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THE DESK OF **DANNY ADNO**

EMPLOYEE OR CONTRACTOR?

Can employers disguise a genuine
employment relationship?

In February this year the Fair Work Commission (FW) rejected an application for unfair dismissal brought by a Victorian Uber driver¹, and in doing so provided useful guidance in the key distinguishing factors to be considered when assessing whether a worker is an employee or an independent contractor.

The decision in the Uber case shouldn't fool you into thinking that the differences between employees and independent contractors are simple and clearly defined. There is no single factor determining whether a person is an employee or a contractor. Rather the Courts will need to consider the totality of the relationship between the parties.

A sham contracting arrangement is when an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done to avoid the company's liability to pay employee entitlements, or potential vicarious liability that might be incurred by an employer.

Failure to correctly identify an employee or contractor may have wide reaching negative impacts on your business. Penalties may also be imposed on the employer, under the Independent Contractors Act 2006 (Cth) and the Fair Work Act 2009 (Cth).

In light of the recent Uber Case, and the holistic approach applied by the Courts, we set out below some key factors to consider, that may contribute to determining whether a person is an employee or an independent contractor:

FACTOR	EMPLOYEE	CONTRACTOR
Hours of work	Generally, employees will work standard or set hours	Contractors have freedom to choose when they work, with no minimum period of hours. Under agreement, contractors may decide what hours to work in order to complete specific tasks
Expectation of Work	Employees have ongoing expectations to engage in regular work	Contractor's obligations are limited to the agreement and will cease on completion of a specific task

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Payment	Employees are paid regularly i.e. weekly, fortnightly or monthly, as agreed in an employment contract outlining each party's rights and obligations	Contractors have an ABN and submit invoices for work undertaken pursuant to the contractor agreement. But remember, having regard to the holistic approach, each relationship must be considered on its own merits, so don't automatically assume if a person has an ABN that they are an independent contractor
Tools and Equipment	Employees are provided with the equipment they need to perform their work duties	As evidenced in the Uber case, contractors must supply and maintain their own equipment such as a car, phone and internet plan. However, alternative arrangements may be regulated within a contract for service
Workcover/ Public Liability Insurance	Employees are usually covered by their employer's public liability, professional indemnity and or Workers' Compensation insurances policies	Contractors are required to procure their own insurance policies
Leave	Employees are entitled to receive paid leave (annual leave, personal/carers' leave and long service leave)	Contractors are not entitled to any paid leave
Tax	Employees have income tax deducted from their wages	Contractors are liable to pay their own tax and GST to the Australian Taxation Office
Superannuation	Employees are entitled to have superannuation contributions paid into a nominated superannuation fund by their employer	Contractors are responsible for their own superannuation. Note in certain circumstances, independent contractors may be entitled to be paid superannuation contributions

¹ Michael Kaseris v Rasier Pacific V.O.F [2017] FWC 6610

There is no one clear distinction between employees and independent contractors, so for more information or a confidential discussion, please contact Danny Adno from Silberstein & Associates.

Resource: Fair Work Ombudsman, 'Independent contractors and employees',



CONTACT DANNY

Danny is a highly motivated, experienced and strategic commercial lawyer. He has strong technical and interpersonal skills and is solutions focused.

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