

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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