

a technical note on

## Contractors and Workers' Compensation



WorkCoverWA

## WorkCover WA

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## About WorkCover WA

WorkCover WA is the government agency responsible for overseeing the workers' compensation and injury management scheme 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.

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## Disclaimer

This publication contains information regarding workers' compensation and injury management. It is intended to provide general information only. You should not act or omit to act on the basis of anything contained herein. This brochure should be read in conjunction with the Workers' Compensation and Injury Management Act 1981. You should seek appropriate legal/professional advice about your particular circumstances.

For more information, visit the WorkCover WA website at [www.workcover.wa.gov.au](http://www.workcover.wa.gov.au). Workers' compensation legislation is also available from the State Law Publisher website at [www.slp.wa.gov.au](http://www.slp.wa.gov.au).

# Contractors and workers' compensation

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

In addition to traditional employer-employee arrangements, contractors and sub-contractors may also be entitled to workers' compensation if they are defined as workers under the Workers'

Compensation and Injury Management Act 1981 (the Act).

It is important for anyone who engages workers under contractual working arrangements to check whether they have workers' compensation obligations under the Act.

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



# Definitions

## 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 Workers

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.

## Working Directors

A 'working director' is a director of a company who executes work for or on behalf of the company and whose earnings as a director are in substance for personal manual labour or services.

A company must apply to an approved workers' compensation insurer to cover their working directors. If this action is not taken, working directors are not covered for any claim made by the working director on the company.

Some working directors may work in more than one employment and be employed or engaged directly by some other employer. If employed or engaged directly, that other employer may have a liability for the working director.

### Important

Just because a person is described as self-employed or has an Australian Business Number does not exempt the person or entity who has engaged them from any liability for work-related injuries. 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, i.e. the relationship is one of employer-employee and the employer must take out workers' compensation to cover that employee.

## Defining a worker's status - contract of service

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 (i.e. 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 restrictions 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, i.e. 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 be in substance 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, it is necessary to establish what the worker is paid for.

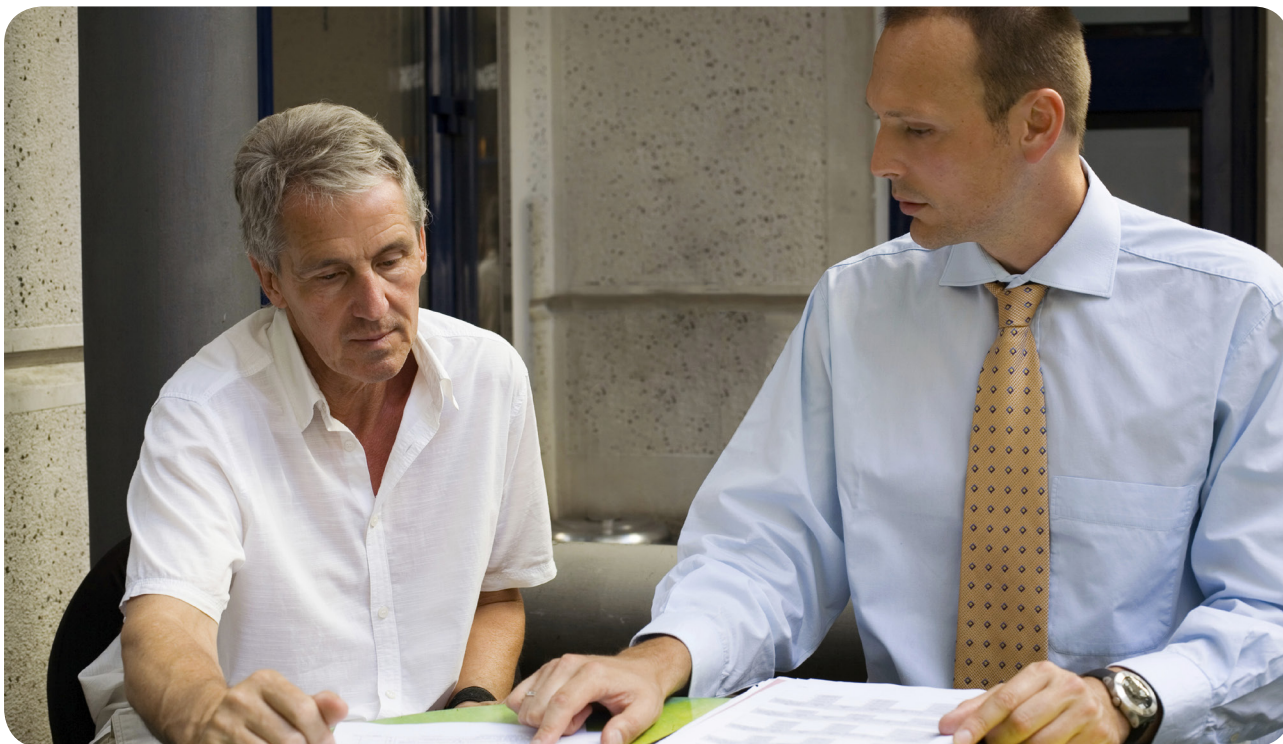
The meaning of the term 'in substance'

The term 'in substance' broadens, rather than confines 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.

#### Defining a worker's status - 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 (i.e. bricklayers or plasterers for a builder); and

- contractors/sub-contractors who perform activities for the efficient conduct of an employer's trade or business (i.e. fencers for a farmer).

A 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.

# Deemed Workers

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 must 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.

# Avoidance Arrangements

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;
  - (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."

### Interpretation

Employers cannot contract out of liability under the Act by making a worker sign an agreement that they are not entitled to claim workers' compensation or seek to avoid liability through contractual

arrangements. The Act refers to such an agreement as an avoidance arrangement.

Employers who allow a worker to do work for them under an avoidance arrangement 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 and meet return to work obligations in accordance with the Act.

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 payments for which the employer is liable. The penalty is \$2,000.





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