



# Legal Issues Bulletin

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## Have I hired a contractor or employee and why does it make a difference?

Principals, regional and State office staff frequently pay people to undertake a variety of tasks. These arrangements can be both long and short term in nature.

### Does it matter whether the person I am paying is an employee or a contractor?

Yes it does. Different legal liabilities and obligations apply depending on whether the person is an employee or a contractor.

### What does this bulletin do?

This bulletin provides an **overview only** of the factors to be considered when deciding whether a person is an employee or a contractor.

Where more definitive advice is required about whether an individual should be treated as an employee or a contractor this should be sought from:

- [Industrial Relations directorate](#) ; or
- [Legal Services](#).

Advice about taxation for employees and contractors should be obtained from the Taxation unit.

### Is there an easy way to tell if a person is an employee or a contractor?

No – telling the difference between contractors and employees has challenged courts for a number of years because contractors and employees have some features in common.

Each case needs to be looked at individually to determine whether the person is a contractor or an employee.

### When do I need to decide whether the person I am paying to do some work for me is an employee or a contractor?

You need to decide that before the person starts working because different arrangements need to be put in place for an employee and a contractor.

## What sort of factors do I need to consider when deciding whether I need to hire a contractor or take on an employee?

The most common way of doing this is by considering the degree of control you exercise, or have the right to exercise, over the way in which the work is to be performed, including the place of work and the hours of work.

For example if you are a principal and pay someone to work as a casual in your school's office you will generally pay them directly (rather than through an employment agency) and supply the equipment they use.

You will also usually tell them when they should come to work, what they should do while they are at work and how long they should remain at work. What they are paid will be set by an industrial award.

A combination of all of these factors indicates they are an employee rather than a contractor.

## How does this differ from a contractor?

A contractor generally agrees to produce a result. They work for themselves (or a company) rather than for you.

As well as using their own tools and equipment and working for an all-inclusive price (which may include labour), other factors that tend to indicate a person is a contractor include:

- That you do not have the right to control how the work is done (for example you may tell the contractor you want the wiring replaced but won't tell him or her how to do it);
- The person does not work a specific number of hours that you dictate;
- The person can employ other staff or arrange for the work to be undertaken by others (sometimes a contract will restrict a contractor's right to get someone else to do the work – this doesn't by itself turn them into an employee however);
- The person operates as an independent business and has an Australian Business Number;
- You pay the person a fixed amount which is dependent on the desired result being achieved (though sometimes contractors can be paid just for labour);
- The person submits an invoice for the work performed; and
- The person pays their own tax and is responsible for their own workers compensation and public liability insurance.

If the person you are paying can be found in a listing of the yellow pages, he or she will almost certainly be a contractor.

An example of a contractor is a person who you pay to fix an electrical problem at a campus or school.

## If a person is a contractor, what does this mean in terms of my responsibilities?

If the person is a contractor, he or she is responsible for a range of issues that are ordinarily the responsibility of an employer.

These include workers compensation insurance and payment of personal income tax.

Depending on the nature of the arrangement, the contractor may also be fully responsible for any damage caused to third parties or their property.

## I've heard that I will be responsible for payment of superannuation deductions even if the person is a contractor. Is this correct?

Yes, provided the contractor is an individual rather than a company and he or she is engaged under a contract that is wholly or principally for his or her labour.

If the service is provided through an employment agency or the individual operates through a company the agency or company must provide the superannuation guarantee support.

In the school context, the requirement to pay superannuation deductions generally applies to music tutors, physical education instructors and band leaders that are hired by the school.

This cost needs to be factored into the total cost of the contract.

Penalties can apply if you do not make payments for the superannuation guarantee contribution. Further information on this issue can be obtained from the Taxation unit.

### What about responsibility for workers compensation coverage? Can I also be liable for this?

The [Workplace Injury Management and Workers Compensation Act 1998](#) provides a wider definition of employee than that which normally applies.

If the particular contractor does not themselves contract or employ other people and does not generally hold him or herself out as doing the particular type of work, then the department will be responsible for any relevant workers compensation coverage.

This does not apply if the actual contract is with a company, even though the company may essentially be a “shell” for the person concerned.

### What if I and the person I pay to do work for me agree that he or she will be called a contractor? Won't this clarify the situation?

No. It doesn't matter what the arrangement is called. The true nature of the relationship will be based on the particular circumstances of each case, relying on an examination of the various indicators outlined in this bulletin.

This will be the case even if you have a written agreement which states that the person being paid is a contractor. The written agreement will just be another factor to consider in determining the true nature of the relationship.

### What can happen if an employee is mistakenly treated as a contractor?

A number of potential legal and financial issues can arise, including responsibility for:

- Payment of any outstanding Pay As You Go taxation deductions that should have been made, including any possible penalties imposed by the Australian Taxation Office for failure to make the deductions;
- Making good any unpaid superannuation deductions that should have been made, including any penalties that may be applicable;
- Any shortfalls in unpaid industrial award entitlements, such as possible overtime and penalty rates and sick leave, in the event the work performed by the person was covered by an award;
- Payment of any outstanding annual leave or long service leave entitlements; and
- A civil penalty being imposed for a breach of an industrial award.

In addition, you may also expose the department to an unfair dismissal claim by the person in the event the arrangement is terminated.

### It seems very complicated. How am I supposed to work out whether a person is a contractor or an employee?

A good place to start is by thinking about the work you need to get done and the best way of getting it done.

The less independence you give to the person you are paying the more likely it will be that person will be regarded as an employee.

It's important to sort this out before you start paying the person as you may be responsible for superannuation, workers compensation, taxation and other matters.

The table at the end of this bulletin gives you some examples of how to tell the difference between an employee and a contractor.

It's important to realise this table is a guide only and that you should always ask for help if you are uncertain whether or not a person is an employee or a contractor.

You should seek advice if you have any doubts from the Industrial Relations directorate or Legal Services.

## How do I make sure the person who I am paying to do some work understands that they are a contractor?

It's useful to have something in writing before the person starts.

For an employee this could be a letter that sets out information about the work they will be doing (for example that they are working as a School Learning Support Officer, what they will be paid and how long they will be employed).

For a contractor it could be a contract or a quotation that you have accepted.

A [sample contract](#) can be found on Legal Services's website.

## Contractors and Employees

The following table is a general guide as to the most likely categorisation of a variety of relationships to be found in schools and the department generally.

It is a general guide only. There is no absolute guarantee in any particular case, a relationship described as a contractor or employee will ultimately, at law, be found to be one or the other. If any doubt arises as to the true nature of the relationship, advice should be sought from the department's Industrial Relations directorate or Legal Services.

Type of Work	Need identified by School?	Paid By School	Subject to Principal s professional supervision?	Working agreed Hours	Paid for Results rather than hours worked?	Provides all or most of the necessary materials and equipment to complete the work	Free to accept or refuse work	Most Likely Category
Music Tutor, Language Tutor, Band Leader	Yes	Yes	Yes	Yes	No	No	No	Employee
Dance Teacher	No	No	No	Yes	No	No but pays for use of equipment	Yes	Contractor
Electrician or Plumber	Yes	Yes	No	Yes	Yes	Yes	Yes	Contractor
Jumping Castle Proprietor (during a fete)	Yes	Yes	No	Yes	No	Yes	Yes	Contractor

## About Legal Services

Legal Services is here to support our government schools. **Staff can contact Legal Services by email or phone.**

Legal Services can only provide legal advice to departmental staff. It is not able to provide legal advice or assistance to parents, students or members of the public due to the potential for a conflict of interest.