

FAQ: Contractor or employee?

Contractor or employee?

Farmers may choose to engage an independent contractor when they have a specific job which needs to be done by a person with a particular skill, for instance, silage making or hay making.

It is important to be able to distinguish between an independent contractor and an employee as the law imposes different rights and obligations on those who engage independent contractors and those who engage employees.

What is a contractor?

A contractor is someone who you pay for a service. They can choose to take the job, they can delegate who does the task, they are responsible for getting the job done and they supply their own equipment. They have an ABN and are responsible for their own Workcover and super.

What is the difference between a contractor and an employee?

An independent contractor is a person who works under a commercial contract or a **contract for services**. The independent contractor can operate as an individual or through a partnership, company or trust.

An employee is defined as a person who works under an employment contract or a **contract of service**. A company or partnership cannot be an employee.

If a person has nothing else to sell other than labour, then they are an employee, not a contractor. Someone does not become a contractor simply by supplying an ABN.

Can I employ a relief milker as a contractor?

No

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Further reading

Draft Contract for Services on the Dairy Farm - visit www.thepeopleindairy.org.au/LiteratureRetrieve.aspx?ID=16578

Read more about independent contractors www.thepeopleindairy.org.au/engagement-reward/independent-contractor.htm

[Understanding independent contractors](#) explains the criteria to qualify as an independent contractor or an employee - visit www.thepeopleindairy.org.au/LiteratureRetrieve.aspx?ID=16582

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The Law

Sham contracts

The federal industrial laws make it an offence to do any of the following and significant penalties apply:

- dismiss an employee for the purpose of engaging them as an independent contractor; represent an employment relationship as
- independent contracting; or
- make a false statement for the purpose of
- influencing or persuading an individual to enter into an independent contract

Common law

An employee is always an individual (as opposed to a company or partnership) and their employment is regulated by state and federal industrial relations laws including awards. An employee does not have the right to control how and when work is performed and cannot delegate work to others.

Some laws such as workers compensation and superannuation laws as well as some taxation laws deem workers to be employees regardless of the common law definition.

Because industrial laws about employment do not apply to independent contractors some people think that if they call a person a contractor they will be able to avoid these responsibilities. This is not the case.

Calling a person an independent contractor, when the true nature of their engagement is as an employee, does not avoid these laws applying.

Contractor v. employee test questions

There are a number of questions which can be asked to help determine whether a person is an independent contractor at common law. The answers to the various questions are then weighed up to decide whether 'on balance' the total picture points to employment or independent contracting.

If the answer to the majority of the questions is 'yes' then the relationship will more than likely be one of independent contracting.

- Is the person doing similar work for other people?
- Do they advertise their services to the public?
- Can they employ others to help out with the work or do they have to do it personally?
- Does the person have invoicing systems, standard terms of trade, insurance, debt collecting systems, appropriate financial records etc. which businesses commonly use?
- Does the work lead to an ability to make a profit or is the work the same as an employee would do for wages?
- Was the contract price negotiated commercially?
- Does payment depend on the person providing a satisfactory result?
- Does the person bear the risk for poor performance?
- Does the person use their own assets, tools & equipment to do the work?
- Does the person have the right to decide how and when the work is done?
- Does the person represent the work as part of their own business?
- Is the person providing the work financially independent from the other business?
- Does the person benefit from goodwill?
- Has the person agreed to provide a particular outcome or result and when the result has been achieved will they leave?
- Is the work the type of work that other people do as part of a business as opposed to employment? In other words, could a person working as a casual or part-time employee for a number of employers just as easily do the work?