

Sham contracting in the FWO's sights in 2011

Engaging staff as contractors rather than as employees raises some difficult issues.

Firstly, the law regarding whether a particular person is "really" a contractor or an employee is notoriously difficult to apply, so the risk of a "contractor" being found to be in fact an employee, with award pay entitlements (including overtime and penalties) and accrued entitlements to leave, is ever present.

Secondly, whatever the general legal position may be, specific legislation regarding income tax, superannuation, payroll tax and workers compensation contains varying rules regarding liabilities of the employer/principal, some depending on whether the person in question is a contractor or not under common law rules, and some applying even if the person is a contractor under those rules.

The Fair Work Act has added to this mix another area of difficulty in relation to "sham contracting". The Act provides that it is an offence (penalty up to \$33,000 per offence for a company) to engage in the practice of "sham contracting", which is essentially:

- misrepresenting to a person that they were engaged as a contractor when "really" they were an employee (applying this rule in turn depends on the notoriously vague common law test referred to above and whether the alleged offender knew or was reckless as to whether or not someone was actually an employee);
- dismissing or threatening to dismiss a person in order to re-engage them as a contractor
- making false representations to induce an employee or ex-employee to become a contractor.

- Traditionally, the best way to confirm a person's status as a contractor has been
- to have a written contract in place which includes provisions demonstrating that the substance of the relationship is contractual; and
- implementing the work and the relationship in such a way that it is in fact contractual rather than employment in nature.

The relevant factors include who controls the work and supplies tools, materials, skills and so on, whether the contractor is a company or an individual and has business outside this particular relationship, and how you treat issues usually incidental to employment such as paid leave, deduction of tax, and insurance.

The Fair Work Act makes it even more important to pay attention to these sorts of issues and to manage arrangements with contractors properly. The Fair Work Ombudsman has announced that sham contracting will be one of its enforcement priorities in 2011, citing situations where relatively unskilled workers such as security officers, receptionists, cleaners and casual retail assistants are engaged as contractors (and implicitly exploited relative to their entitlements were they employed) and their engagement is, pretty clearly, really one of employment.

For assistance with advice on applying the distinction between employees and contractors in particular circumstances, preparing effective contractor agreements and managing contracting arrangements, please contact Stephen Booth, Anna Ford, or Enza Iannella at Coleman Greig on 9635 6422.

For Further Information

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