



## Contractors and Workers' Compensation – Are You a Worker Under the Act?

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Contractors have access to workers' compensation scheme entitlements if they are considered to be a worker, as defined section 5 of the *Workers' Compensation and Injury Management Act 1981 (the Act)*.

It is important for people who engage workers under any contract working arrangements to check whether they have a workers' compensation liability under the Act.

Just because someone is described as self-employed, or has an Australian Business Number, does not mean the business or company engaging them is not liable for any workplace injury they sustain.

The Act applies regardless of any contract made to the contrary. In relation to contractors, any private arrangement about workers' compensation means nothing if the contractor makes a claim and the law considers them to be a worker.

In workers' compensation law, there are two main parts to the definition of worker:

- The primary definition covers workers employed under a contract of service – a clear employer-employee relationship.
- The extended definition includes independent contractors engaged under a contract for service, where they get paid for personal manual labour or services.

### Contract of service

Much of Western Australia's workforce works under a contract of service, including:

- full-time and part-time workers
- casuals
- seasonal and piece workers
- workers on salary or wages
- workers supervised and controlled by an employer
- workers who may be fired by an employer
- workers who work for only one employer
- workers with set hours of work.



If contractors or sub contractors do not genuinely run an independent business and work under arrangements similar to employees, they may be considered a worker under the primary definition.

The following factors considered together may assist in determining if a person works under a contract of service.

### **Control**

If the work is directed and/or controlled by someone else, then it is likely a contract of service applies. However, if there is agreement to produce a certain result (and no-one is directing or controlling your actual work) then the person may not be working under a contract of service.

### **Payment**

If payment is on the basis of the time spent on the job, this may indicate a contract of service.

### **Working hours**

If the working hours are spelt out in a contract, it suggests control and supervision and may indicate a contract of service.

### **The right to employ others**

If you are entitled to delegate your work and employ others to do the work for you, then the relationship is less likely to be a contract of service.

### **Equipment**

The more material and equipment the person is provided with to do work, the more likely it is that they are employed under a contract of service.

### **Termination**

The right to dismiss a worker indicates that one party has control of the conduct of the work of another and a contract of service exists.

## **Terms of the contract**

If a contract exists which states the relationship is one of principal and contractor, it does not mean that such a relationship is recognised in workers' compensation law. If all the factors indicate the relationship is a contract of service then agreements in contract to the contrary are not binding. However, if the relationship is ambiguous, then an express provision in the contract bears significance in law.

Even if you are not employed under a contract of service, you may still be considered a worker under the extended definition.

## **Contract for service**

You may carry out work under a contract for service. Such arrangements apply to many independent contractors and sub-contractors.

Two major factors determine whether a person is a worker under the extended definition:

1. You must be engaged by someone else to work for the purpose of their trade or business and you perform the actual activities of that business (for example, a roof tiler sub-contractor engaged by a roof tiling business). Or, you do work related to the efficient conduct of the employer's trade or business (for example, a fencing contractor engaged to replace fencing on a sheep station).
2. The money you get must in substance be for your personal manual labour or services. Important considerations include:
  - whether you are provided with plant and equipment
  - whether extra labour or personnel are provided
  - whether administrative or other services not directed at the actual work are provided (such as drafting, typing and secretarial services).

The fact that you receive payment for some other reason in addition to providing manual labour or services, does not mean you are not considered a worker under the extended definition. However, any other reason must be comparatively insignificant in relation to the payment you get for labour or services.

Examples of people who work under a contract for service and are likely to be considered a worker include:

- Contractors or sub-contractors who perform the actual activities (for example, bricklaying or plastering) of the employer's trade or business (that is, for a builder).
- Contractors or sub-contractors who perform activities (for example, fencing) for the efficient conduct of an employer's trade or business (that is, for a farmer).

In each case, if the contractor or sub-contractor does not supply materials or employ any workers and is paid in substance for personal manual labour or services, he or she is likely to be defined as a worker.

Therefore, even if you use your own tools, and this is not a big factor for what you are paid for, you may still be defined as a worker.

However, if you supply a lot of materials and/or employ workers, you are unlikely to be considered a worker.

### **Joint liability**

The Act also protects sub-contractors engaged in contractual arrangements involving more than one employer.

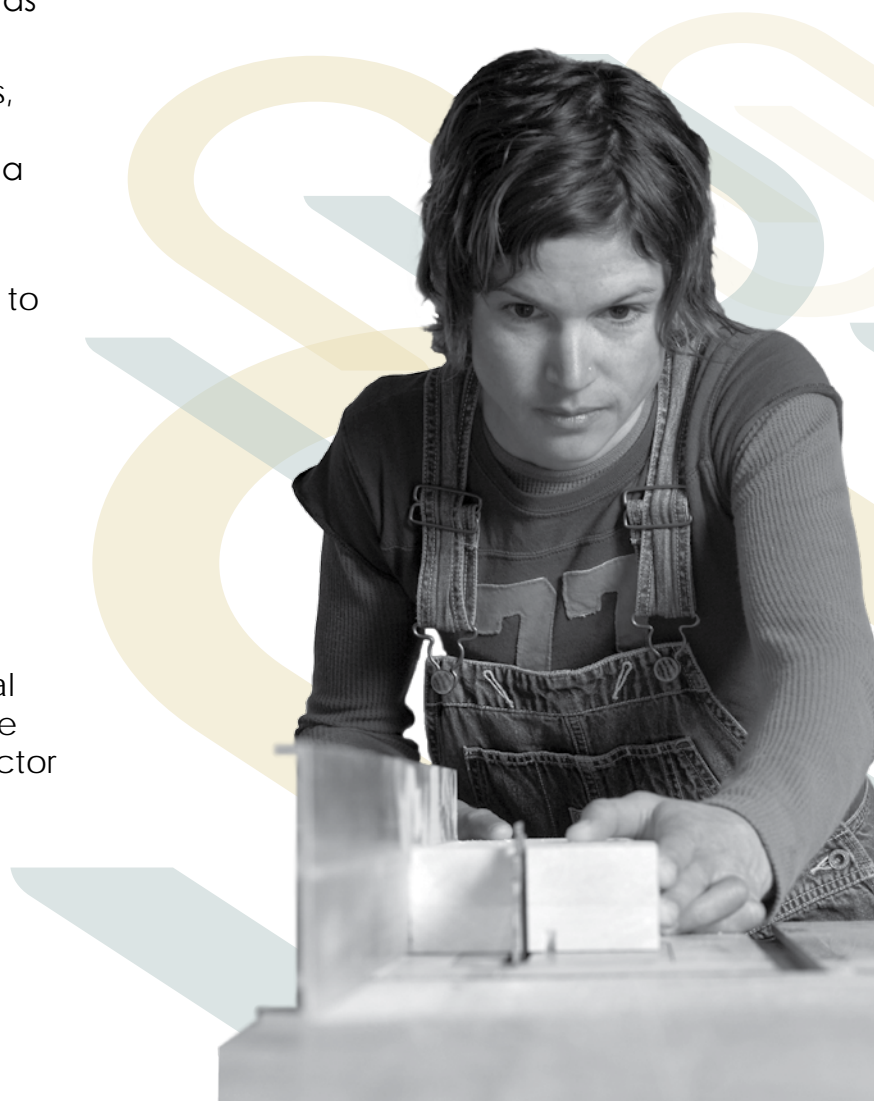
If the principal employer arranges a contractor to do work for the principal's trade or business, then both the principal and the contractor are considered to be the employer of any workers the contractor may employ.

The principal and any contractors must take out workers' compensation insurance for a contractor's workers. If claiming for injury, a worker may claim compensation either from the principal, or the contractor, or both.

Principals will be liable only if the work was directly related to their business and the injury happened at their workplace or a workplace under their control or management.

This applies right down the contractual chain. For example, if a head contractor on a building site engages various contractors who engage sub-contractors, then all parties (principal, contractor and sub-contractor) are liable to cover any workers the sub-contractor may employ. If one of the sub-contractor's workers is injured at work, a compensation claim could be made on the principal, the contractor or the sub-contractor.

Therefore, principals should ensure that contractors have current workers' compensation insurance policies, and all workers should check that they are covered.



## Employers must not avoid workers' compensation

To help ensure workers are covered by workers' compensation, the laws prohibit employers from entering into workers' compensation avoidance arrangements (ie the practice of requiring individuals to set up their own company as a condition of getting a contract for work).

## Examples of avoidance arrangements

### Worker previously employed

CWKG Engineering enters into a contract with a welder who was previously employed under a contract of service by the company to weld steel roofing frames.

Under the new arrangement the welder provides substantially similar services as she did when employed by CWKG Engineering, but provides those services on behalf of a separate company as a director or employee, working principally for CWKG Engineering. The work done is also directly part of the business of CWKG Engineering (ie metal fabrication).

If an injury occurs, CWKG Engineering will be liable to pay the welder compensation and meet return to work obligations, if required.

### Worker not previously employed

Morrissey Cleaners calls for tenders from incorporated companies to provide cleaning services to clients. Morrissey Cleaners intimates that it is not responsible for workers' compensation under the contractual arrangement for any company winning the tender for the contract.

An applicant, Mr Brookes, forms a company named PB Pty Ltd, registers himself as the director and PB Pty Ltd wins the contract. While the contract is in effect Mr Brookes does work principally for.

Morrissey Cleaners – work that is directly a part of the business of Morrissey Cleaners (ie industrial cleaning).

If an injury occurs, Morrissey Cleaners will be liable to pay Mr Brookes compensation and meet return to work obligations if required.

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### About WorkCover WA

WorkCover WA is the government agency responsible for overseeing the workers' compensation and injury management system in Western Australia.

This includes monitoring compliance with the *Workers' Compensation and Injury Management Act 1981*, informing and educating workers, employers and others about workers' compensation and injury management and providing an independent dispute resolution system.

### Disclaimer

Important note: This information is not to be taken as legal advice. For full details refer to the Act or seek your own legal advice. Whether someone is considered a 'worker' under the Act depends on a range of circumstances in each particular case. Therefore, WorkCover WA cannot provide definitive advice on each and every kind of employment relationship. Although the information has been compiled with care, legislative amendments and decisions made in WorkCover WA's dispute resolution system and relevant courts may change the interpretation of laws affecting coverage for contractors. Note that rulings and decisions from other regulatory bodies (for example, the Australian Taxation Office) do not apply in relation to liabilities and obligations for covering contractors for workers' compensation.



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