

Principles of Sham Contracting

Difference between the Employee and Independent Contractor

Indicator	Employee	Independent Contractor
Hours of Work	Generally, works standard or set hours (note: a casual employee's hours may vary from week to week).	Under agreement, decides what hours to work to complete the specific task.
Expectation of Work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	Usually engaged for a specific task.
Risk	Bears no financial risk (this is the responsibility of their employer).	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.

(Independent contractors and employees, 2020)

Prohibitions of sham contracting

Under the sham contracting provisions of the Fair Work Act 2009, an employer cannot:

- Misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- Dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor
- Make a knowingly false statement to persuade or influence an employee to become an independent contractor.

Penalties

Fair Work Inspectors are responsible for imposing sham contracting penalties. Then it is the courts that hand out the fines which are \$12,600 for individuals and \$63,000 for corporations, per contravention. "Fair Work Inspectors may also apply to the courts to grant an injunction or an interim injunction if an employer seeks (or threatens) to dismiss an employee for the purpose of engaging them as an independent contractor" (Independent contractors and employees, 2020).

General Protections etc.

Under the Fair Work Act 2009, there are some general protections provided to independent contractors and their principals. They are protected from any "adverse action by any person in relation to the decision to exercise or potentially exercise their rights under these provisions".

Fair Work Ombudsman. 2020. Independent Contractors And Employees. [online] Available at: <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/independent-contractors-and-employees>> [Accessed 9 August 2020].

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Table of Contents Sham Contracting Roundtable Discussion Paper Word

1. Understanding the eBook Sham Contracting Roundtable Discussion Paper Word
 - The Rise of Digital Reading Sham Contracting Roundtable Discussion Paper Word
 - Advantages of eBooks Over Traditional Books
2. Identifying Sham Contracting Roundtable Discussion Paper Word
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Sham Contracting Roundtable Discussion Paper Word
 - User-Friendly Interface
4. Exploring eBook Recommendations from Sham Contracting Roundtable Discussion Paper Word

- Personalized Recommendations
 - Sham Contracting Roundtable Discussion Paper Word User Reviews and Ratings
 - Sham Contracting Roundtable Discussion Paper Word and Bestseller Lists
5. Accessing Sham Contracting Roundtable Discussion Paper Word Free and Paid eBooks
 - Sham Contracting Roundtable Discussion Paper Word Public Domain eBooks
 - Sham Contracting Roundtable Discussion Paper Word eBook Subscription Services
 - Sham Contracting Roundtable Discussion Paper Word Budget-Friendly Options
 6. Navigating Sham Contracting Roundtable Discussion Paper Word eBook Formats
 - ePub, PDF, MOBI, and More
 - Sham Contracting Roundtable Discussion Paper Word Compatibility with Devices
 - Sham Contracting Roundtable Discussion Paper Word Enhanced eBook Features
 7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Sham Contracting Roundtable Discussion Paper Word
 - Highlighting and Note-Taking Sham Contracting Roundtable Discussion Paper Word
 - Interactive Elements Sham Contracting Roundtable Discussion Paper Word
 8. Staying Engaged with Sham Contracting Roundtable Discussion Paper Word
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Sham Contracting Roundtable Discussion Paper Word
 9. Balancing eBooks and Physical Books Sham Contracting Roundtable Discussion Paper Word
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Sham Contracting Roundtable Discussion Paper Word
 10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
 11. Cultivating a Reading Routine Sham Contracting Roundtable Discussion Paper Word
 - Setting Reading Goals Sham Contracting Roundtable Discussion Paper Word
 - Carving Out Dedicated Reading Time
 12. Sourcing Reliable Information of Sham Contracting Roundtable Discussion Paper Word

- Fact-Checking eBook Content of Sham Contracting Roundtable Discussion Paper Word
- Distinguishing Credible Sources
- 13. Promoting Lifelong Learning
 - Utilizing eBooks for Skill Development
 - Exploring Educational eBooks
- 14. Embracing eBook Trends
 - Integration of Multimedia Elements
 - Interactive and Gamified eBooks

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