

Employee or Contractor? Why it matters to know!

This issue confronts and often confuses business owners. Most businesses engage not only employees, but also contractors, consultants and other service providers. These various methods for the engagement of workers can give rise to obligations for PAYG withholding, payroll tax, workers compensation, superannuation and fringe benefits tax. The question is, what obligations, and when?

Due to their substantial complexity, the rules are often not understood, and businesses remain confused about their obligations. As a result, this can lead to substantial exposure for employment taxes and charges.

When considering a workers' status, the first thing is to determine the true nature of the relationship between the worker and the party requiring their services.

It is not correct that if the worker quotes an ABN and provides an invoice for services rendered, that they are a contractor and not an employee. This is a common, and often costly misconception.

Sometimes it is very easy to determine the distinction between the employee and contractor, but often there is considerable middle-ground where the issue becomes very blurred. This has not been helped by modern working conditions such as performance-based contracts, flexible working arrangements, and the ability to work from home or remote locations.

The only time where the arrangement can be conclusive, is where the worker is legitimately engaged via an interposed entity, for example a company or trust. If the worker is engaged this way he is not an employee, although even so, obligations may still arise in relation to some employment taxes.

It is important to ensure that if the worker is engaged via an interposed entity, this structure is not a sham, and that the worker in reality is not engaged directly by the principal.

Where the worker is engaged via another entity, several things have to be considered. These include:-

- the extent to which the principal can control and direct the worker,
- the nature in terms of the contract (written or verbal),
- whether the worker is engaged to produce a result, or on an ongoing or indefinite basis,
- does the worker provide materials or equipment,
- does the worker have the power to delegate or refuse work?

Unfortunately, this list is not conclusive. Other factors may be relevant, and no one factor is conclusive. It is a matter of assessing all the facts in relation to the engagement. Confused yet? You're not alone, most business are!

Deciding the worker is not an employee is not the end of the matter, as most employment taxes have some form of extended application - even with contractors. For example;-

- PAYG withholding will generally only apply where an ABN is not quoted.
- Superannuation will apply where the contractor is a natural person, engaged for his or her labour. An obligation for super will not arise where the worker is engaged via an interposed entity.
- Payroll tax has the ability to capture contractors - whether they work as natural persons or via interposed entities. Payments to contractors will be subject to payroll tax unless an exemption applies. Nasty!
- WorkCover (NSW) has contract provisions which mirror those of payroll tax. And the contractor provisions may apply even where the worker is engaged via an interposed entity, and is registered for WorkCover in their own right. These are dangerous provisions!

As you can see, the law involving the distinction between employees and contractors can deem legitimate contractors to be caught for employment taxes. They are complex and confusing laws, and this area warrants specialist assistance.

We would be pleased to provide expert advice to assist you in correctly applying these laws.

Please contact Brad if you have any questions in relation to this area of employees versus contractors.