

# Contractors vs Employees: Under The ATO Spotlight

## Why Consider the Contractor issue now?

The contractor issue is not at all new, nor has it been subject to any dramatic recent change. However, there are a number of diverse factors that have brought this issue back to the spotlight.

## Whatever solution you choose you'll be backed by:

1. **Growth in the number of Contractors:** The attractions of contractors are many: a substantial release from the growing obligations that employers face and the flexibility which comes with being able to gain or shed resources in line with needs and the business cycle, just to name a couple.
2. **Government / Treasury Attention:** The new contractor reporting regime which will apply to the building and construction industry from 1 July 2012 is the most obvious example of measures to examine contractor arrangements.
3. **Tax Office Attention:** The Tax Office's compliance plan for 2012 is reason enough to note how important the contractor issue has become.
4. **Institutional attention:** It is reasonable to expect that union scrutiny of contractor arrangements will continue.

## What are your obligations?

There are very different obligations depending on whether you engage a contractor or employee in such areas as:

- PAYG withholding;
- Payroll Tax;
- Superannuation Guarantee;
- Fringe Benefits Tax;
- Workers' Compensation;
- In certain circumstances, GST and
- The Fair Work Act.

Determining your obligation requires a detailed review of the legislation and case law under each specific area. We recommend you contact your

Harris Black team member to help you determine your obligations.

## New Reporting for Building & Construction Industry

The Government announced that from 1 July 2012 businesses in the building and construction industry will have to report annually to the Australian Taxation Office ('ATO') details of payments made to contractors. Treasury has released exposure draft regulations to introduce the system.

A business is defined as being primarily in the industry if more than 50% of the purchaser's business income is derived from providing building and construction services in the current financial year, or at least one of the two financial years prior to the current financial year.

Providing services in the building and construction industry is very broadly defined and includes businesses from architects, engineers to project managers and traditional trades. A full list of industries can be found on the ATO website. Your Harris Black team member can help you determine if you are caught by the new reporting regime.

Businesses caught by these new reporting rules will be required to report actual payments made, and will be required to include the following details:

1. The contractor's name;
2. The contractor's ABN;
3. The contractor's address (if known);
4. The total amount paid or credited to the contractor over the income year;
5. Whether any GST has been charged; and
6. Any other information the Commissioner may require.

Businesses will have to provide an aggregate report for each contractor they make payments to during the income year. The report will be required to be lodged on an annual basis, 21 days after the conclusion of the financial year.

Businesses impacted will have to implement systems to capture this information from 1 July 2012.

### Why the complexities?

Whether an entity is an employee or a contractor is not clear cut. An employee is rarely defined in any legislation and therefore case law is often the only guidance to define this relationship.

Determining a worker's status depends upon the terms and conditions under which the work is performed.

### Factors to consider

We have provided a table below to help you determine whether you have engaged a contractor or employee. These factors may be oral or in writing, or simply understood between the parties.

No one factor is necessarily conclusive. It depends on the facts in each case:

Factors to consider	Employee	Contractor
Control over work	The employer has an implied right in industrial law to direct and control the work of an employee. The employee works in the business of the employer and the employer is free to manage their business as they see fit.	A payer has a right to specify how the contracted services are to be performed. However, such control must be specified in the terms of the contract, otherwise the contractor is free to exercise their discretion.
Independence	An employee works in the business of the payer. Their work is an integral part of the business.	Although the work of a contractor is done for the business, it is not integrated into it but is ancillary to it.
Payment	Payment is often based on the period of time worked, but an employee can also work on 'piece rates' or commission.	Payment is dependent on the performance of the contracted services.
Commercial risks	An employee generally bears no legal risks in respect of the work; since the employee works in the business of the employer, the employer is legally responsible for any work performed by the employee.	A contractor bears legal risk in respect of the work. They have the potential to make a profit or loss, and must remedy any defective work at their own expense.
Ability to delegate	An employee performs the work personally and generally cannot subcontract the work to someone else.	Unless otherwise specified in the contract, a contractor can subcontract or delegate the work.
Tools and equipment	The employer, except when specifically agreed otherwise, usually provides tools and equipment.	Generally, a contractor provides their own tools and equipment.

### Does the worker have an ABN?

If a worker has an Australian business number (ABN) this does not automatically mean the worker is a contractor. You still need to consider the nature of your agreement with the worker.

### What if the contractor is a company?

A contractor that is a company is more likely to be treated as a contractor, however if a company is ultimately put in place to avoid an employment relationship, then it is likely that the authorities will look through the company structure anyway.

If you would like to discuss this issue further, please contact your Harris Black team members.