



Guide to employment status

Determine employee rights and your responsibilities

One of the difficult decisions when taking on more resource for your business can be deciding the new person's employment status. Getting this wrong can be expensive in terms of potential employment tribunal claims and subsequent awards.

Employment status is a high-risk area of HR. Several high-profile employment law cases have shown the repercussions of incorrectly classifying employees and workers as self-employed.

Employers engaging independent contractors or seeking to change a working relationship with an existing employee need to be especially cautious with employment status.

What is employment status?

Employment status helps to determine a person's employment rights and the employer's responsibilities. Australian employment law the main types of employment are:

- Full time
- Part time
- Casual
- Fixed term

What is an employee?

The key part in deciding if a person is an employee is the mutuality of obligation. The employer has to provide work and pay for it and the employee has to do the work personally. The employer has a high level of control about how and when the work is done which is set out in an employment contract.

In return, the employee has the right to a raft of employment rights, such as: entitlement to the national minimum wage, paid holiday, statutory sick pay, maternity pay and the right not to be unfairly dismissed. An employee can be full time, fixed term or part time.



What determines whether someone is an employee or independent contract?

Independent contractors have different rights and obligations to employees. This is because they provide services to another person or business, as opposed to being employed by that person or business. A contractor is:

- Are truly in business for themselves and are responsible for the success or failure of that business.
- Invoice you for the work they perform.
- Choose when and how they work.
- Are able to send someone else to complete the work for them.
- Work with multiple different clients.
- Are not entitled to national minimum wage, sick pay or holiday pay.

In a landmark Uber ruling, the determining factor which stated the driver as a "contractor" was the lack of control of their own day-to-day work. An "employee" would be the opposite. And a "contractor" is likely to have some, but not all, of the characteristics.

Courts will look not only at the contract between the parties but at the reality of how the work is performed. So simply calling someone self-employed and providing a contract with the right to substitute will soon be seen as a sham if it does not reflect the true working relationship between the parties.



This is where it gets confusing...

Many employers classify employment status for tax reasons. However, this limited classification can open an employer up to employment tribunal risk. Your tax, super and other obligations will vary depending on whether your worker is an employee or contractor.

If your worker is an employee you'll need to:

- Withhold tax from their wages and report and pay the withheld amounts to the Australian Tax Office
- Pay superannuation
- Report and pay fringe benefit tax if you provide your employee with fringe benefits

If your worker is a contract:

- They will look after their own tax obligations, so you will not be required to withhold any tax unless they do not quote their ABN to you
- You may still have to pay superannuation for individual contractors if the contract is principally for their labour

How to be confident in your classification

To avoid the incorrect classification of employment status and encountering greater risk in the future, contact your local HR Dept for professional advice.

