INDEPENDENT CONTRACTOR VS EMPLOYEE FACTSHEET

Contacting the Victorian Chamber of Commerce and Industry

There have been numerous incidences where the Victorian Chamber has saved a business considerable time and money by assisting in the redundancy process. Restructures leading to redundancies can be a complex area of workplace relations, and there are a number of potential risks for employers to be aware of. In the context of a redundancy strategy, employees may still claim an entitlement to severance payments or be able to bring a discrimination claim against their employer, even if they remain employed in a post-restructure position, which makes this area especially problematic.

We highly recommend you consider seeking assistance in determining a restructure strategy that ensures, as far as possible, that the process is dealt with in accordance with the legislative requirements.

Our workplace relations team can also provide assistance to both members and non-members on a range of more complex matters tailored to your business or our HR Packages. The consultants can tailor a solution to your needs by providing training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

Disclaimer

The information contained in this document has been prepared by the Victorian Chamber of Commerce and Industry in this format for the convenience and benefit of its members and is provided as a source of information only. The Victorian Chamber does not accept responsibility for the accuracy of the information or its relevance or applicability in particular circumstances. The information does not constitute, and should not be relied on, as legal or other professional advice about the content and does not reflect the opinion of the Victorian Chamber, its employees or agents. The Victorian Chamber and its employees, officers, authors or agents expressly disclaim all and any liability to any person, whether a member of the Victorian Chamber or not, in respect of any action or decision to act or not act which is taken in reliance, whether partially or wholly, on the information in this communication. Without limiting the generality of this disclaimer, no responsibility or liability is accepted for any losses incurred in contract, tort, negligence, or any other cause of action, or for any consequential or other forms of loss. If you are uncertain about the application of this information in your own circumstances you should obtain specific advice.

Independent Contractor vs Employee Factsheet

About the Victorian Chamber of Commerce and Industry

The Victorian Chamber of Commerce and Industry (Victorian Chamber) is the largest and most influential go-to partner for Victorian business, informing and supporting over 65,000 members and clients across the state.

We provide products and services, programs, information and support to members and non-members to ensure a diverse and robust business community in Victoria.

What we do

The Victorian Chamber proudly champions business' interests with a strong focus on ensuring transformational growth, international trade opportunities, and sustainability for all members and non-members. We work as a team to connect and support through:

- Workplace Relations Advice Line
- Workplace Relations Consulting
- Health, Safety, and Wellbeing Consulting
- Policy and Advocacy
- Events
- Training
- International Trade Consulting
- Apprenticeship Services
- Partnering with Government

Workplace Relations Advice Line

Our experienced team are here to give you over-the-phone advice about human resources or workplace relations issues.

Lean on our experts who will provide accurate information and general advice over the phone on all workplace relations issues. Our advisors are trained to give up-to-date information for your business, whatever your industry or size. Our Employer members have free and unlimited access to expert advice through the Advice Line.

Workplace Relations Consulting

With our expert and practical advice, your business can address a wide range of workplace relations matters.

- Representation at the Fair Work Commission
- Workplace investigations into matters such as alleged bullying or harassment
- Enterprise bargaining and union disputes, including right of entry matters
- Mediation services, performance management, disciplinary and termination advice
- Generalist HR services, including policy and procedure reviews and employee engagement strategies
- Advice for equal opportunity, harassment, discrimination and bullying matters
- Modern award compliance and wage information
- Training tailored to your unique needs

In addition to our wide range of consulting services, we've designed a set of packages covering all your workplace relations and HR needs. Lean on our experts so you can get on with what you do best – business.

Mental Health and Wellbeing Consulting

Promoting positive mental health benefits both your business and your employees. Build a thriving, productive workplace while meeting your legal obligations. Our expert consultants have the skills and experience to help you effectively manage mental health in your workplace. From our Comply and Partner packages, through to our training services, we enable you to build a thriving, productive workplace while meeting your legal obligations.

For assistance or more information, please contact the Workplace Relations Advice Line on (03) 8662 5222 or access our library of Workplace Relations Tools and Templates.

If you are a member of the Victorian Chamber, contact the Workplace Relations Advice Line on **03 8662 5222**.

Independent Contractor vs Employee Factsheet

Independent Contractor vs Employee

This fact sheet provides some general guidance on the differences between employees (contract of service) and self-employed independent contractors (contract for services).

Whilst there are a number of indicators to help tell the difference between an employee and an independent contractor, unfortunately, there is no one single test which will determine whether a person is either an employee or an independent contractor.

To determine whether a person is an independent contractor or an employee, a court will consider a number of factors which take into account the entire working relationship on balance. Each situation needs to be tested on a case-by-case basis, and in some instances, courts have found that people are not employees for some purposes (for example taxation) but are employees for others (for example vicarious liability).

For more information, please phone the Workplace Relations Advice Line on 03 8662 5222.

Employees

All employees are entitled to a minimum set of conditions under workplace relations law. Some of these entitlements include payment of wages, hours of work and personal/carer's leave.

A typical indicator that implies an individual is an employee is that the employer will have the right to direct the ways in which the employee works. In addition, the employer has the lawful authority to command the worker.

Other indicators that a relationship is one of employer and employee are that an employee:

- generally works standard or set hours
- bears no financial risk (this is the responsibility of their employer)
- is entitled to have superannuation contributions paid into a nominated superannuation fund by their employer
- has income tax deducted by their employer
- is paid regularly (e.g. weekly / fortnightly / monthly); and/or
- is generally entitled to get paid leave (e.g. annual leave, personal / carer's leave, long-service leave) if they are a permanent employee.

Independent contractors

Whilst there is no specified definition in the *Independent Contractors Act 2006,* an independent contractor can be known as a contract for services or a person who agrees to deliver a certain outcome. *The Independent Contractors Act 2006* relies on the common law meaning of independent contractor. The common law is a set of legal principles which have been developed through decisions in the courts.

An independent contractor will typically maintain a high level of flexibility and discretion as to how their work is to be performed. However, the service contract may contain terms which indicate the types of materials to be used and the methods of performance.

Other indicators that imply a relationship is one of company and independent contractor are that an independent contractor will:

- bear the risk for making a profit or loss on each job
- generally pay their own superannuation and tax, including GST

- generally have their own insurance
- be contracted to work for a set period of time (for example, two months), or to do a set task
- decide what hours to work to complete the job
- generally submit an invoice for work completed, or is paid at the end of the contract or project; and/or
- not get paid leave.

As previously mentioned, to determine whether a person is an independent contractor or an employee, each situation needs to be tested on a case-by-case basis.

Refer to the Australian Taxation Office checklist below:

Employee	Independent Contractor (worker)
Control: your business has the legal right to control how, where and when the worker does their work.	Control: the worker can choose how, where and when their work is done, subject to reasonable direction by you.
Integration: the worker serves in your business. They are contractually required to perform work as a representative of your business.	Integration: the worker provides services to your business. The worker performs work to further their own business.
Mode of remuneration: the worker is paid either: - for the time worked - a price per item or activity - a commission.	Mode of remuneration: the worker is generally contracted to achieve a specific result, and is paid when they have completed that result, often for a fixed fee.
Ability to subcontract or delegate: there is no clause in the contract allowing the worker to delegate or subcontract their work to others. The worker must perform the work themselves and can't pay someone else to do the work for them.	Ability to subcontract or delegate: there is a clause in the contract allowing the worker the right to delegate or subcontract their work to others. The clause must not be a sham and must be legally capable of exercise.
Provision of tools and equipment: your business provides all or most of the equipment, tools and other assets required to complete the work; orthe worker provides all or most of the tools, but your business provides them with an allowance or reimburses them for expenses incurred.	Provision of tools and equipment: the worker provides all or most of the equipment, tools and other assets required to complete the work, and you do not give them an allowance or reimbursement for the expenses incurred. The work involves the use of a substantial item that your worker is wholly responsible for.
Risk: the worker bears little or no risk. Your business bears the commercial risk for any costs arising out of injury or defect in their work.	Risk: the worker bears the commercial risk for any costs arising out of injury or defect in their work.
Generation of goodwill: your business benefits from any goodwill arising from the work of the worker.	Generation of goodwill: the worker's business benefits from any goodwill generated from their work, not your business.

Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024

What is changing?

From 27 February 2024

- Back-pay for unpaid entitlements will not arise for workers who were contractors under the old version of the Act and will change in status to employees as a result of the new amendment. However, for such workers, employment liabilities started accruing from 27 February 2024.
- Opt-out notices where the new employee definition does not apply, will be available for high income contractors. It is only available to those earning above the 'contractor high income threshold.' **Please note the figure is yet to be specified.**
- The Act previously provided that for SHAM contracting a reasonable defence would be that an employer can prove that they *did not know* and were not *reckless,* as to whether the individual should have been engaged as an employee rather than a contractor. The Act now prohibits an employer from intentionally misclassifying an employee as a contractor, by replacing and narrowing the defence so that an employer bears the onus of proving that they "reasonably believed" the individual could be validly engaged as a contractor.

From 1 July 2024

Any independent contractor in any industry who earns below the 'contractor high income threshold' will be able to raise a dispute over 'unfair contract terms' related to workplace relations matters in the Fair Work Commission. If the Commission is satisfied that the contract does contain unfair terms, it may make orders to:

- set aside all or part of the contract which relates to the workplace matter; or
- amend or vary all or part of the contract relating to it.

This particular change will only apply to contracts that are entered into from 1 July 2024.

From 26 August 2024

A definition of "employee" and "employer" will be added to the *Fair Work Act 2009* (Cth). Both will be determined by reference to the 'real substance, practical reality, and true nature of the relationship' between the parties.

As discussed above, a muti-factor test for contractors will require an assessment of:

- the totality of the relationship; and
- the terms of the contract governing the relationship; and
- other factors relating to the totality of the relationship including, but not limited to, how the contract is actually performed in practice.

This legislation clarification has been designed to overcome the High Court's recent decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (Personnel Contracting), and *G Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, which focused on the terms of the written contracts.

Therefore, in assessing whether the relationship is that of an employee or an independent contractor, the decision would not be limited to the terms of the contract, but the real substance and overall relationship will be paramount.