Employee or Independent Contractor?

USQ ACCOUNTANTS

Decision tree for tax and super purposes, following the High Court in Personnel Contracting and Jamsek [2022]

1. Is the worker engaged through a **company, trust or partnership**?

YES → **CONTRACTOR (entity)**
The people doing the work are not your employees.

NO ↓

2. Is the worker supplied through a **labour hire / on-hire firm** that you pay?

YES → **LABOUR HIRE**
The firm handles PAYG, super and FBT.

NO ↓

3. Is the worker an **apprentice, trainee, labourer or trades assistant**?

YES → **EMPLOYEE**
Always, whatever the contract says.

NO ↓

4. Read the contract (written, oral, implied or a mix). Labels such as "contractor" and holding an ABN are irrelevant; conduct only counts if it varies the terms. **Do the terms show the worker serving in your business as its representative?**

Indicator	Points to employee	Points to contractor
Control	Business can direct how, where, when	Worker decides, subject to reasonable direction
Integration	Works as your representative	Works to build own business
Pay	Per hour, per item or commission	Fixed fee for a specified result
Delegation	Must do the work personally	Real right to subcontract (not a sham)
Tools	You supply, or reimburse / pay allowance	Worker supplies at own cost
Risk	You bear injury / defect costs	Worker bears them
Goodwill	Goes to your business	Goes to the worker's business

No single indicator decides it; weigh them together, not as a checklist.

Mostly → **EMPLOYEE**
Withhold PAYG, pay SG, report through STP. Fair Work entitlements apply.

Mostly contractor ↓

5. Is the contract **wholly or principally for the worker's labour**? Or is it domestic work over 30 hrs a week, sport / arts / entertainment, or film and broadcast work?

YES → **CONTRACTOR, but EMPLOYEE for super**
Pay SG to their fund. No PAYG withholding.

NO ↓

INDEPENDENT CONTRACTOR - no SG and no PAYG withholding. Withhold 47% if no ABN is quoted (unless there is a voluntary agreement). Report on TPAR where the industry requires it.

Separate tests - check these too, the answer can differ
Fair Work Act: since 26 Aug 2024 the whole relationship, including actual conduct, decides employment status. A worker can be a contractor for tax yet an employee under the Fair Work Act.
Payroll tax: Victoria's relevant contract rules can bring genuine contractors into wages.
WorkCover: its own deeming rules apply.
Super choice: you may pay super to a contractor voluntarily to remove SGC risk. If you do, write it into the contract.

Sources: ATO, *Difference between employees and independent contractors* (updated 17 Dec 2024); TR 2023/4; SGR 2023/1. General guidance only, not advice for any particular arrangement. USQ Accountants, 44 Lakeview Drive, Scoresby VIC 3179 | T. +61 3 9070 4790 | www.unitedsq.com
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