



The Fair Work Ombudsman can investigate complaints of sham contracting. Employers can be prosecuted and face penalties of up to \$33 000 per contravention for a body corporate or \$6600 for an individual if they are found to be engaging in sham contracting.

- Some employers misrepresent or disguise employment relationships as independent contracting to avoid having to give an employee their proper work entitlements, such as minimum rates of pay and leave entitlements.
- Arrangements such as these are not genuine and may be regarded as sham contracting. Sham contracting is against the law. It's also against the law to:
- dismiss or threaten to dismiss an employee to re-engage them as an independent contractor to do substantially the same work; or
- knowingly make a false statement to persuade or influence an employee to become an independent contractor.

Is my contract a sham?

If an employer dismisses or threatens to dismiss an employee to re-engage them as an independent contractor to do substantially the same work, a Fair Work Inspector can apply to the courts to:

- stop the dismissal from happening
- order the employer to give the employee their job back
- have the employer compensate the employee
- make any other order the court considers appropriate.

Also, if an employee has been dismissed, the employee (or a union that represents them) can apply to Fair Work Australia to deal with the dismissal.



- Decide how to carry out the work and what expertise is needed to do so.
- 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.
- Are contracted to work for a set period of time (e.g. 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 are paid at the end of the contract or project.
- Do not get paid leave.

Independent contractors

- Perform work, under the direction and control of their employer, on an ongoing basis.
- Generally work standard or set hours.
- Bear no financial risk (this is the responsibility of their employer).
- Are entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.
- Have income tax deducted by their employer.
- Are paid regularly (e.g. weekly/fortnightly/monthly).
- Are generally entitled to get paid leave (e.g. annual leave, personal/carer's leave, long-service leave) if they are a permanent employee.

Employees

- Perform work, under the direction and control of their employer, on an ongoing basis.
- Generally work standard or set hours.
- Bear no financial risk (this is the responsibility of their employer).
- Are entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.
- Have income tax deducted by their employer.
- Are paid regularly (e.g. weekly/fortnightly/monthly).
- Are generally entitled to get paid leave (e.g. annual leave, personal/carer's leave, long-service leave) if they are a permanent employee.

What's the difference?

Independent contractors are self-employed and contract their services to clients, such as other businesses. Although an independent contractor may perform work for a business, they are not regarded as an employee and will generally have different rights to employees. In a practical sense, they are 'running their own business'; it's important to know the difference between an independent contractor and an employee to ensure they are receiving the correct entitlements. An employee will also have different rights and protections to an independent contractor.

It's not always easy to tell the difference, but here are some of the indicators that make someone more likely to be an employee or an independent contractor. No single point makes a person either an employee or an independent contractor, it requires an overall assessment of all the factors.

Workers can be engaged in different arrangements in the contact centre industry.

The Fair Work Ombudsman can help

Need help?

Call the Independent Contractors Hotline on 1300 667 850 or visit www.fairwork.gov.au/contractors

The following Australian Government websites provide information and resources for engaging or operating as an independent contractor:

- Contracting in the building or construction industry
www.abcc.gov.au/independentcontractors
- Rights and responsibilities of contractors and information on unfair contracts
www.business.gov.au/contractors
- Tax and superannuation for contractors
www.ato.gov.au/contractors
- Having an ABN doesn't make you a contractor – are you entitled to one?
www.ato.gov.au/abnentitlement



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www.fairwork.gov.au
Fair Work Infoline 13 13 94
Mon-Fri 8.00am-6.00pm local time

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Fair work in the contact centre industry

The Fair Work Ombudsman can help

What's the difference?

Is Adam an independent contractor?



Adam has just been engaged as a customer service advisor by Peter who owns Oz Teleservices Pty Ltd. When Adam commenced his employment, Peter applied for an ABN on his behalf so he could start immediately.

Adam is advised that his hours of work will be 10am – 5pm, five days a week. Adam performs his work at a commercial premises leased by Peter, and is supplied with a computer, phone, company email address and phone number. Adam was given two days of unpaid training prior to starting, where he received scripts and technical training on the products he is dealing with.

Adam is paid a flat rate of \$1 for every inbound call he can successfully resolve within five minutes, however it is up to his supervisor to determine whether a call is successfully resolved. His supervisor is provided with an electronic summary of all calls Adam handles.

At the end of every fortnight, Adam's supervisor determines how much he will be paid and it is directly deposited into his bank account. Adam does not receive any annual leave, personal leave or superannuation, as Peter considers him to be an independent contractor.

Based on the above facts Adam is more likely to be considered an employee than an independent contractor. As an employee Adam would be entitled to the minimum terms and conditions of the relevant Modern Award (such as the Contract Call Centres Award 2010) and the National Employment Standards under the Fair Work Act 2009. Note that no single factor makes a person either an employee or independent contractor.

Depending on all the circumstances, Peter as the owner of Oz Teleservices Pty Ltd, may have contravened provisions of the *Fair Work Act 2009*, and could be exposed to court awarded penalties.

Is Melanie an independent contractor?



Lauren manages a call centre which provides technical IT support on behalf of her clients. Recently, her company acquired a new client which specialises in a niche software product. Lauren was aware that her existing staff did not have knowledge of this particular product so she decided to look externally for assistance.

Lauren used her industry contacts to track down Melanie, a service desk operator who has specialist knowledge in the area and performs work for a number of companies who sell this product.

Lauren had a meeting with Melanie where they negotiated her contract and fees. It was agreed that she would be paid a flat service fee for each enquiry of \$85. For calls over one hour, the amount would be \$200. Melanie told Lauren that she would need to fit her work around her other jobs, and they agreed she would be able to delegate any tasks to her own staff when she was not available. Melanie runs her business from home, and invoices Lauren on a monthly basis for each enquiry resolved, billing her for the cost of any outbound calls or costs incurred.

Melanie is not subject to any direct supervision and she is required to complete her tasks in line with her contract. Melanie's performance is measured against the terms of her contract and if she does not perform to the standard required she can be liable for any losses that are caused as a result.

Based on the above facts it appears that Melanie is an independent contractor. Note that no single factor makes a person either an employee or independent contractor.

Lauren, as the hirer of Melanie's services, needs to ensure that she is engaging Melanie in a genuine independent contracting arrangement to avoid any contraventions of the *Fair Work Act 2009*.

The Fair Work Ombudsman can help

The Fair Work Ombudsman can investigate these arrangements. If you think you are being treated as an independent contractor when you are in fact an employee, you may be missing out on entitlements that are required to be paid to you. Visit www.fairwork.gov.au/contractors or call the Independent Contractors Hotline on 1300 667 850.