Employee vs. Contractor

The Australian Taxation Office (“ATO”) provides various key indicators to assist in differentiating between services provided by contractors and employees. In essence, it states that an employee works to provide his or her labour in the service of the employer (typically to enable the employer to achieve a result), while an independent contractor works in his or her own business (or on his or her own account). The University should examine each individual contract or arrangement in order to determine whether the person is engaged as an employee or as an independent contractor.

To determine whether someone is an employee under common law there is no exclusive measure. The totality of the relationship between the University and the individual must be considered. For example, a contract that purports to characterise the relationship as principal and independent contractor cannot be effective if it contradicts the effect of the agreement as a whole.

Key factors to be considered under common law to determine the nature of the relationship as employee or contractor are detailed below. Please note that all factors must be considered and no one factor is determinative:

- control (an employer has lawful authority over the manner in which work is performed; a contractor works to achieve the result on his/her own account);
- results contracts (there is strong evidence of contracting where the substance of the contract is to achieve a specified result);
- power to delegate (a contractor will usually have ability to arrange his/her own personnel or subcontractors);
- risk (a contractor usually bears the risk of commercial loss, arising out of injury or defect of work);
- conditions of engagement (the payment of employment benefits such as annual leave; use of assets provided by payer and/or allowances or reimbursement of expenses for use of own materials or assets; discretion over task allocation and termination of engagement would usually indicate an employee relationship); and
- integration test (a contractor would usually be seen to be carrying on business for themselves on their own account, an employee acts in the service of a superior).

Please refer to Part 2.3 Attachment A, which sets out a summary of the key indicators and illustrates the different application of these indicators to an employee or contractor relationship. This Attachment should be used by the Universities to assist in determining whether the payment is to an employee or a contractor.
Personal Services Income

Personal services income is income earned from the effort of an individual, such as their labour or skill. Income is still personal services income even if that income is paid or payable under a contract.

You have personal services income if:

- you are an individual who earns income by providing your personal efforts or skills, or for producing a result from your personal efforts or skill; or
- you are a company, partnership or trust and your income includes an individual’s personal services income (personal services entity). If you have personal services income of more than one individual, each individual must be looked at separately.

Income is not personal services income if it is mainly:

- for supplying or selling goods;
- for granting a right to use property; or
- generated by an income-producing asset.

New measures have been introduced which will apply from 1 July 2000 to entities that earn personal services income and are not personal services businesses. The measures apply where personal services income is diverted to an entity (company, partnership or trust) and that entity is not carrying on a personal services business. Where the measures apply they deem that the personal services income is earned by the individual performing the services and will be included as assessable income in the individual’s tax return. The measures also limit the deductions available to the individual.

To determine whether an entity is conducting a personal service business there are a number of tests and if the entity earns 80% or more of its income from one source, a determination from the Commissioner of Taxation will determine if it is a personal service business. This is an issue for the contractor and the personal service entity.

It is important to note that these provisions do not affect the relationship that the University has with the entity. Therefore, if the University has a contract with the entity (i.e. company, partnership or trust), the University makes payments directly to the entity and the entity has provided its Australian Business Number (“ABN”) then there is no requirement for the University to withhold from any payments made to the entity. This will be the case even where it is determined that the Personal Services Income provisions apply to the entity.
Thesis Examiners

If Thesis Examiners are independent contractors and are not able to provide an ABN number the University is obliged to withhold PAYG. The withholding will be for no ABN and will be at a rate of 46.5%. Where the Thesis Examiner is an employee of the University, the University will be required to withhold at the rates published by the ATO. If the examiners fail to provide a tax file number or a Statement by Supplier form the rate of withholding will be at 46.5%.

Scholarships

There is a general exemption for most scholarships, bursaries, or other educational allowances derived by a student (of any age) receiving full time education at a school, college or University. “Full-time education” in this context means a full-time course as opposed to a part-time course and does not preclude the student from holding a part-time job.

Payments received by a student “on the condition” that the student will (or will if required) become, or continue to be, an employee of the payer or enter into, or continue to be a party to a contract for labour with the payer are excluded from the exemption.

Reimbursements

Reimbursements that are not covered by allowances/per diems above may be subject to FBT - please refer to the FBT section in this manual for further information.

Honorariums (Gifts/Voluntary Payments)

Gifts or voluntary payments to a person as an individual, whether because of that person’s personal qualities or needs (eg the recipient’s dire financial circumstances) or as a token of gratitude for past personal advice or friendship are not income therefore not taxable. This is because the gift is not related in any way to the personal exertion of the individual.

If the gift is to the person as a product or incident of employment or a reward for services (including past services) it will be assessable income. Other factors taken into account to determine whether the payment is an honorarium and not taxable include the periodicity, recurrence or regularity of the payment.

The key conditions for a payment to be exempt from tax include:

- the payment does not represent direct payment for a service;
- it is a once-off payment unlikely to be repeated;
- it is made voluntarily by the payer;
- the payee has no expectation of the payment; and
- the payee has no legal right to receive the payment.
PAYG
PAYMENT TO CONTRACTORS/INDIVIDUALS
COMPARISON OF CONTRACTOR AND EMPLOYEE

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<thead>
<tr>
<th>Features of Relationship</th>
<th>Employee – Contract of Service</th>
<th>Independent Contractor – Contract for Services</th>
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</thead>
<tbody>
<tr>
<td>1. Lawful authority to command</td>
<td>Under a contract of service, the payer usually has the right to direct the manner of performance. Of course, where the nature of the work involves the professional skill or judgment of the worker, the degree of control over the manner of performance is diminished. What is important is the lawful authority to command that rests with the payer.</td>
<td>The hallmark of a contract for services is said to be that the contract is one for a given result. The contractor works to achieve the result in terms of the contract. The contractor works on his/her own account.</td>
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<tr>
<td>2. How is the work performed?</td>
<td>Tasks are performed at the request of the employer. The worker is said to be working in the business of the payer.</td>
<td>An independent contractor enters into a contract for a specific task or series of tasks. The contractor maintains a high level of discretion and flexibility as to how the work is to be performed. However, the contract may contain precise terms as to materials used and methods of performance and still be one for services.</td>
</tr>
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<td>3. Risk</td>
<td>An employee bears little or no risk. An employee is not exposed to any commercial risk. This is borne by the employer. Further, the employer is generally responsible for any loss occasioned by poor workmanship or negligence of the employee.</td>
<td>An independent contractor stands to make a profit or loss on the task. They bear the commercial risk. The contractor bears the responsibility and liability for any poor workmanship or injury sustained in performance of the task. Generally, a contractor would be expected to carry his or her own insurance policy.</td>
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<td>4. Place of performance</td>
<td>A worker under a contract of service will generally perform the tasks on the payer’s premises using the payer’s assets and equipment.</td>
<td>A contractor, on the other hand, generally provides all his or her own assets and equipment.</td>
</tr>
<tr>
<td>5. Hours of work</td>
<td>An employee generally works standard or set hours.</td>
<td>An independent contractor generally sets his or her own hours of work.</td>
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IMPORTANT DISCLAIMER:
This tax manual has been developed as a joint effort by the public universities in Western Australia. No person should rely on the contents of this tax manual without first obtaining advice from your University’s tax accountant or other qualified professional. This tax manual has been provided as a general reference guide, on the terms and understanding that the authors are not responsible for the results of any actions taken on the basis of information in this tax manual, nor for any error or omission therein. The authors and all Universities involved in the development and update of this tax manual expressly disclaim all and any liability and responsibility to any person, in respect of anything done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this tax manual. You should not rely on this tax manual for your personal income tax obligations.
### Features of Relationship

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<tr>
<td>6. Leave Entitlements</td>
<td>The contract generally provides for annual leave, long service leave, sick leave and other benefits or allowances.</td>
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<tr>
<td>7. Payment</td>
<td>An employee is generally paid an hourly rate, piece rates or award rates.</td>
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<tr>
<td>8. Expenses</td>
<td>An employee is generally reimbursed for expenses incurred in the course of employment.</td>
</tr>
<tr>
<td>9. Appointment</td>
<td>An employee is generally recruited through an advertisement by the employer.</td>
</tr>
<tr>
<td>10. Termination</td>
<td>An employer reserves the right to dismiss an employee at any time (subject to State or Federal legislation).</td>
</tr>
<tr>
<td>11. Delegation</td>
<td>An employee has no inherent right to delegate tasks to another. However, there may be a power to delegate some duties to other employees.</td>
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