a commission.  | Contractors are paid for a result achieved based on a quote provided by the contractor to the business.   |
| Equipment and assets               | The employer usually provides most or all of the equipment and assets that are needed to do the work, or an allowance or reimbursement for it. | The contractor provides most or all of the equipment and assets that are required to do the work and typically does not receive an allowance or reimbursement for the associated costs. |
| Commercial risks                   | Employees take no commercial risks – the employer is legally responsible for the work done by the employee.                                    | Contractors take commercial risk and are legally responsible for their work. They are also liable for the cost of rectifying any defects in their work.                                 |
| Control over work                  | The employer has the right to direct the way in which the employees do their work.   | Contractors have freedom to choose the manner in which the work is done, subject to specific terms in the contracting agreement.  |
| Independence                       | Employees work within a business and are considered part of the business. They do not operate independently                                    | Contractors operate in their own business independently and are free to accept or refuse additional work.   |



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# Getting the Independent Contractor Agreement right



To properly document an independent contractor arrangement, it is crucial for an appropriate Independent Contractor Agreement to be created and signed. It will set out the terms and conditions of the engagement and ensure that the rights and obligations of the parties are clear.

To ensure that the agreement properly creates an independent contracting relationship rather than a relationship of employer/employee, it should be drafted by a lawyer and include the following:

## **DETAILED DESCRIPTION OF THE SERVICES**

The agreement should describe in detail the services to be provided and clarify what type of work will be considered out-of-scope. Consider whether the services will be divided into phases and, if so, the duration and deadline date for each phase. The agreement should also set out the intended outcomes/results of the work.

## **INVOICING AND PAYMENT**

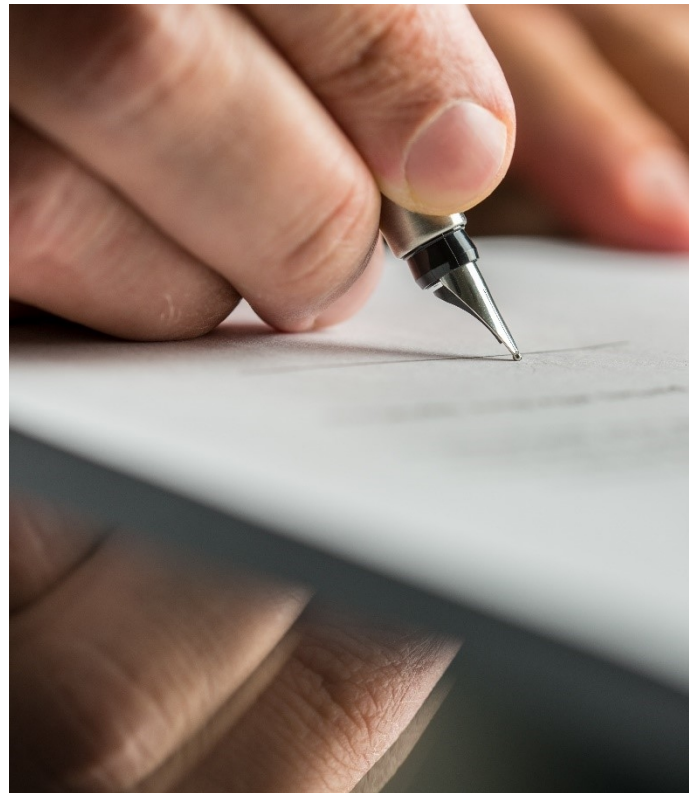
It is essential for the agreement to set out a detailed regime governing invoicing by the contractor and payment of those invoices by the business. This includes how often invoices will be issued and timing for when payment of each invoice will need to be made. The contractor's fees may be fixed or based on hourly rates with invoices rendered periodically or upon completion of the services (or each phase of the services, if applicable).

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## NON-SOLICITATION AND NON-COMPETE OBLIGATIONS

In general, it is advisable to include provisions in the Independent Contractor Agreement that prevent the contractor from:

- **non-solicitation** – encouraging staff, customers and/or suppliers to leave the business; and
- **non-compete** – providing services to customers/clients of the business, or otherwise competing with the business, after the contractor's engagement with the business has ended.



Enforcement of non-compete obligations in Australia is complex and difficult and the non-compete provisions of the agreement should be carefully prepared by a lawyer.

## TERMINATION OF THE CONTRACTOR'S ENGAGEMENT

The Independent Contractor Agreement should contain clauses that clearly set out when and how the contractor's engagement may be terminated. This includes both:

- **termination upon notice** – termination upon notice by the parties in the absence of breach; and
- **termination for breach** – termination by one party if the other party breaches the agreement.

## BREACH OF THE AGREEMENT

The agreement should clearly describe what conduct of the parties will be considered a breach of contract, along with the consequences that will flow from any breach. The business should seek to obtain an indemnity from the contractor for any damages to the business that result from the contractor breaching the terms of the agreement.

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# Case Study: Did Uber get it wrong?



## FACTS

The Fair Work Ombudsman (FWO) recently investigated Uber Australia Pty Ltd regarding whether Uber drivers are contractors or employees. The investigation was triggered by a change to Uber's pricing policy quoting exact, upfront prices to the passenger. Uber asked drivers to sign amended contracts consenting to the new pricing structure or risk being "deactivated".

## GROUNDINGS FOR INVESTIGATION

The FWO investigated whether Uber was incorrectly characterising its drivers as independent contractors rather than employees in order to avoid paying them minimum wage, annual leave, sick leave and superannuation. The investigation examined whether Uber was compliant with workplace laws, including the *Fair Work Act 2009* (Cth), the *Fair Work Regulations 2009* (Cth) and other legislation such as the *Independent Contractors Act 2006* (Cth).

## EVIDENCE EXAMINED

The FWO reviewed the drivers' contracts, log-on and log-off records, ABN documents, payment statements, banking records and pricing schedules and conducted interviews with both drivers and Uber.

## DECISION

It was decided that Uber drivers are contractors and not employees of Uber. The FWO stated that, in order for an employment relationship to exist, there must be an obligation for the employee to perform work when demanded by the employer. This obligation was not present between Uber and its drivers because the drivers have control over whether or not to perform the work as well as the timing and duration of work.

# Employee or Contractor: Myth vs Fact

Whether the relationship is employment or independent contracting depends upon the entire working relationship between the parties. It is not merely a matter of choice: the title of the contract or the label applied by the parties is not determinative. It is important for a lawyer to examine the terms and conditions of the working arrangement as a whole to determine whether the person is an employee or contractor.



The following table highlights some common misconceptions about independent contracting:

| Myth  | Fact   |
|---|--|
| If a person has an ABN or registered business name, they're a contractor.   | Having an ABN or registered business name makes no difference as to whether the person is an employee or contractor. You should never pressure a staff member to obtain an ABN in an attempt to disguise an employment relationship as independent contracting.            |
| Employees can't be used for short jobs or extra work during busy periods.   | The length of a job or regularity of work doesn't affect whether a person is an employee or contractor. Employees and contractors can both work casually, temporarily, infrequently and during busy periods and can be hired/engaged for short jobs and specific projects. |
| A person can't spend more than 80% of their time working for one business if they want to be considered a contractor. | The so-called "80/20 rule" only relates to whether the income of the individual who actually performs the work will be taxed as personal services income and not whether the relationship will be considered employment or independent contracting.                        |
| Contractors are never entitled to superannuation.   | Businesses may be required to pay superannuation for their contractors. If payment to an individual contractor is wholly or principally for the contractor's personal labour, then superannuation still needs to be paid.  |
| Submitting an invoice for work done means the person is a contractor.   | Although contractors should always invoice for their work, invoicing alone is not determinative. The structure and terms of the entire arrangement between the parties needs to be considered.   |



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# MORE INFORMATION

## ABOUT W3IP LAW PTY LTD

W3IP Law is a specialist law firm that provides expert intellectual property and trade mark attorney services specialising in the fields of information technology and Internet law. W3IP Law has extensive experience in drafting of all types of commercial and international agreements. We are focused on customer service, providing value, building our client's business and developing long term relationship with our clients.

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