

CG Workplace– February Bulletin

As our previous CG Workplace Bulletins have foreshadowed, there have been recent reforms to the laws relating to Independent Contractors and their contracting arrangements with businesses which will commence on 1 March 2007. This bulletin provides a brief overview of those reforms as well as some practical implications for your business.

Changes to Independent Contractor Laws

The new Independent Contractors legislation, for the first time, recognises the status of Independent Contractors and protects their unique position in the Australian workplace. It does this by allowing parties to enter into a Reform Opt-In Agreement, avoiding certain State or Territory laws. The reforms recognise the freedom of Independent Contractors to enter into arrangements that are primarily commercial relationships, and prevent interference with the terms of genuine independent contracting.

The reforms include:

- overriding State and Territory laws which deem certain classes of Independent Contractors to be Employees;
- ensuring that existing State and Territory outworker and owner-driver protections are preserved;
- providing a fairer and a more accessible national unfair contract review scheme through the Federal Court and the Federal Magistrates Court.

Sham Contracting Arrangements & Prohibited Conduct

The reforms have ensured significant protection for workers through prohibiting 'Sham' arrangements and certain 'Prohibited' conduct.

A Sham contracting arrangement occurs where there is an attempt to disguise an employment relationship as an independent contracting arrangement (usually to avoid responsibility for employee entitlements). An Employer cannot:

- intentionally disguise a person's employment, or an offer of employment, as an independent contracting arrangement;
- dismiss, or threaten to dismiss an Employee for the sole and dominant purpose of re-engaging the person as an Independent Contractor;
- make a knowingly false statement for the purpose of persuading an Employee to become an Independent Contractor.

Prohibited conduct includes reforms that a person must not:

- take (or threaten to take) any action with the intent to coerce another person into signing a Reform Opt-In Agreement; and
- knowingly make a false statement in order to persuade or influence another person into signing a Reform Opt-In Agreement.

The Office of Workplace Services will have the power to investigate and enforce penalties against Employers. An Employer who is found to be in breach of any of the Sham or Prohibited Conduct provisions can be fined up to \$33,000.

The Lessons are:-

Parties who want to consider the Reform Opt-In Agreement should carefully assess their factual circumstances to ensure there is no risk of being found to have disguised what is actually an employment agreement.

What has not changed?

Unfortunately there is no clearer definition of just what is an “*Independent Contractor*” under the new legislation. The Common Law test of an Independent Contractor will continue to apply.

Under the Common Law test there are a number of ways to tell the difference between an Employee and an Independent Contractor. Some common indicators include:-

Employees:	Independent Contractors:
<ul style="list-style-type: none"> • are entitled to receive superannuation contributions from their Employer; • have income tax deducted by their Employer; • perform work, at the direction of their Employer, on an ongoing basis; • are paid regularly (e.g. weekly/fortnightly/monthly); • are entitled to receive paid leave (e.g. annual leave, personal/carer’s leave, long service leave). 	<ul style="list-style-type: none"> • pay their own superannuation and GST; • use their own tools; • are contracted to work for a set period of time (e.g. two months), or to do a set task, and decide what hours to work to complete the specific work; • generally submit an invoice for work completed and are typically paid at the end of the project; • are generally in a position to make a profit or loss from the work.

The courts have adopted a multi-factor test to determine whether a person is an Employee or Independent Contractor - so each case is considered on its own merits.

The Lesson for Employers:-

Employers should conduct a review of all staff to review whether or not an opportunity exists that could benefit both Employer and Employee to enter into a Reform Opt-In Agreement. This is particularly the case in the construction and transport sectors.

If you are not sure whether you are an Employee or Independent Contractor you can contact us.

Transitional Provisions

There will be a 3 year transitional period to give businesses and workers time to adjust to the new legislation.

Under these provisions, all contracts made before 1 March 2007 or contracts that continue the terms of the previous contracts will continue to be dealt with under the relevant State and Territory contractor laws until the contract is replaced by one made under the new legislation or from 1 March 2010, whichever comes first.

For further information about any of the above issues or other issues please contact:

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