



Who is a worker & employer?

Explanatory Guide



Who is a Worker & Employer - Explanatory Guide

Introduction

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

In addition to traditional employer-employee arrangements, people engaged in other working arrangements may also be entitled to workers compensation if they are defined as workers under the *Workers Compensation and Injury Management Act 2023* (the Act).

It is important for anyone who engages workers in paid work to check whether they have workers compensation obligations under the Act.

This explanatory guide provides information to help determine who is a worker and who is an employer under the Act and how workers compensation laws are applied in practice, in relation to:

- contracts of service and apprenticeships
- contracts for the performance of work
- deemed workers and employers including:
 - labour hire arrangements
 - working directors
 - jockeys
 - NDIS support workers
 - principal/contractor arrangements
 - avoidance arrangements

Disclaimer

This publication is intended to provide general information only. You should not act or omit to act on the basis of anything contained herein. This explanatory guide should be read in conjunction with the *Workers Compensation and Injury Management Act 2023*. You should seek appropriate legal/professional advice about your particular circumstances. For more information, visit the WorkCover WA website at workcover.wa.gov.au. Workers compensation legislation is available from the Department of Justice website at legislation.wa.gov.au

Contract of service and apprenticeships

Most workers who are covered by the Act have a contract of service or apprenticeship with an employer.

The Act – contract of service or apprenticeship

The Act provides an individual is a **worker** if —

- 1) the individual has entered into, or works under, a contract of service with a person, whether the contract is express or implied, oral or written; or
- 2) the individual —
 - has entered into a contract with a person to work as an apprentice, or works under a contract with a person as an apprentice, whether the contract is express or implied, oral or written; and
 - has entered into a training contract that specifies the individual is undertaking an apprenticeship.

The person with whom the worker has entered into the contract, or for whom the worker works under the contract, is the worker's employer.

Key points

A large part of the workforce works under a contract of service including:

- full-time and part-time employees
- casual employees
- seasonal and piece workers

Some indicators a worker may work under a contract of service include:

- working for salary or wages
- the employer withholds PAYG tax
- working whilst supervised and controlled by an employer
- having the capacity to be fired by an employer
- working for only one employer; and
- working with set hours of work.

Many contractors and sub-contractors may be defined as workers under a contract of service if they do not have independence in conducting their operations and do not genuinely run an independent business or enterprise.

Just because a person is described as self-employed or has an Australian Business Number does not necessarily mean the person is not working under a contract of service with another person.

Avoidance arrangements, or “sham contracting arrangements”, are prohibited. See ‘avoidance arrangements’.

Other key points:

- only an individual can be a worker
- a company, trust or partnership cannot be a worker
- an employer may be an individual or a legal person such as a company or partnership and includes the State or an agency or instrumentality of the State and the Crown, or an agency of the Crown, in any of its other capacities.

Indicators of contract of service

There is no definitive test that can be applied to determine if a contract of service exists. However, there are a number of factors that distinguish workers employed under a contract of service from those employed as independent contractors (contract for service). No one factor alone indicates such a contract. Instead the totality of the employment relationship must be considered.

Determining whether a contract of service exists includes the following considerations:

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 more 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 greater 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.

Summary of factors 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

Contract for performance of work

An individual not employed under a contract of service may still fall under the extended definition of worker in the Act if contracted to perform work. This may include contractors and sub-contractors.

The Act – contract for performance of work

The Act provides an individual is a **worker** if —

- 1) the individual has contracted with a person for the performance of work by the individual and —
 - the work is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name; and
 - the individual does not sublet the contract; and
 - if the individual employs a worker, the individual performs part of the work personally.

The person with whom the worker has entered into the contract, or for whom the worker works under the contract, is the worker's employer.

Key points

If an individual has contracted with a person for the performance of work by the individual, each of the three factors above must be satisfied before an individual can be defined as a worker under the extended definition.

Other key points:

- only an individual can be a worker
- a company, trust or partnership cannot be a worker
- an employer may be an individual or a legal person such as a company or partnership and includes the State or an agency or instrumentality of the State and the Crown, or an agency of the Crown, in any of its other capacities.

Just because a person is described as self-employed or has an Australian Business Number does not necessarily mean the person is not working under a contract for the performance of work with another person.

Avoidance arrangements, or “sham contracting arrangements”, are prohibited. See ‘avoidance arrangements’.

Example – extended definition worker

An individual may be defined as a worker under the extended definition if engaged to do work that is outside the scope of their normal trade or business, or the work they are engaged to do is not regularly carried out by the individual in their own name, or a business or firm name.

An example is a sole trader bricklayer who regularly operates a bricklaying business who has general home maintenance skills and is contracted to personally carry out maintenance work (not related to bricklaying) for another business. In this example the sole trader would be a worker under the Act.

Labour hire

Labour hire workers, or ‘on hire’ workers, are employed and paid by labour hire companies but work at client organisations known as host employers.

An individual engaged in labour hire employment is a worker and the labour hirer is the worker’s employer.

What is labour hire employment?

Labour hire employment means employment of an individual (the employee) under a contract of employment pursuant to which the services of the employee are temporarily lent or let on hire by the employer (the labour hirer) to another person (the host).

If employment is labour hire employment, the employee is a worker for the purposes of the Act.

If employment is labour hire employment, the labour hirer (and not the host) is the worker's employer for the purposes of the Act for work done personally by the worker for the host. This is subject to the following conditions —

- there is no contract between the worker and the host for the work to be done for the host; and
- if the labour hirer is a corporation — the worker is not a director of the corporation.

What is not labour hire employment?

An employment agent finding work for a person is not labour hire employment. The Act does not make an employment agent the employer of a person for whom the agent finds work if the worker is engaged directly by the person for whom the work is to be done. It makes the labour hirer the employer only if there is no contractual relationship between the worker and the host.

Other potential liabilities and obligations

In specific circumstances the host may be liable as a “principal” to pay compensation to the worker as well as the labour hirer. See principal/ contractor arrangements.

Avoidance arrangements, or “sham contracting arrangements”, are prohibited. See ‘avoidance arrangements’.

Return to work obligations of host employers

A host must, to the extent that it is reasonable to do so, cooperate with the labour hirer in respect of action taken by the labour hirer to facilitate the worker's return to work.

This applies if a worker has an incapacity for work as a result of an injury from employment with the labour hirer for work done for the host.

The labour hirer's obligations that a host must cooperate with are:

- to establish and implement a return to work program for the worker
- to provide the worker's pre-incapacity position or suitable position.

Working directors

A 'working director' is only taken to be a worker and covered by the Act in specific circumstances.

Definition of working director

A working director means a company director –

- who does work for or on behalf of the company; and
- whose remuneration, by whatever means, as a company director of the company is in substance for personal manual labour or services.

The following individuals are not working directors under the Act –

- workers who are not registered with ASIC as a director of the company applying for cover
- entities registered as individual/sole traders
- partners in a partnership entity or other unincorporated entity
- directors of an entity incorporated under legislation other than the *Corporations Act 2001*. For example, directors of an association incorporated under the *Associations Incorporation Act 2015*.

When is a working director covered?

A company must apply to a licensed workers compensation insurer to cover each working director they wish to cover as a worker under the company's workers compensation policy.

A working director is not covered as a worker if the company has not named the working director and made a declaration of the working director's remuneration when applying for the issue or renewal of a workers compensation policy.

Insurance obligations

When applying for the issue or renewal of a workers compensation policy covering one or more working directors the company must -

- make a statement naming each director on the policy
- declare that the director executes work for or on behalf of the company and that the director is remunerated in substance for personal manual labour or services
- provide a declaration of estimated remuneration and a declaration of actual remuneration in the approved form for each working director at policy inception and renewal.

Jockeys

Jockeys licensed under the *Racing and Wagering Western Australia Act 2003* are deemed workers under the Act.

Coverage of jockeys

A person who is a licensed jockey is a worker for the purposes of the Act if the person —

- is riding a horse in any race run under the management of a registered club or
- is engaged in performing, for a licensed trainer, riding work or the usual duties of a jockey.

Who is the jockey's employer?

The employer of a jockey for the purposes of the Act is —

(a) Racing and Wagering Western Australia unless paragraph (b) applies; or

(b) the licensed trainer for whom the person is engaged when the person is performing for the licensed trainer riding work or the usual duties of a jockey but not at a licensed facility and not when riding a horse in any race run under the management of a registered club.

The terms licensed, licensed jockey, licensed facility, licensed trainer are defined in the Act.

Other deemed workers & excluded workers

Regulations made under the Act provide:

- that an individual of a specified class or description, who otherwise would not be, or may not be, a worker is to be considered a worker for the purposes of the Act (deemed workers)
- that an individual of a specified class or description, who otherwise would be, or may be, a worker is not a worker for the purposes of the Act (excluded workers).

Individuals prescribed in regulations as deemed workers (where it is unclear whether a contact of service exists) are:

- workers who hold public office
- specific religious workers prescribed in the regulations
- NDIS support workers (see next section)

Individuals prescribed in regulations as excluded workers are:

- crew members of a fishing vessel if remunerated wholly or mainly by way of share of profits or gross earnings of the working of the vessel
- serving police officers and Aboriginal police liaison officers
- contracted sporting contestants – other than jockeys

Deemed workers: NDIS support workers

The National Disability Insurance Scheme (NDIS) lets participants choose to self-manage all or part of their funds. This includes being able to engage and pay for their own support workers directly.

Support worker directly engaged by a NDIS participant

If a participant in the NDIS receives funding for supports under their plan and that funding is self-managed by the participant or managed by a registered plan management provider to engage a person to deliver a funded support —

- the person engaged is a worker; and
- the participant is the employer of the worker.

This applies whether the support worker is engaged full time, part time, on contract or casual.

The term support worker, participant, funded support, and registered plan management provider are defined in the *National Disability Insurance Scheme Act 2013* (Commonwealth).

Support worker engaged by a company or third party

A NDIS support worker is not a worker of the participant if the support worker engaged to deliver the funded support is —

- employed by a person that is in the business of supplying support workers to NDIS participants; and
- that person has a contract with the support worker to provide the funded support to the participant.

A business will be an employer of a NDIS support worker if they have a contract of service with that support worker to provide services to a NDIS participant. See section on contract of service.

If the nature of the employment is labour hire employment, the labour hirer is the support worker's employer, for work done personally by the support worker for the NDIS participant. See section on labour hire employment as this is subject to the following conditions —

- there is no contract between the support worker and the NDIS participant for the work to be done for the NDIS participant.
- if the labour hirer is a corporation — the support worker is not a director of the corporation.

Principal/contractor arrangements

The Act protects subcontractors engaged in contractual arrangements which involve more than one entity.

Principal and contractor are both deemed employers

If a worker suffers an injury from employment working for a contractor, and the contractor has contracted with a principal for the execution of work by or under the contractor, then:

- both the principal and the contractor are taken to be employers of the worker
- both the principal and the contractor are jointly and severally liable to pay any compensation that the contractor would be liable to pay if the contractor were the sole employer.

A worker may claim compensation from the contractor or principal, or both.

When a principal is liable

A principal will only be liable for compensation to a contractor's worker 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
- the injury arises in respect of premises on which the principal has undertaken to do the work or that are otherwise under the principal's control or management.

This liability applies right down the contractual chain. For example, if a principal 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.

Insurance rights and obligations

As principals and contractors are both deemed employers, they must take out a workers compensation policy.

Principal contractors are entitled under the Act to be indemnified by the contractor for any compensation they are required to pay to a contractor's workers.

Any principal contractor is therefore strongly encouraged to take active steps to make sure that contractors they engage have a workers compensation policy in place that indemnifies the principal. This is important to ensure the necessary insurance is in place for the principal's potential liability.

A principal contractor is not required to provide a remuneration declaration with respect to a contractor's workers if the principal contractor shows when applying for the issue or renewal of a workers compensation policy that the contractor who employs the worker holds a workers compensation policy that indemnifies the principal.

This can be satisfied, for example, by showing a record of the contractor's certificate of currency or a policy endorsement.

A principal must provide a remuneration declaration for the contractor's workers if insurance records of coverage are not provided.

Avoidance arrangements

The Act protects workers and imposes liability on employers for arrangements that are contrived to avoid workers compensation obligations. For, example by requiring individuals to incorporate (set up their own company) as a condition of getting a contract for work.

What is an avoidance arrangement?

A person (the worker) does work for another person (the employer) under an avoidance arrangement if —

- the work is done under an arrangement (whether or not the arrangement is with the employer) that is contrived to enable the employer to have the benefit of the worker's services without having liabilities and duties as the worker's employer under the Act; and
- while the arrangement is in effect the worker does work principally for the employer on behalf of a company of which the worker is an employee or director; and
- the work that the worker does for the employer is directly a part of or process in the trade or business of the employer.

It is an offence to engage in an avoidance arrangement. The penalty is a fine of \$15,000.

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 also 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 a fine of \$15,000.