

Guidance for labour hire providers: engaging workers as independent contractors

This guide helps ensure that when engaging workers as independent contractors, you:

- comply with your legal obligations
- do not engage in sham contracting
- keep your labour hire licence.

WORKER CLASSIFICATION

This guidance material has been updated in light of the decisions of the High Court regarding independent contracting relationships in [CFMMEU v Personnel Contracting \[2022\] HCA 1](#); [ZG Operations v Jamsek \[2022\] HCA 2](#) and the Federal Court's decision in [EFEX Group Pty Ltd v Bennett \[2023\] FCA 508](#)

Independent contractors and employees have different rights and obligations. Independent contractors provide services to another person or business, while an employee is employed by that person and serves in their business.

It is important to correctly classify your workers because it affects:

- your workers' entitlements
- your tax, super and other obligations regarding the worker.

To correctly classify workers, you must consider the terms of the contract between you and your worker. A contract can be written, oral or a mix of both. Some important considerations:

- Using labels such as 'contractor', 'employee' or 'principal' in a contract does not determine the actual legal relationship between the parties – instead what matters is whether the terms of the contract, considered as a whole, create an employment relationship, or an independent contracting relationship.
- How much control do you / the host have? Can you set hours, placements, give directions – including through the host? If so, this points to employment.
- Is the worker genuinely conducting their own independent business, or are they serving in your business and/or your host's business? If the latter, this points to employment.

Note: apprentices and trainees are always employees, never independent contractors.

For further information to help you comply with your legal obligations, read:

1. [Independent contractors – Fair Work Ombudsman \(FWO\)](#) for more information on the difference between employees and independent contractors. You'll also find information on minimum pay, working conditions and entitlements.
2. [Your tax and super obligations – Australian Taxation Office \(ATO\)](#) for information on the obligations you owe each type of worker.

If you're still unsure, you should consider independent legal advice.



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YOUR LEGAL OBLIGATIONS

You have ongoing legal obligations related to independent contractors.

Independent contracting laws

The [Independent Contractors Act 2006 \(Cth\)](#) sets up a national unfair contracts remedy scheme for independent contractors where they can ask a court to set aside a contract if it is harsh or unfair.

You can be liable for damages if you pay your independent contractors less than they would be entitled to as an employee.

The [Fair Work Act 2009 \(Cth\)](#) and the [Equal Opportunity Act 2010 \(Vic\)](#) protect independent contractors from discrimination and victimisation

Pay as you go (PAYG) withholding

Labour hire providers must withhold tax from payments to individual workers who perform work or services directly for clients (including hosts), regardless of whether they are an employee or independent contractor.

All workers (employees and independent contractors) need to provide you with:

- their Tax File Number (TFN), regardless of whether they also have an Australian Business Number (ABN) (which they may have for unrelated activities), or
- an instalment rate to vary the rate of tax.

You can use the ATO's tax calculator to work out how much to withhold, which will depend on whether your worker provides you with their TFN.

If you have withheld tax amounts from payments you make to your workers, you need to:

- provide the withheld amounts to the ATO
- report those amounts to the ATO regularly on activity statements
- lodge an annual report to the ATO confirming your total withholding
- provide payment summaries detailing total payments and withholding to each of your workers.

You won't need to do payment summaries for amounts you reported and finalised through Single Touch Payroll (STP).

At the end of the financial year, you also will need to finalise your STP data, so your workers can access their 'tax ready' income statements via myGov when preparing to lodge their income tax returns.

See [Labour-hire firms and their workers - Australian Taxation Office](#) for more information.

Superannuation guarantee

If you pay independent contractors mainly for their labour, they are employees for superannuation guarantee (SG) purposes, and you may need to pay super to a fund for them.

It doesn't matter if the independent contractor has an ABN.

Make super contributions for independent contractors if you pay them:

- under a verbal or written contract that is mainly for their labour (more than half the dollar value of the contract is for their labour)
- for their personal labour and skills (payment isn't dependent on achieving a specified result)

- to perform the contract work (work cannot be delegated to someone else).

If you're ever unsure if a worker is eligible for super contributions, you can use the [super guarantee eligibility decision tool](#) on the ATO website.

The minimum super you must pay is the [super guarantee percentage](#) of the worker's ordinary time earnings. This is the labour component of the contract. Do not include:

- any contract payments that are for material and equipment
- overtime for which the worker was paid overtime rates
- GST.

Paying an additional amount equal to the SG rate to the independent contractor on top of their usual pay does not count as a super contribution. To avoid the SG charge, you must make the SG contribution to the independent contractor's super fund each quarter.

See [Super for employers – Australian Tax Office](#) for more information.

Payroll tax

Payroll tax applies if you pay wages in Victoria and your Australian wages exceed the monthly threshold of \$58,333 (until 1 July 2024). Payments to contractors are taken to be wages where the contractors predominantly provide labour services and work exclusively or primarily for one principal in a financial year.

See [Contractors – State Revenue Office](#) for more information.

You may be investigated by the State Revenue Office if you do not register and pay the correct amount of payroll tax, and penalties and interest may apply.

Workers' compensation laws

You may need to include independent contractors in your wages estimate for workers' compensation insurance. Most labour hire workers who are engaged as independent contractors must be included in your wages estimate, see [Understanding who is and isn't your worker – WorkSafe Victoria](#) for more information.

SHAM CONTRACTING

A sham contracting arrangement is when an employer disguises an employment relationship as an independent contracting arrangement.

Sham contracting arrangements can exist even if:

- you treat the worker like an independent contractor in some ways
- you require the worker to have an ABN and submit invoices.

How is sham contracting harmful?

Businesses often engage in sham contracting to:

- illegally lower their labour costs
- deny workers their employee entitlements
- unfairly undercut honest labour hire providers by not complying with workplace and superannuation laws
- not meet their tax obligations, which means the community is missing out on revenue that could have contributed to community services like hospitals, schools and roads.

Sham contracting is illegal

It's against the law for a business to incorrectly treat their employees as independent contractors under the *Fair Work Act 2009* (Cth). It is illegal to:

- tell an employee they are an independent contractor
- say something false to convince an employee to do the same work for the employer but as an independent contractor
- dismiss or threaten to dismiss an employee if they do not become an independent contractor
- dismiss an employee and hire them as an independent contractor to do the same work.

The *Fair Work Act 2009* (Cth) provides serious penalties for sham contracting.

Businesses also risk receiving penalties and charges from the ATO where they engage in sham contracting, including:

- PAYG withholding penalty
- superannuation guarantee charge.

LABOUR HIRE AUTHORITY

Our purpose is to protect labour hire workers from exploitation by labour hire providers and their hosts, and to improve the transparency and integrity of the labour hire industry.

We do this by ensuring that labour hire providers comply with all their legal obligations, including their obligations relating to independent contractors.

We work closely with other regulators and law enforcement agencies and share information as permitted by law.

This ensures transparent and compliant labour hire providers do not face unfair competition from dishonest and rogue operators.

What should I do if I am not compliant?

If you have been genuinely mistaken about your legal obligations regarding independent contractors, you can contact us on 1300 545 200 or email enquiries@labourhireauthority.vic.gov.au to discuss how you will fix the situation.

If you continue to be non-compliant with your obligations relating to independent contractors, you risk your licence being suspended or cancelled. You will not be able to operate a labour hire business in Victoria if your licence is suspended or cancelled.