



Government
of South Australia

Department of Trade and
Economic Development

BizFacts

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Employee or Independent Contractor?

A number of matters should be addressed when considering whether a person is an employee or an independent contractor.

The criteria set out in this BIZFACT, whilst relevant, should not be regarded as being conclusive.

It is not uncommon for some employers to categorise people who were formerly employees as independent contractors in the belief it leads to certain savings, eg. in payroll tax and other statutory entitlements which apply to employees but not to independent contractors.

You should be aware that the courts (industrial and civil) can go behind any written document purporting to set up an independent contractor agreement to discover the facts.

The wrong categorisation of persons as independent contractors can expose employers to expensive litigation, where the status of a person's 'employment' is challenged, and lead to significant penalties.

Criteria for making an assessment:

How is the work performed?

Employee: An employee is normally engaged to do work on a continuing basis and at the direction of the employer.

Independent Contractor: The contract or agreement will require the performance of the work or specific jobs.

Where is the work performed?

Employee: The work is normally performed at one of the places of business of the company or wherever the company otherwise directs.

Independent Contractor: The work is normally performed at a place identified in the contract or agreement or as otherwise agreed by the parties.

Who provides the plant, equipment and material?

Employee: Plant and equipment is normally provided by the employer, although an employee may provide certain hand tools. An employer usually provides materials necessary for the performance of work by the employee. It would not be usual for an employee to incur significant expenditure on materials, plant or equipment without reimbursement by the employer.

Independent Contractor: The contract or agreement will specify who is required to provide the plant and equipment but it is usual for the independent contractor to supply the necessary equipment to enable him/her to carry out the work. The contract may be for the supply of labour only or both labour and materials.

Who provides the floor space, power, telephone etc?

Employee: These are not normally provided by the employee. An employee may in some circumstances, provide a telephone facility for contact after normal working hours, but in this case, the employer may reimburse some or all of the costs.

Independent Contractor: The contractor is responsible, in most cases, for the supply of floor space, the cost of power and telephone services and other like matters.

Who controls the manner in which the work is to be performed?

Employee: An employer will normally direct, or have a right to direct, the manner in which the work is to be performed; and the employee is obliged to obey the reasonable directions of the employer.

Independent Contractor: An independent contractor normally has freedom in the way the work is performed subject to the requirements in the contract, agreement or specifications.

Does the contract or agreement relate to a specified period within which a job is being performed or is it of continuing duration?

Employee: Work is normally performed on a continuous basis unless a fixed term contract is agreed upon, or if the employment is sporadic. It is to be done at times convenient to the employer.

Independent Contractor: The contract or agreement would specify the work to be performed and the time within which it is to be completed.

What about leave of absence from work?

Employee: This is normally at the discretion of the employer but will be subject also to the employee's entitlement under an award, statute, or enterprise agreement.

Independent Contractor: Leave of absence does not apply to independent contractors.

Are there any payment entitlements over and above those relating to the work performed?

Employee: An employee may be entitled to payment for leave and holidays as prescribed by provisions of the relevant award, statute or by an enterprise agreement or contract of service, if one exists. Superannuation payments may apply.

Independent Contractor: An independent contractor is not entitled to payment for leave or holidays.

Who has the responsibility for losses caused by poor workmanship or negligence?

Employee: These are the responsibility of employer. The employee may be disciplined for poor workmanship or negligence at the discretion of the employer because the employee has a fundamental obligation to exercise due skill and care.

Independent Contractor: An independent contractor is responsible and has to bear any financial loss for poor workmanship or negligence. He/she is responsible for the reasonable performance of the work specified in the agreement.

Other matters which should be addressed:

- Is there a written contract/agreement?
- Are the terms of the agreement supported by the facts?
- Does the contract require work to be performed by a specified person?
- Who is responsible for scheduling the work?
- Is the relationship a continuing one or does it exist to achieve a specific result?
- How is payment to be calculated?
- Are invoices required to be submitted by the person performing the work?
- How can the contract or agreement be terminated?
- What remedy is available if the person performing the services fails to carry out the work in a satisfactory manner?
- Is Workers Compensation insurance provided by the independent contractor?
- Is the person performing the work, in his/her activities, part and parcel of the employer's business or merely an accessory to it?
- Does the person performing the work have the right to refuse the performance of a particular task or job?
- Has the person performing the work the opportunity to profit from sound management in performance of the work?

If it is determined by using the criteria referred to above, that the person is an independent contractor, it is advisable to have that arrangement in a written contract/agreement. That agreement should incorporate at least the following matters:

- The independent contractor will supply the necessary equipment, tools and materials, where appropriate, to enable performance of the work under a work program jointly agreed between the parties to the agreement.
- The business will pay the independent contractor the amount agreed for the work performed by the independent contractor, and payment will be made upon completion of the work or by appropriate progress payments as the case may be. The independent contractor will be responsible for payment of all government taxes.
- The independent contractor is to start and complete the work at times agreed.
- The independent contractor is to take out independently the necessary insurance cover (which may include Workcover and sickness, health or disability insurance) in respect of himself/herself and any employee.
- The independent contractor is to keep books, receipts, and records where expenditure is outlaid for the work to be performed. Evidence must be produced to the company before the independent contractor is reimbursed for such expenditure.

Contacts for further information:

Business Enterprise Centre Network

Eastside BEC

Unit 2, 294 Payneham Road
PAYNEHAM SA 5070

Telephone (08) 8132 0377

Facsimile (08) 8132 0985

E-mail admin@eastsidebec.com.au

Web www.eastsidebec.com.au

Enterprise Adelaide

5 Pirie Street
ADELAIDE SA 5000

Telephone (08) 8203 7815

Facsimile (08) 8203 7575

E-mail admin@enterpriseadelaide.com.au

Web www.enterpriseadelaide.com.au

Inner Southern BEC

903b South Road
CLARENCE GARDENS SA 5039

Telephone (08) 8351 0227

Facsimile (08) 8351 0340

E-mail admin@isbec.com.au

Web www.isbec.com.au

Inner West BEC

Adelaide University Research Park
Ground Floor, 30-32 Stirling Street
THEBARTON SA 5031

Telephone (08) 8159 8700

Facsimile (08) 8159 8711

E-mail iwbec@bec.org.au

Web www.bec.org.au

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Northern Adelaide BEC

95 Womma Road
ELIZABETH WEST SA 5113
Telephone (08) 8256 0910
Facsimile (08) 8256 0999
E-mail admin@nabec.com.au
Web www.nabec.com.au

Southern Success BEC

Unit 5, 209 Main South Road
MORPHETT VALE SA 5162
Telephone (08) 8326 6511
Facsimile (08) 8326 6922
E-mail success@ssbec.com.au
Web www.ssbec.com.au

Salisbury Business and Export Centre

Innovation House West
Technology Park
MAWSON LAKES SA 5095
Telephone (08) 8260 8205
Facsimile (08) 8260 8206
E-mail sbec@salisbury.sa.gov.au
Web www.salisbury.sa.gov.au

Tea Tree Gully BEC

North East Development Agency.
114 Tolley Road
ST AGNES SA 5097
Telephone (08) 8397 9555
Facsimile (08) 8397 9599
E-mail admin@neda.asn.au
Web www.bec.neda.asn.au

North West Business Development Centre

Todd Street Business Chambers
6-8 Todd Street
PORT ADELAIDE SA 5015
Telephone (08) 8440 2440
Facsimile (08) 8440 2442
E-mail admin@nwbusiness.com.au
Web www.nwbusiness.com.au

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