Why Consider the Contractor issue now?

The contractor issue is not at all new, nor has it been subject to any dramatic recent change. However there are a number of diverse factors that have brought this issue back to the spotlight.

1. **Growth in the number of Contractors:** The attractions of contractors are many: a substantial release from the growing obligations that employers face and the flexibility which comes from being able to gain or shed resources in line with needs and the business cycle, just to name a couple.

2. **Government / Treasury Attention:** The new contractor reporting regime, which will apply to the building and construction industry from 1 July 2012 is the most obvious example of measures to examine contractor arrangements.

3. **Tax Office Attention:** The Tax Office’s compliance plan for 2012 is reason enough to note how important the contractor issue has become.

4. **Institutional attention:** It is reasonable to expect that union scrutiny of contractor arrangements will continue.

What are your obligations?

There are very different obligations depending on whether you engage a contractor or employee in such areas as:

- PAYG withholding
- Payroll Tax
- Superannuation Guarantee
- Fringe Benefits Tax
- Workers’ Compensation and
- The Fair Work Act

Determining your obligation requires a detailed review of the legislation and case law under each specific area. We recommend you contact your Brentnalls SA team member to help you determine your obligations.

Disclaimer

The information provided in this information sheet does not constitute advice. The information is of a general nature only and does not take into account your individual financial situation.

It should not be used, relied upon, or treated as a substitute for specific professional advice. We recommend that you contact Brentnalls SA before making any decision to discuss your particular requirements or circumstances.
Contractors vs Employees: Under the ATO Spotlight

Why the complexities?

Whether an entity is an employee or a contractor is not clear cut. An employee is rarely defined in any legislation and therefore case law is often the only guidance to define this relationship.

Determining a worker’s status depends upon the terms and conditions under which the work is performed.

Factors to consider

We have provided a table below to help you determine whether you have engaged a contractor or employee. These factors may be oral or in writing, or simply understood between the parties.

<table>
<thead>
<tr>
<th>Factors to consider</th>
<th>Employee</th>
<th>Contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Control over work</td>
<td>The employer has an implied right in industrial law to direct and control the work of an employee. The employee works in the business of the employer and the employer is free to manage their business as they see fit.</td>
<td>A payer has a right to specify how the contracted services are to be performed. However, such control must be specified in the terms of the contract. Otherwise the contractor is free to exercise their discretion.</td>
</tr>
<tr>
<td>Independence</td>
<td>An employee works in the business of the payer. Their work is an integral part of the business.</td>
<td>Although the work of a contractor is done for the business, it is not integrated into it but is ancillary to it.</td>
</tr>
<tr>
<td>Payment</td>
<td>Payment is often based on the period of time worked, but an employee can also work on piece rates or commission.</td>
<td>Payment is dependent on the performance of the contracted services.</td>
</tr>
<tr>
<td>Commercial risks</td>
<td>An employee generally bears no legal risks in respect of the work; since the employee works in the business of the employer, the employer is legally responsible for any work performed by the employee.</td>
<td>A contractor bears legal risk in respect of the work. They have the potential to make a profit or loss, and must remedy any defective work at their own expense.</td>
</tr>
<tr>
<td>Ability to delegate</td>
<td>An employee performs the work personally and generally cannot subcontract the work to someone else.</td>
<td>Unless otherwise specified in the contract, a contractor can subcontract or delegate the work.</td>
</tr>
<tr>
<td>Tools and equipment</td>
<td>The employer, except when specifically agreed otherwise, usually provides tools and equipment.</td>
<td>Generally, a contractor provides their own tools and equipment.</td>
</tr>
</tbody>
</table>

Does the worker have an ABN?

If a worker has an Australian business number (ABN) this does not automatically mean the worker is a contractor. You still need to consider the nature of your agreement with the worker.

What if the contractor is a company?

A contractor that is a company is more likely to be treated as a contractor, however if a company is ultimately put in place to avoid an employment relationship, then it is likely that the authorities will look through the company structure anyway.

If you would like to discuss this issue further please contact your Brentnalls SA team member

255 Port Road
PO Box 174
HINDMARSH SA 5007

Tel:  08 8241 8444
Fax:  08 8241 8488
Email: admin@brentnalls-sa.com.au