

**IS YOUR
INDEPENDENT
CONTRACTING
A SHAM?**

**ASPECT LEGAL
CHEAT SHEET
SERIES**

A publication of aspect legal



ASPECT LEGAL: EVERYDAY BUSINESS CHEAT SHEET

Is your independent contracting a SHAM?

If you engage independent contractors, you need to ensure that your practices don't fall foul of the Fair Work Act and put you at risk of being labelled as engaging in "sham contracting" – where a business attempts to disguise employment relationships as independent contractor relationships to avoid employer obligations such as minimum pay rates, superannuation, leave and other entitlements. Do this, and be at risk of falling under the watchful eyes of the ATO.

Who should read this Cheat Sheet

1. Businesses that are considering whether to take on employees, versus contractors.
2. Businesses who already regularly engage contractors.
3. Commuters on Sydney Rail – waiting for that late train. Again.
4. Directors and HR managers (who can be personally liable for failing to adequately advise their employers/company about their obligations under the Workplace Relations Act)



If you regularly engage contractors, and especially if you engage them for lengthy periods of time, routinely review the relationship to assess whether the arrangements could be viewed as one of employment

How to use this Cheat Sheet

The information contained on this cheat sheet is provided for general information purposes only and does not constitute legal advice – sorry, we had to say that. But we have tried to make it helpful for you by...

signposting the situations where you should contact a lawyer with this symbol:



and signposting practical tips to help you get the most out of this cheat sheet with this symbol:



What makes a worker an independent contractor?

There is no single factor that will definitively indicate what the nature of the relationship is, because every contractual relationship is unique (we know, it sounds like such a lawyerly thing to say!).



Aspect TIP

The more a worker looks like an employee, acts like an employee and is treated by you like an employee, then no matter what you call them, they may in fact be deemed to be an employee.

A court will consider the extent to which the following factors apply:

- **Control** – the worker decides how the work will be performed and what expertise is required
- **Liability and risk** – the worker is responsible for the risk involved in the work, eg the cost of rectifying substandard work
- **Location and hours of work** – the worker decides the time and place of work
- **Leave entitlements** – the worker doesn't receive any leave
- **Tax and Super** – the worker pays their own superannuation and tax, including GST
- **Payment** – the worker doesn't receive a regular salary or wage, but only gets paid when set tasks or stages of work are completed as outlined in the contract, and generally submits an invoice
- **Equipment and expenses** – the worker provides their own equipment, tools or other necessities required to complete the work and is responsible for their own expenses
- **Scheduling** – the worker is engaged for a set task and there is no guarantee of ongoing work
- **Ability to work for others** – the worker can work for more than one payer
- **Ability to refuse work** – the worker only performs the tasks that have been contractually agreed upon
- **Appointment** – the worker finds work by promoting and advertising their own services
- **Insurance** - the worker is responsible to take out insurance appropriate to their business for workers' compensation (even though in some situations you may be responsible to cover the worker under your workers' compensation insurance policy), professional indemnity and public liability.



Lawyer Alert

Contact us if you would like an opinion on whether your day-to-day arrangements put you at risk of sham contracting

Aspect TIP

Use this [online tool](#) offered by the Australian Government to help you decide if your worker is an employee or contractor.

Aspect TIP

This Cheat Sheet provides a good starting point for working out whether your business engagement arrangements may fall foul of the Fair Work Act – but this area is grey so if you engage contractors or are thinking of doing so contact us on 02 8006 0830 or at info@aspectlegal.com.au. We can review your existing contracts and arrangements and give you some helpful tips.

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