

Contractors and workers' compensation

Technical note 1



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.

Disclaimer

This brochure is only a guide to the law. It 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.

Employers must ensure workers' compensation insurance is in place to cover workers for work related injuries.

In addition to traditional employer-employee arrangements, contractors and subcontractors may also be entitled to workers' compensation if they are defined as workers under the *Workers Compensation and Injury Management Act 1981* (the Act).

This factsheet describes how 'workers' are defined in the legislation and how the compensation laws are applied in practice.

Defining a worker

The Act has both a primary and extended definition of a worker.

The **primary definition** covers those who are employed under a contract of service – the relationship being one of employer-employee.

The **extended definition** broadens the scope of who is considered as a worker under the Act to include independent contractors engaged under a contract for service where the remuneration they receive is in substance for personal manual labour or services. (The term 'in substance', is explained later in this document).

Deemed arrangements

In some circumstances, where a contractor's workers are under the control and direction of a principal contractor, that principal contractor may also be liable (jointly with the contractor) for the contractor's workers.

A workers' compensation liability may also arise where a worker is engaged under contractual arrangements contrived so that the employer can avoid his or her liabilities under the Act. For example, by requiring the worker to incorporate (set up their own company) as a condition of getting a contract.



Important:

Just because a person is described as self-employed or has an Australian Business Number does not mean the person or the entity (eg business, company) engaging them is exempt from any liability for workplace injury.

The provisions of the Act apply regardless of any contract made to the contrary (section 301).

In relation to contractors, this means that any private arrangement entered into in relation to compensation for workplace injury is null and void if the contractor makes a claim and is considered to be a worker under the Act.

Contract of service

A large part of the workforce works under a contract of service including:

- full-time and part-time workers;
- casuals (working for an employer's trade or business);
- 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; and
- workers with set hours of work.

Many contractors and sub-contractors may also be defined as workers under the primary definition if they do not have independence in conducting their operations and do not genuinely run an independent business or enterprise.

What the Act says

Section 5 (primary definition):

"... "worker" does not include a person whose employment is of a casual nature and is not for the purpose of the employer's trade or business, ... but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing; ..."

Interpretation

Although there is no definitive statement that can be applied to determine if a contract of service exists, generally it is clear whether a person is working under such a contract, ie the relationship is one of employer/employee and the employer must take out workers' compensation to cover that employee.

Defining a worker's status

There are a number of factors that distinguish workers employed under a contract of service from those employed as independent contractors. No one factor alone indicates such a contract. Instead the totality of the employment relationship must be considered.

- **Control**

The most important indicator of the existence of a contract of service is the level of control over a worker.

If the work done by the worker is subject to the direction and control of the other person, then an employer/employee relationship is more likely to be established. However, where the worker agrees only to produce a certain result but is not subject to control in actually doing the work then the relationship is likely to be considered as one of principal/independent contractor.

- **Remuneration**

Where remuneration is paid on the basis of time spent on the job, the relationship is likely to be a contract of service and the relationship one of employer-employee. Where the contract relates to services provided (ie contract for services), remuneration is more likely to depend on results or levels of production.

- **Working hours**

Where the working hours are stipulated in a contract, it infers greater levels of control and supervision. Coupled with other factors, this may indicate the existence of a contract of service and an employer-employee (worker) relationship.

- **The right to employ others**

If a person is entitled to delegate their work and employ others to do the work for them, then the relationship is more likely to be a contract for service, than a contract of service.

- **Equipment**

Generally, the higher the level of material and equipment provided for the worker, the more likely it is that he or she is employed under a contract of service.

- **Termination**

A right to dismiss a worker does not by itself indicate the contract is a contract of service. However, it is a further example of the right to control a worker and may indicate that one party has effective control of the conduct of the work of another.

- **Terms of the contract**

Just because two parties enter into a contract, which says the relationship is one of principal and contractor, does not necessarily mean that such a relationship is established under the Act.

If all other factors indicate the relationship is of another kind, then the parties' expressed intentions do not alter its true nature. However, where the relationship is ambiguous, then an express provision in the contract will bear greater significance in law.

Summary of factors to consider in determining a contract of service

- The nature of the work.
- The extent of any control exercised by the employer.
- How and on what basis the employee is remunerated.
- Any obligation to work for defined or regular hours.
- Who provides tools, equipment and fuel.
- How and in what circumstances the contract is terminated.
- Who pays the tax, insurance, licensing fees etc.
- Any restriction from working for other employers.
- The express intentions of the parties.

Contract for service

People not employed under a contract of service may still fall under the extended definition of worker in the Act, ie they are under a contract for service.

These include many independent contractors and sub-contractors.

Two major factors must be satisfied before someone can be defined as a worker under the extended definition:

- they must be engaged by another person to work for that person's trade or business (see below); and
- the remuneration must in substance be for his or her personal manual labour or services (see below).

What the Act says

Section 5 (extended definition)

- a. *"...any person to whose service any industrial award or industrial agreement applies; and*
- b. *any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services ..."*

Interpretation

To determine whether a worker falls within part (b) of the extended definition, you need to establish what they are paid for.

The meaning of the term 'in substance'

The words, in substance, broaden rather than confine the extended definition of a worker.

If payment is received for some other reason, in addition to providing manual labour or services, it does not negate the definition. However, the other reason must be comparatively insignificant in relation to the payment made for labour or services.

In determining whether or not the remuneration is in substance for personal manual labour or services, matters to consider include:

- the provision of plant and equipment;
- the provision of additional labour or personnel; and
- the provision of administrative or other services not directed at the actual work (such as preparation, drafting, typing and secretarial services).

The meaning of engaged for the purpose of the employer's trade or business

Those who perform the actual activities of the employer's business are likely to be engaged for the purpose of the employer's trade or business, for example a roof tiler sub-contractor engaged by a roof tiling business.

However, people performing activities related to the efficient conduct of the employer's trade or business are also likely to meet the definition for example, a fencing contractor engaged to replace fencing on a sheep station.

Examples of contract for service

Examples of those defined as working under a contract for service include:

- contractors/sub-contractors who perform the actual activities of the employer's trade or business (eg bricklayers or plasterers for a builder); and
- contractors/sub-contractors who perform activities for the efficient conduct of an employer's trade or business (eg fencers for a farmer).

These contractor/sub-contractor may be self-employed or have an Australian Business Number, but could still be considered a worker of a person who engages them, pursuant to the Act.

A contractor/sub-contractor may use their own hand tools, but if this is not a significant factor for what he/she is paid for, it will not matter for the purpose of satisfying the extended definition.

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

If the contractor/sub-contractor supplies significant materials and/or employs workers, then there is doubt whether he or she would be a worker under the Act.

Joint and several liability for sub-contractors

Section 175 of the Act is designed to protect sub-contractors engaged in contractual arrangements which involve more than one employer.

What the Act says

Section 175(1)

1. *"Where a person (in this section referred to as the principal) contracts with another person (in this section referred to as the contractor) for the execution of any work by or under the contractor and, in the execution of the work, a worker is employed by the contractor, both the principal and the contractor are, for the purposes of this Act, deemed to be employers of the worker so employed and are jointly and severally liable to pay any compensation which the contractor if he were the sole employer would be liable to pay under this Act."*

Interpretation

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

As employers, both principals and contractors must take out workers' compensation insurance for a contractor's workers. In the event of a claim for injury, a worker may claim compensation either from the principal or the contractor, or both.

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.

The principal will be liable only if the work being done at the time of the injury is directly a part or process in the principal's trade or business and if the injury happens at the principal's workplace or a workplace that is under the principal's control or management.

Under section 175(2), if the principal is required to pay the claim in the first instance, he or she may sue the contractor to recover the full cost of the claim.

Principals should ensure that contractors have current workers' compensation insurance policies.

Suitable arrangements can be made with an approved insurer to strike an appropriate or discounted premium for principals.

Liability for arrangements that are contrived to avoid workers' compensation

Workers' compensation laws prohibit certain employers from requiring individuals to incorporate (set up their own company) as a condition of getting a contract for work.

What the Act says

Section 175AA

1. "...a person ("W") executes work for another person ("E") under an avoidance arrangement if –
 - (a) the work is executed under an arrangement that is contrived to enable E to have the benefit of W's services without having liabilities and duties as W's employer under this Act;
 - (b) the arrangement was entered into on or after the coming into operation of section 13 of the Workers' Compensation Legislation Amendment Act 2005; and
 - (c) while the arrangement is in effect –
 - i. W executes work principally for E on behalf of a company of which W is an employee or director (the "company"); and
 - ii. the work is directly a part or process in the trade or business of E.
2. Unless the arrangement is, or is of a class of arrangements, prescribed by the regulations, an arrangement is contrived for the purpose described in subsection (1)(a) if –
 - (a) before executing work under the arrangement, W was E's worker and provided substantially similar services; or
 - (b) although the circumstances described in paragraph (a) did not exist before W executes work under the arrangement, E intimated, before the arrangement was entered into, that E was unwilling to enter into an arrangement for the provision of substantially similar services that would have resulted in W being E's worker."

Interpretation

The meaning of avoidance arrangement

The term, avoidance arrangement, applies only in the following circumstances.

1. The arrangement was entered into, on, or after 14 November 2005.
2. The work is done under an arrangement designed to enable an employer to benefit from a worker's services without liabilities and duties as the worker's employer under the Act; specifically if:
 - (a) before the arrangement was made, the worker was the employer's worker (under the Act) and provided substantially similar services; or
 - (b) before the arrangement was made, the employer intimated that he or she would not engage the worker under contractual arrangements that would make the worker the employer's worker under the Act.
3. While the arrangement is in effect, the worker does work principally for the employer on behalf of a company of which the worker is an employee or director.
4. The work is directly a part or process in the trade or business of the other employer.

Employers who allow a worker to do work for them under such avoidance arrangements may be fined a maximum of \$5,000.

If a worker is injured while working for an employer under an avoidance arrangement, the employer will be liable to pay workers' compensation entitlements in accordance with the Act and also to meet return to work obligations.

It is an offence for an employer (or the employer's insurer) to receive any money or indemnity from the worker (or the worker's company) in respect of any compensation liability the employer has to pay compensation. The penalty is \$2,000.

Examples of avoidance arrangements

1. Worker previously employed

CWKG Engineering enters into a new 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 working for 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 any return to work obligations.

2. Worker not previously employed

Morrissey Cleaners calls for tenders from incorporated companies to provide cleaning services to its 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 any return to work obligations.

Further information

For more information on contractors and workers' compensation, or other similar matters, please telephone us, email us, call in or go to our website.

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