

## **Employee or a Sub-contractor?**

### **Why does it matter?**

It is important for both the principal contractor and the sub contractor to know what the relationship really is. Many conditions of employment such as annual leave, and remedies in the industrial relations jurisdiction, such as unfair dismissal and denial of contractual benefits, are limited to employees only. Principals may be exposed to claims for underpayment of wages, fines or matters relating to vicarious liability. Employees may be entitled to a range of conditions not enjoyed by sub contractors.

Regardless of whether you or your subcontractor label him/her as a sub-contractor does not necessarily mean that they are one. The arrangement must fit within the legal definition of a sub-contractor otherwise it may be deemed a sham arrangement.

### **What is a sub-contracting arrangement?**

A sub-contracting arrangement is a business to business relationship, with the subcontractor providing a service which usually involves providing labour, tools, capital equipment and expertise. A sub-contractor undertakes to produce a given product or service and is not under the direction or control of an employer in the execution of his or her work. A sub-contractor can delegate their tasks to someone else to perform.

### **What is an employment relationship?**

In an employee/employer relationship the employee provides labour and works under the direction and control of the employer. The employer determines who does the work as well as when, how and where it is done.

### **Other factors?**

Employees usually work for only one employer. A sub-contractor is usually free to offer his or her services to anyone. Employees are an integral part of the employer's business and usually work on an ongoing basis. Sub-contractors provide services as their own businesses or on their own account, working when (generally) it suits them.

Employees are usually paid according to the relevant award, agreement or contract of employment. A sub-contractor usually negotiates and agrees on a rate for a specific job. Employees generally receive benefits in addition to wages such as paid leave. Sub-contractors do not have these entitlements. Employees usually work with the employer's tools, equipment and materials. Subcontractors usually provide their own tools, equipment and materials.

The checklist on the following page may help to determine whether your subcontractors are employees or a sub-contractors. It is a guide only and is not intended to give you a definitive assessment of the work arrangement.

## Indicators

	Yes	No	Unsure
1. Is the sub contractor given direction and is under the control of the principal?			
2. Do they have to do the work personally?			
3. Do they provide only labour?			
4. Do they wear the principal's uniform?			
5. Does the principal provide the tools and vehicles, if any, to carry out the work?			
6. Do they work pre-determined or fixed hours?			
7. Are they under an obligation to work for only one principal?			
8. Do they receive regular wages?			
9. Do they receive paid leave entitlements?			
10. Are they paid an hourly rate?			
11. Does the employer/ principal contractor make contributions towards superannuation?			
12. Does the tax declaration form state that the sub contractor is an employee?			
13. Are they reimbursed for expenses incurred in the course of performing the work? E.g. fuel, travelling			
14. Is Pay As You Go income tax or other insurances deducted from any payments?			
15. Are they covered by the principal's Workers' Compensation policy?*			
16. Do they have the right to delegate the work to someone else?			
17. Can they bargain for the rates of payment?			
18. Do they provide the vehicles, tools and other materials if any, to carry out the work?			
19. Are they able to accept work from other principals?			
20. Do they run their own businesses?			
21. Can they refuse to do certain jobs due to other commitments?			
22. Can they profit from the sound management of their work?			

23. Do they tender a GST invoice for work performed?			
24. Are their businesses trading corporations? eg Pty Ltd Company			
25. Do they have a written contract with the Principal Contractor?			
26. Do they have a Business Licence to provide Security Services			

\* Workers' Compensation can also apply to sub-contractors as well as employees. A tick in the grey boxes indicates that an employer/employee arrangement may exist. The more grey boxes you have ticked the higher is the probability that it is an employer/employee relationship.

If you have answered yes to more grey questions than white questions you need to seek professional advice as this relationship is likely to be that of employer /employee and not Principal Contractor / Sub Contractor.