



Our tax Laws are complicated when it comes to hiring a contractor, and rightly or wrongly, in most occasions it is the liability of the person hiring the contractor to ensure that they are being paid and treated correctly.

As an employer, you are unable to “contract out” of superannuation, employer responsibilities, and workcover – i.e. you can’t employ / contract someone on the specific basis that they are responsible for those things.

Whether the employer is liable for those items is determined by the relationship between the employer and the contractor (i.e. how the work is done), not what is stated in a contract or agreement.

**Just because someone has an ABN, doesn’t mean they are a “contractor” in the eyes of the law**

## Background

---

Why is dealing with contractors so difficult?

Superannuation, workcover, annual leave, etc are all benefits afforded to employees, but obviously come at an additional cost. To avoid paying these items, some businesses used to structure (and some still do) all employees as contractors, and put in the contracts that each person was liable for their own superannuation, workcover, etc.

Have you (or someone you know) been told by a prospective employer that they’ll only take you on if you have an ABN? This is what they are trying to achieve.

The question of whether a person is a contractor or employee is more than whether they have an ABN or not, as the Law has several tests and conditions that make that determination – regardless of what paperwork exists between an employer and “contractor”.

The ATO have a section of their website dedicated to this topic at <https://www.ato.gov.au/business/employee-or-contractor>.

## Indicators of an employment relationship

---

The following factors are indicators that a person is an employee (and not a contractor):

- Where the business exercises a high degree of control of the individual in the performance of their services;
- Where the individual is integrated in the organisation’s business;
- Where the individual is paid to work (as opposed to achieve a specific result);
- Where remuneration is based on time or a piece rate;
- Where the business supplies the tools and materials to do the work;
- Where the business maintains the tools and equipment required to do the work;
- Where the business is liable for defects arising from the individual’s work (i.e. who would get sued);
- Where the business has exclusive rights to the individual’s services;
- Where the individual is not able to turn work down;
- Where the individual is prevented from sub-contracting work out or delegating the work;
- Where the individual normally works at the organisation’s place of business, or at its direction; and
- Where the individual wears the uniform of the business.

The first one (control) is the most important factor, however it is not the be all and end all. No one factor will on its own determine a contractor’s status.



## A Company as an employee

While a company cannot be an employee, it can be determined that the persons underneath this company are employees.

*For example: John Doe Construction hires Mr. A as a contractor, and Mr. A uses his company ABC Pty Ltd to be a party to the contract (i.e. John Doe Construction is contracting ABC Pty Ltd).*

*If Mr. A is under the control of John Doe Construction, is paid for turning up (not producing a result), and has everything provided for him – then it can be determined that Mr. A is an employee of John Doe Construction.*

It is generally only in extreme circumstances where a employer—employee relationship is trying to be hidden by interposing a company (or trust / partnership) that the ATO will intervene and make this determination.

## Obligations to employees

Where a contractor is deemed to be an employee, the business is liable for pretty much everything afforded to people under a normal employment contract.

### Superannuation

If an individual is an employee, you are generally liable for superannuation on their “wage”, just like every other employee.

The only exemptions that apply are:

- Where the employee is over 69 years of age;
- Work done by non-residents outside of Australia;
- Employees with particular entry visas;
- Employees being paid under the Commonwealth Government Community Development Employment Program;
- Employees temporarily in Australia and under an international social security agreement;
- Employees receiving parental leave and other specified payments; and
- Employees receiving less than \$450 per month.

### Director's liability for unpaid superannuation

A company director can become personally liable for unpaid superannuation.

This extends to individuals who have been treated as contractors and unknowingly superannuation is due. As you can imagine, if you have several “contractors”, then the personal liability can become quite large.

### PAYG Withholding

Employers are liable to withhold PAYG from the remuneration of employees. In the case of “contractors” that are employees by law, the employer finds themselves in the situation where they have paid the contractor in full, but are still liable to remit tax to the ATO.

As you could imagine, going to the contractor to demand they repay you the tax (which they would get back on their tax return) may be difficult, especially if they have left your employment and you can no longer locate them.

This will not excuse you from having to pay the ATO unpaid PAYG. And nor can the ATO force the contractor to repay you – so potentially you can be out of pocket significantly.



## Workcover

Workcover is a little different – but not much.

In addition to the test described above (i.e. if you are an employer above, you will also be liable for workcover), you will also be required to pay workcover for contractors that meet the following 3 criteria:

- The provision of materials or equipment is not the principal object of the contract (i.e. the value of labour is more than 50% of the contract);
- At least 80% of the work is performed by the same individual (i.e. there is little or no delegating or sub-contracting of the work); and
- At least 80% of the contractor's overall services income is earned from the hirer

## **Using an interposed entity (e.g. a company)**

Similarly, a person contracting via their own company can still be deemed an employee of the hirer.

The tests are pretty much the same as the above test, so if the contract is mainly for labour, and consists of 80% of the worker's income, chances are that the employer is liable for workcover regardless of how the contractor is structured.

## **Disclaimer**

We have provided this document as a very basic guide which is intended to assist people in improving their understanding of the tax laws and how they operate. When considering what actions to take however, there are more factors that should be considered.

This is not intended to be a comprehensive document that can be taken as tax advice, financial advice, or any other kind of advice. The content does not consider any of your personal circumstances and is only generic in nature.

This document is not to be taken as advice under any circumstances. If you are considering acting based on anything written in this document, we suggest you seek professional advice first.

If you have any questions, you can contact M.C.A. Accountants Pty. Ltd. by phone on 03 8689 9770, by email at [admin@mcaaccountants.com.au](mailto:admin@mcaaccountants.com.au), or by post at PO Box 8095, Carrum Downs, VIC, 3201.

**We will not accept liability for anyone relying on the contents of this document**