Independent Contractor Assessment

Background

Under the Closing Loopholes changes a de nition of “employee” and “employer” for the rst time has been inserted into the Fair Work Act. This new de nition will apply from 26 August 2024. [1]

Under this new de nition, in order to determine whether a worker is an ‘employee’ (as opposed to an independent contractor) consideration must be given to:

- the ‘real substance, practical reality and true nature of the relationship’; and
- the whole relationship between the parties, including the terms of the contract and how the contract is performed in practice. [2]

Critically, this means to determine whether a worker is an employee or an independent contractor, it will no longer be suf cient to simply look to the terms of the written contract. Instead, what is required is an assessment of the totality of the relationship and other factors, including how the contract is actually being performed in practice.

Employers who utilise any independent contractors in their business should therefore consider reviewing their current arrangements to assess the likelihood that any contractors they engage may be considered ‘employees’ under the new de nition from 26 August 2024.

Assessing whether a worker is an ‘employee’ or ‘independent contractor’

Characterising a worker as an ‘employee’ or independent contractor under the new de nition is not a straightforward, tick box exercise. The test as to whether someone is an employee or contractor is now a broad ranging one. It requires consideration of the contract, as well as the totality of the relationship and how the contract is being performed in practice to determine the ‘ real substance, practical reality and true nature of the relationship’ . As a result, each assessment will vary from business to business and from worker to worker, depending on the speci c arrangements in place, as well as the day-to-day reality of operations with each worker.

This document has been prepared to assist you with this process by taking you through a range of factors to consider as part of an assessment of your terms of engagement document (e.g. contract) if you have one. As well as other factors related to how the contract might be be ing performed in practice. For each factor the table summarises and contrasts how it might tend to indicate a worker is an employee versus how it might tend to indicate a worker is a contractor.

There are no rules as to the weighting given to each of the factors in the decision-making process, with no one factor necessarily determinative. The factors are just a guide, [3] with the ultimate question being

Leave	
The worker is entitled to paid leave (e.g. personal leave, annual leave, compassionate leave)	The worker is not entitled to any paid leave.
Disciplinary Action	
The company has the right to suspend or dismiss the worker	The contract with the worker may be terminated for breach
Commercial risk	
The company remains liable for remedying any	

Direction and Control	
The company exercises, or has the right to exercise, control over how, when and where work is performed by the worker etc. This might be evidenced by: • the worker reporting into someone at the workplace • the worker being directed to complete tasks by someone employed by the company • the worker being provided instructions either in writing or by training or supervision	The worker possesses a large degree of autonomy, control, and discretion as to how, when and where their work is performed
The company monitors/supervisors the workers work	The worker performs their work/service without supervision/monitoring by the company
The worker works solely for the company	The worker performs work for other businesses
The company can determine what work of the worker can be delegated or sub-contracted out and to wht2.2 (o -0-13 ( )-9 (w)-53 (d)5wt)6.7 (r)44.7 (-)ate (n)16.4 (t)6.7 (d)-ugsd bn be deleg(o)4.6 a .8 (d)5 (o)3.1 (r	
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Remuneration, tax and reward	
The worker is remunerated by reference to time worked or on salary e.g. they are paid by the hour/ week/month	The worker is remunerated for services/job or goods/product delivered or paid based on results

If the answer to those questions is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.'

If after doing this assessment you conclude that any of your contractors are more likely than not to be considered an employee under the new 'employee' de nition from 26 August 2026 then unless the worker will have the right to 'opt out' and exercises it, this presents a signi cant risk, that will likely require you to take action.

You should also be aware that if an employee is found to have been misclassi ed as a contractors, they may have a claim for backpay for employment-based entitlements (e.g. leave, overtime, superannuation) that have arising since 27 February 2024 (the date the Closing Loopholes Bill received royal assent). In addition, if it is found that the employee was recklessly or knowingly incorrectly characterised as a contractor, this could also give rise to pecuniary penalties under the Fair Work Act for engaging in sham contracting.

Need help?

If the above assessment has raised any issue1.6 (a)s .6 (..2 - (i)4.6 (o)3.1 ()6.8)7.9 (a)ssessm