

Long Service Leave

*Determining whether your
people are subcontractors
or employees for
contribution purposes*

*Their Time
to enjoy*



CONSTRUCTION
INDUSTRY
LONG SERVICE
LEAVE SCHEME

The Definition of “Employee” for Contribution Purposes

The purpose of these guidelines is to provide some background information about employment relationships and to provide guidelines as to how MyLeave will consider certain subcontracting arrangements for contribution purposes

The relationship between an employer and an employee is a contractual one and is referred to in law as a “contract of service”. In contrast the principal/independent contractor (subcontractor) relationship is referred to as a “contract for services”.

The definition of “employee” in the Construction Industry Portable Paid Long Service Leave Act (the Act) uses the term “contract of service” as follows:- “employee means a person who is employed under a **contract of service** in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification”; or “an apprentice”.

However, the Act does not include a definition of “**contract of service**” therefore case law is relied on to provide working interpretations of that term.

In general terms, employees contract to provide their labour in the service of the employer, while independent contractors work in their own independent business and in the course of their business, contract to achieve a result for a principal.

In most cases, distinguishing between an employee and an independent contractor is relatively simple, however, over time a change in work practices has, in some cases, tended to blur the traditional distinctions between the two.

Background to Employer/Employee Relationship Determinations

Over many years the courts have established a number of tests that can assist in determining when an employer/employee relationship exists. However, the High Court has made it clear that there is no single test that can be relied on and it is the totality of the relationship which must be considered in reaching a determination.

Accordingly, although various tests identified by the courts can be used as a guide, to reach a determination it is necessary to consider all facets of the relationship between the parties and each case must be considered on its own facts.

Some of the more significant factors that have traditionally been considered by the courts as key indicators of whether an employer/employee relationship exists are outlined below.

Contract vs Actual Relationship

The terms of the contract provide evidence of the nature of the relationship between the parties. However, it is necessary to consider all of the facts and circumstances of the parties’ relationship, including their conduct towards each other at the time they entered into the contract and subsequently.

Little weight can be given to a particular term of the contract if it contradicts the effect of the agreement as a whole, or the practical relationship between the parties. Moreover, there is considerable authority for the proposition that the parties’ labeling of their relationship as one between independent contractor and principal will have no effect where that relationship, in practice, is really one of employment.

In particular, a clause in a contract that states that the relationship between the parties is that of “independent contractor and principal”, is not conclusive and must be considered in the context of all the other terms of that contract as well as the practical relationship that exists between the parties.

Similarly, a clause in a contract that describes the contract as one to “produce a result”, is not conclusive and the contract will not be regarded as a contract between an independent contractor and principal unless supported by the facts.

Contracts to Achieve a “Given Result”

A contract to produce a “given result” is one in which the focus is on what ultimate result the contract requires, rather than what must be provided when performing the contracted task.



Background to Employer/Employee Relationship Determinations

If the facts behind a contract support that its purpose is to achieve a “given result”, then it is an indicator that the relationship is one between principal and independent contractor.

This is particularly the case where the contract is for a fixed price, where payment is made subject to meeting various milestones specified in the contract, or at its completion.

If the contract is not to achieve a “given result” but is really for the labour of the worker, this is an indication that the relationship is one of employer/employee. An example of this type of arrangement would be where a worker provides “labour only” pursuant to a contract and is paid at an hourly rate, or set rate of pay, per pay period.

Control and Direction

It is accepted that an important test of whether an employer/employee relationship exists is that of “control”. The power or **right** to control or to direct (eg. through a supervisor) how, where, when and who is to perform the work in question, is a strong indication of an employer/employee relationship. For example, if the worker is required to work in conjunction with one or more others (eg. in a pair or as part of a team), or if their work is co-ordinated with the work undertaken by others, it is likely that it would be necessary for the employer to exercise, or have the right to exercise, some degree of control and direction over the worker. Similarly, if the worker works on a project that is subject to quality control measures, it is likely that the worker will also be subject to some degree of control and direction.

The absence of control may indicate that the relationship is not one of employer/employee, however, this is not necessarily conclusive. The High Court has noted that control is not the sole determinant of the nature of the relationship. It is merely one of a number of factors to be considered in making that determination and therefore it is the totality of the relationship between the parties which must be considered.

Independent Business

If a worker is engaged by a person in the ordinary course of operating their own independent business, then this is indicative of an independent contractor and principal relationship, particularly if the person works for a number of clients. For example, if the worker was engaged as a result of advertising his or her services to the public as a normal part of carrying on a business, or as a result of winning a tender, then this will be indicative of an independent contractor and principal relationship.

Where the worker is exposed to making a loss as a result of the work undertaken, rather than the employer incurring all the risk, the worker is more likely to be considered as an independent contractor. A similar position holds if the worker has an opportunity to create their own goodwill. Moreover, the greater the expenditure incurred in earning the income and the greater the physical assets (materials, equipment) supplied by the worker, the more likely it is that the worker will be considered an independent contractor.

Note that if a person simply provides their labour to an employer (unless it is provided through a company or a trust), it is unlikely that the person will be considered to be operating an independent business.

Power to Delegate

The power to delegate work (ie. the power of the worker to engage another person to undertake the work) is indicative that the worker is an independent contractor.

However, in a principal and independent contractor relationship the power to delegate will generally be implicit, as the focus is on achieving a result rather than obtaining the services of a particular person.

Consequently, delegation clauses in contracts are considered in the context of the total arrangement between the parties to ensure that they are not simply a statement without foundation. Accordingly, a delegation clause in which a replacement worker must be approved by the principal, may not be regarded as establishing a power to delegate.

Integration

If the worker is an integral part of the principal’s business, then this is indicative of an employment relationship. For example, if the services provided by the worker are of a type that are ordinarily required in the course of the principal’s business, this is indicative of an employment relationship, particularly if the engagement is for a lengthy period. Similarly, if the worker is required to work in conjunction with employees or other workers engaged by the principal (eg. in a pair or as part of a team), this would also be indicative of an employment relationship.

How MyLeave Determines Employer/Employee Relationships

In reaching a determination as to whether an employer/employee relationship exists, the Board would normally obtain documentation and seek responses to a number of questions which would draw out sufficient information on which to base a decision.

How MyLeave Determines Employer/Employee Relationships

This approach, based on legal principles which require the totality of the relationship to be taken into account, requires that each case be considered on its own particular facts.

However, in order to provide employers and their advisors with some guidance in respect of MyLeave’s position on employer/employee relationships in general, a short list of factors has been developed from judicial precedents.

Where **all** these factors exist in a relationship between a worker and the person for whom the services are provided, it is likely, depending on the facts of each case, that MyLeave will accept that the relationship is one of independent contractor/principal.

The factors are as follows. The worker:

- **undertakes to produce a “given result” for a fixed fee rather than to simply do work ie the worker is paid for the result of the labour and not for the labour itself;**
- **provides the materials and/or equipment necessary to undertake the task. The equipment should be more than “incidental” to the person’s services ie. should be more than tools of trade;**
- **has an unfettered discretion to delegate the work;**
- **bears the risk of making a loss in running a business through incurring significant expenses related to the income earned; and**
- **provides services to the general public and not just to the principal.**

Where any of the factors identified above are not present in an arrangement, it will be necessary for MyLeave to examine the totality of the relationship before making a determination as to the nature of the relationship.

Where all the factors identified above are not present in an arrangement and that arrangement is simply “to do work” for an hourly, or other time based rate of pay, it is likely that MyLeave will determine that the arrangement is one of employer/employee.

Should there be any doubt as to whether an arrangement would attract a contribution payment, a written approach should be made to MyLeave specifying the details and attaching the relevant documentation.

On the facing page is a list of questions which when answered, will give an indication as to whether an employer/employee relationship is likely to exist. Note that these questions are provided only to give an indication as to whether an employment relationship exists.

Checklist for Determining Whether an Employer/Employee Relationship Exists

The following is a list of questions which, when answered, will give an indication as to whether an employer/employee relationship exists.

If the answer to most of the questions is “yes”, it is a strong indication that the person providing the services is an employee for the purposes of the Construction Industry Portable Paid Long Service Leave Act:

	YES	NO
Is the person providing the services paid on a time basis (eg hourly rate) rather than on a per job basis?	<input type="radio"/>	<input type="radio"/>
Is the contract wholly or principally for labour?	<input type="radio"/>	<input type="radio"/>
Does the person requiring the services have the authority to control or direct the manner in which the work is to be performed?	<input type="radio"/>	<input type="radio"/>
Is the person providing the services prevented from delegating or subcontracting his/her work to another person without approval?	<input type="radio"/>	<input type="radio"/>
Is the person providing the services engaged for a lengthy period or on a continuing basis?	<input type="radio"/>	<input type="radio"/>
Are the services provided by the worker ordinarily required by the person requiring the services in the normal course of their business?	<input type="radio"/>	<input type="radio"/>
Is the person providing the services performing work similar to work carried out by an employee in the organisation?	<input type="radio"/>	<input type="radio"/>
Are the work hours defined?	<input type="radio"/>	<input type="radio"/>

Important

Note that these questions are provided only to give an **indication** as to whether an employment relationship exists. Should an employer be uncertain as to whether an employment relationship exists, professional legal advice should be sought or MyLeave contacted.



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Their Time to enjoy

Stay in touch at
www.myleave.wa.gov.au

For more information visit us online or contact us below.

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DESIGNED BY **mindfield**

April 2012



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