

Contractor or Employee?

We regularly receive calls from our clients asking whether their new worker is an employee or a contractor, and what obligations they have in respect of that worker.

The first step is to establish whether the person is a contractor or an employee. It is most important to know that the law will uphold the true nature of a work relationship despite any attempts to make a relationship appear to be something else. For example, just because somebody calls themselves a contractor does not make them a contractor. They may well be an employee and you would need to fulfil all the statutory obligations of an employer.

Somewhat surprisingly perhaps, there is no definition of an employee in the Income Tax Assessment Act. There have been many cases regarding the nature of the workplace relationship, and all these cases have stated that we need to look at the ordinary meaning in common law for guidance. The main factors that should be addressed when considering what the real nature of a particular work relationship is are as follows:

Factors indicative of an independent contractor relationship:


- The contract between parties is for the provision of services
- The worker performs, or has an entitlement to perform work for others
- The worker has a separate workplace and advertises his or her services
- The worker risks loss, or making a profit
- The worker is responsible for insuring for work-related injury
- The worker provides and maintains significant tools or equipment
- The work can be delegated or subcontracted.

Factors indicative of an employer/employee relationship:

- The contract between the parties is a contract of service
- The organisation has the right to suspend or dismiss the person
- The organisation has the right to control the manner in which work is performed, including the hours and place of work
- The worker is presented to the public as a representative of the business
- Income tax is deducted from remuneration paid to the worker
- The worker is provided with paid holidays or sick leave.

When running through a checklist of these factors, it is sometimes clear whether the person is an employee or a contractor. Often it is not. Getting it wrong can have severe consequences – imagine the costs to an employer of somebody who has been treated as a contractor for many years but turns out to be an employee, and that person has not received annual leave, sick leave, superannuation etc.

In the next issue of the newsletter we will clarify what your statutory obligations are depending on whether the person is a contractor or an employee. These obligations are not as obvious as may first seem to be the case. Did you know that you may be obliged to pay superannuation for a contractor? Or that in certain circumstances you may have to pay workcover for a contractor you employ that is a company?




One question we will clarify in this newsletter is about the basic tax withholding obligations for contractors and employees.

If the worker is a contractor, then the worker must supply you with an Australian Business Number (ABN). If the worker fails to supply you with an ABN then you are obliged to withhold tax from the payment at 46.5%

If the worker is an employee then you must have the employee complete the appropriate forms and withhold tax from that employee based on the tables provided by the Australian Tax Office (ATO). There are no exceptions to this. It does not matter about the age of the employee or whether the employee is full time, part-time or casual. There is a common misconception that tax does not have to be withheld from casual or part time employees. There will not be withholding if the employee's pay falls below the threshold set by the ATO.

We will discuss statutory withholding obligations in more details in the next newsletter.

If you have any queries regarding any of these issues then please contact your McLean Delmo adviser.



Important: This is not advice. Clients should not act solely on the basis of the material contained in this document. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. This document is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.