PCG 2023/2 - Classifying workers as employees or independent contractors - ATO compliance approach

Practical Compliance Guideline

Classifying workers as employees or independent contractors – ATO compliance approach

Relying on this Guideline

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

Table of Contents **Paragraph**

What this Guideline is about

1. This Guideline outlines the Commissioner's compliance approach for businesses that engage workers and classify them as either employees or independent contractors. It sets out how we allocate our compliance resources, based on the risks associated with the classification.

2. The Commissioner is also the Registrar of the Australian Business Register (the Registrar). To the extent that this Guideline discusses matters of Australian business number (ABN) registration, the Registrar's approach aligns with the Commissioner's.

3. Unless otherwise stated, all references to an 'employee' in this Guideline refer to the ordinary meaning of an 'employee'.

Background

4. When a business engages a worker, the arrangement will generally be one of either:

- employment, where the worker is an employee and the engaging business is their employer, or
- independent contracting, where the worker performs the work in the course of carrying on their own business.

5. Determining which kind of arrangement is entered into is known as 'worker classification'. A business' tax and superannuation obligations, and a worker's tax obligations and entitlement to an ABN, can vary greatly depending on how the worker is classified.

6. Correctly determining whether a worker is an employee or independent contractor is important to ensure that both the business and the worker get their tax, superannuation, ABN registration and reporting obligations right.

7. It is not always easy to identify a worker's classification. The classification is determined by the totality of the contractual arrangement between the parties (including any implied or oral terms). The characterisation of the parties' relationship will generally be guided by the question of whether a worker is serving in the business of the engaging entity, as distinct from conducting an independent business of their own.[1]

8. It is the substance of a contractual arrangement that will dictate a worker's classification, rather than the labels used in it. Sometimes an entity that is carrying on a business will engage a worker with a written contract that describes the worker as an independent contractor, but when all rights and obligations in the totality of the contractual arrangement are considered, the arrangement is actually one of employment, or vice versa. A label in a contract, written or otherwise, cannot deem the relationship to be something it is not.[2]

9. Many arrangements will clearly be one of employment or of independent contracting. However, sometimes the totality of a contractual arrangement may have some indicators that point to an employment relationship and others that point towards independent contracting. This can make the correct classification difficult to ascertain.

10. The Commissioner's view of who is an employee is outlined in Taxation Ruling TR 2023/4 *Income tax: pay as you go withholding – who is an employee?*, which explains

[1] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 *(Personnel Contracting)* at [39].
[2] *Personnel Contracting* at [58] and [66].

when an individual is an employee of an entity for the purposes of section 12-35 of Schedule 1 to the *Taxation Administration Act 1953*.

11. Further to the ordinary meaning of employee, being its meaning under common law, the *Superannuation Guarantee (Administration) Act 1992* (SGAA) contains an extended definition of employee for superannuation guarantee purposes. This extends beyond traditional employment relationships to take into account some independent contractors. Most relevantly, subsection 12(3) of the SGAA provides that if a person works under a contract that is wholly or principally for the labour of the person, the person is an employee for superannuation purposes.

12. The Commissioner's view of who is an employee under the extended definition is outlined in Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?*

Who this Guideline applies to

13. This Guideline applies in situations where an entity that carries on a business (engaging entity) engages a worker and describes how and when we will allocate compliance resources to cases investigating the worker's classification.

14. This Guideline is relevant for a variety of tax and superannuation obligations for both the engaging entity and the worker, where the worker contracts directly with the engaging entity. Tables 1 and 2 of this Guideline summarises the tax, superannuation and reporting consequences for the engaging entity and the worker, depending on the worker's classification.

Table 1: Consequences of a worker's classification where worker is an employee of the engaging entity

Consequences for the engaging entity	Consequences for the worker
• report via Single Touch Payroll (STP) • withhold amounts under the pay as you go (PAYG) withholding regime • make superannuation contributions or be liable for the superannuation guarantee charge • meet fringe benefits tax obligations for benefits provided • not entitled to claim GST credits for wages paid	• not entitled to an ABN in relation to that employment • not entitled to register for goods and services tax (GST) and no GST reporting obligations in relation to that employment

Table 2: Consequences of a worker's classification where worker is an independent contractor

Consequences for the engaging entity	Consequences for the worker
• report via Taxable Payments Annual Reporting (TPAR) as legislated or on a voluntary basis if they satisfy the turnover-threshold test • if the worker satisfies the extended definition of employee, make superannuation contributions or be liable for the superannuation guarantee charge	• make provision for income tax through PAYG instalments, if required • entitled to apply for an ABN • register for and pay GST, if required • consider the personal services income implications

• if the engaging entity and worker are both registered for GST, claim eligible GST credits • if the worker does not quote an ABN when required, or the parties enter into a voluntary agreement, withhold amounts under the PAYG withholding regime	

15. This Guideline does not replace, alter or affect our interpretation of the law in any way. It does not relieve the parties of their obligation to comply with all relevant tax or superannuation laws but is designed to give confidence that we will allocate compliance resources in line with the risk approach detailed in paragraph 23 of this Guideline.

16. The Guideline will be most relevant for situations where a worker's correct classification is less obvious and the engaging entity or worker (or both) want to understand how the ATO will allocate its compliance resources in such circumstances. If the arrangement is clearly one of employment or independent contracting, the parties may choose not to rely on this Guideline but self-assess based on their confidence that the correct classification has been applied.

17. This Guideline does not extend to the income tax affairs of a worker, including whether they are entitled to claim deductions or concessions associated with carrying on a business or whether the personal services income rules apply to their arrangement.[3]

18. This Guideline does not apply to matters that are not tax and superannuation-related and are outside the scope of the laws administered by the Commissioner. This includes matters concerning:

- the *Fair Work Act 2009*
- state revenue issues, including payroll tax
- Comcare and other worker insurance-related matters, and
- obligations under a contract or an applicable award or enterprise agreement (including where those obligations concern payment of superannuation).

Date of effect

19. This Guideline applies in respect of the application of the Commissioner's compliance resources from its date of issue.

Our compliance approach

20. Paragraphs 21 to 25 of this Guideline outline our risk framework for worker classification arrangements, based on the actions taken by the parties when entering into the arrangement. Parties can self-assess against this risk framework to understand the likelihood of the ATO applying compliance resources to review their arrangement.

21. The review of an arrangement may be the result of proactive case selection where particular risk factors and information known to the ATO warrants a review.

[3] See Part 2-42 of the *Income Tax Assessment Act 1997*.

22. A review may also be the result of an unpaid superannuation query received from a worker where they believe that they were entitled to superannuation because:

- they should have been classified as an employee and not an independent contractor, or
- they satisfy the extended definition of employee for superannuation purposes.

23. The risk framework is made up of 4 zones. When we review an arrangement on either of the occasions referred to in paragraph 22 of this Guideline, we will apply compliance resources initially to determine which risk zone the arrangement falls into. Once the risk zone has been determined, whether we have cause to apply compliance resources will depend on the zone in line with Table 3 of this Guideline.

Table 3: Risk zones – ATO approach

Risk zone	Unpaid superannuation query	Proactive case selection
Very low	No further compliance resources will be applied.	No further compliance resources will be applied.
Low	Compliance resources will be applied to test whether the worker meets the extended definition of employee under the SGAA.	No further compliance resources will be applied.
Medium	Compliance resources will be applied to test whether the worker is an employee under the ordinary meaning or meets the extended definition of employee under the SGAA (or both). Medium-risk arrangements will be given lower priority than arrangements that are rated high risk.	Compliance resources will be applied to test whether the worker is an employee under the ordinary meaning or meets the extended definition of employee under the SGAA (or both). Medium-risk arrangements will be given lower priority than arrangements that are rated high risk.
High	Compliance resources will be applied to test whether the worker is an employee under the ordinary meaning or meets the extended definition of employee under the SGAA (or both). High-risk arrangements will be given the highest priority resourcing. Engaging entities may be subject to higher penalties if it is found that they failed to correctly classify their workers.	Compliance resources will be applied to test whether the worker is an employee under the ordinary meaning or meets the extended definition of employee under the SGAA (or both). High-risk arrangements will be given the highest priority resourcing. Engaging entities may be subject to higher penalties if it is found that they failed to correctly classify their workers.

24. Table 4 of this Guideline outlines all the criteria that must be satisfied in order for an arrangement to fall into one of the risk zones. These criteria should not be taken to indicate whether an arrangement is in fact one of employment or independent contracting and should not be taken as guidance on how the ATO will apply the law to determine a classification if compliance resources are applied. If the ATO does have cause to apply compliance resources, it will be in line with the principles described in paragraphs 4 to 12 of this Guideline and in TR 2023/4.

25. In Table 4 of this Guideline:

- criteria 1 to 3 relate to the parties' arrangement, intentions and understanding

- criteria 4 and 5 relate to the conduct of the parties
- criteria 6 and 7 relate to the advice received.

Table 4: Criteria in each risk zone

Criterion	Very low	Low	Medium	High
1	There is evidence that both parties intended for the worker to be classified in the same way, either as an employee or as an independent contractor	There is evidence that both parties intended for the worker to be classified in the same way, either as an employee or as an independent contractor	There is evidence that both parties intended for the worker to be classified in the same way, either as an employee or as an independent contractor	Any arrangements that do not fall within the other 3 risk zones
2	There is a comprehensive written agreement that governs the entire relationship between the parties	There is a comprehensive written agreement that governs the entire relationship between the parties	Not applicable	Any arrangements that do not fall within the other 3 risk zones
3	There is evidence to show that both parties understood what the worker's classification meant, and what the tax and superannuation consequences of that classification would be	Not applicable	Not applicable	Any arrangements that do not fall within the other 3 risk zones
4	The performance of the arrangement has not significantly deviated from the contractual rights and obligations agreed to by the parties	The performance of the arrangement has not significantly deviated from the contractual rights and obligations agreed to by the parties	The performance of the arrangement has not significantly deviated from the contractual rights and obligations agreed to by the parties	Any arrangements that do not fall within the other 3 risk zones
5	The party relying on this Guideline is meeting the correct tax and superannuation obligations that arise for their intended classification, and reporting appropriately	The party relying on this Guideline is meeting the correct tax and superannuation obligations that arise for their intended classification, and reporting appropriately	The party relying on this Guideline is meeting the correct tax and superannuation obligations that arise for their intended classification, and reporting appropriately	Any arrangements that do not fall within the other 3 risk zones

Criterion	Very low	Low	Medium	High
6	The party relying on this Guideline obtained specific advice confirming the classification was correct	The party relying on this Guideline obtained specific advice confirming the classification was correct	Not applicable	Any arrangements that do not fall within the other 3 risk zones
7	An engaging business relying on this Guideline also obtained specific advice confirming the application of the extended meaning of employee under the SGAA, and communicated this outcome to the worker	Not applicable	Not applicable	Any arrangements that do not fall within the other 3 risk zones

26. An arrangement can also fall into the very low-risk category if the engaging entity voluntarily decides to meet employer obligations regardless of their view of the worker's classification. This includes voluntarily engaging in PAYG withholding for the worker, reporting via STP or TPAR, and making superannuation contributions on behalf of the worker.

What if the circumstances of an arrangement change?

27. It is common for arrangements between engaging entities and workers to change over time, as the relationship between the parties evolves and their circumstances change. A significant deviation in the operation of an arrangement may amount to a variation of the contractual rights and obligations between the parties, which could impact the worker's classification.

28. Where a party to an arrangement self-assessed into one of the risk categories in Table 3 of this Guideline when an arrangement was entered into, and there has been a significant deviation, the party will need to reassess to ensure their risk rating has not increased. This may include:

- ensuring that both parties understand the impact of the changes on their working arrangement and classification
- ensuring the contractual rights and obligations agreed by the parties reflect the changes in the working arrangement
- ensuring that, if the classification has changed, all parties understand the tax, superannuation and reporting consequences of the new classification, and
- ensuring that new client-specific advice (whether from the ATO, the engaging entities' in-house counsel or an appropriately qualified third party) has been obtained to confirm the classification in light of the new circumstances.

Explanation of key concepts relating to the criteria for each risk zone

29. This section of the Guideline explains the criteria in Table 4 of the Guideline and provides additional information to assist engaging entities and workers in assessing which risk zone their arrangement falls into.

Criterion 1 – evidence both parties intended the worker to be classified the same way

30. Generally, the Commissioner would be satisfied that a worker and engaging entity both intended for the worker to have the same classification where there is a written contract signed by both parties which asserts that intended classification.

31. However, this evidence may not always be sufficient. For example, the Commissioner would not accept that both parties held the same intent if there was other evidence indicating that one party coerced the other into accepting that the arrangement had a particular classification.

32. Similarly, the Commissioner will not accept that both parties intended for the worker to have the same classification if one party deceived the other party or made false or misleading representations that led the other party into believing the arrangement had a particular classification.

33. The Commissioner will also not accept evidence of a shared intention for the classification of a worker in the case of a sham[4] where both the worker and the engaging entity intended that their relationship, and therefore the worker's classification, would differ from the written contract.

Criterion 2 – comprehensive written agreement

34. If an arrangement does not have its contract terms in writing, or a written contract between the parties fails to comprehensively capture the legal rights and obligations between the parties, there may be a greater risk that the arrangement has been misclassified once all oral and implied contract terms are considered.

35. A written agreement will not govern the entire relationship between the parties if the validity of the agreement is being challenged as a sham, or the terms of the agreement have been varied, waived, discharged or the subject of an estoppel or any equitable, legal or statutory right or remedy.[5] The agreement must also be properly executed.

Criterion 3 – evidence the parties understood the tax and superannuation consequences of the worker's classification

36. If an engaging entity is relying on this Guideline, they need evidence to demonstrate that they have taken steps to ensure the worker understands the consequences of the classification. This evidence could include:

- a record of discussion between the worker and the engaging entity
- induction documentation that has been shared with the worker, or

[4] A contract will be a sham if it is not a legitimate record of the intended legal relationship between two parties, but instead is 'a mere piece of machinery' serving some other purpose (often to act as a facade and deliberately obscure the true legal relationship for third parties). See *Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation* [2008] HCA 21 at [34–35]; *Personnel Contracting* at [177]. A reference to a 'sham' in this Guideline is not a reference to 'sham arrangements' considered under Division 6 of Part 3-1 of the *Fair Work Act 2009*.

[5] *Personnel Contracting* at [43], [59] and [173]; *WorkPac Pty Ltd v Rossato* [2021] HCA 23 at [56–57] and [63].

- any other correspondence with the worker.

Criterion 4 – no significant deviation in performance

37. As noted in paragraph 27 of this Guideline, where there is a significant deviation in the operation of an arrangement, there is an increased likelihood that one or more of the legal rights and obligations governing the relationship have been varied. A deviation is more likely to be considered significant if:

- an aspect of performance directly contradicts the terms of the contract, or
- the deviation relates to one or more crucial components of the contract.

Criterion 5 – meeting the correct tax and superannuation obligations, and reporting appropriately

38. To determine what the correct tax, superannuation and reporting obligations were for the purposes of this criterion, assume the classification that the party intended is correct.

39. Tables 1 and 2 of this Guideline provide details on some of the tax, superannuation and reporting obligations that need to be met for an engaging entity and a worker, depending on the worker's classification.

40. If an engaging entity is relying on this Guideline for a worker that they have treated as an independent contractor, to satisfy this criterion they must meet correct tax and superannuation obligations to their intended classification and report through either STP or TPAR as appropriate, even where that reporting is on a voluntary basis.

Criterion 6 – obtaining specific advice

41. To satisfy this criterion the advice must be prepared by an appropriately qualified professional. This may be from the entity's own in-house counsel, a third party such as a solicitor or tax professional, an administrative body, or client specific advice from the ATO.

42. Where multiple workers are engaged under the same kind of arrangement, a single piece of advice that addresses that arrangement will be sufficient to cover all relevant workers, provided the rights and obligations between the parties do not differ in any meaningful way from the arrangement covered by the advice.

43. The engaging entity will need to provide a copy of the advice to the Commissioner if requested. The Commissioner will be satisfied that this criterion has been met if the position in the advice was at least reasonably arguable. To be reasonably arguable, the position must be cogent, well-grounded and considerable in its persuasiveness.[6]

Criterion 7 – treatment of the extended meaning of employee under the Superannuation Guarantee (Administration) Act 1992

44. The guidance in paragraphs 41 to 43 of this Guideline equally applies to this criterion when considering the written advice an engaging entity obtains regarding whether a worker satisfies the extended meaning of employee under the SGAA.

[6] The Commissioner's view on the concept of a reasonably arguable position is outlined in Miscellaneous Taxation Ruling MT 2008/2 *Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable*.

45. To satisfy this criterion an engaging entity is only required to communicate the outcome of the advice obtained under this criterion to the worker. The evidence described at paragraph 36 of this Guideline will satisfy this criterion.

Example 1 – very low risk – engaging entity and worker acting consistently with an agreed and understood relationship

46. *A manufacturing business entered into a contract with a software engineer, Brett, to design, develop, test and install a new software program. The business intended to engage Brett as an independent contractor and the terms of the comprehensive written agreement between the business and Brett indicated this classification.*

47. *In seeking to rely on this Guideline, the business identified the following facts that show it satisfied the very low-risk criteria listed in Table 4 of the Guideline in determining the risk zone of the arrangement:*

- *the business had a record of discussions with Brett in which it highlighted that he was being engaged differently from the business' employees and why he was a contractor and not entitled to superannuation*
- *the business had procedures in place to ensure the terms of contracts and the tax and superannuation implications for its workers, including Brett, were explained, understood and acknowledged*
- *neither Brett's nor the business' subsequent actions suggested any significant deviation from the contracted arrangement; Brett acted consistently with that arrangement, including by invoicing for his work using an ABN and charging GST*
- *the business had obtained professional advice from an employment lawyer regarding their arrangement with Brett and their resulting tax and superannuation obligations, which indicated that the classification was correct and Brett did not satisfy the extended definition of employee for superannuation purposes, and*
- *the business complied with all of the taxation and reporting obligations arising from its engagement of Brett as a contractor.*

48. *The arrangement is rated in the very low-risk zone. No further compliance resources will be applied to scrutinise whether Brett should instead have been classified as an employee of the engaging entity.*

Example 2 – very low risk – engaging entity engages both contractors and employees – relationships are agreed and understood

49. *Aussie Building Cleaners Pty Ltd (ABC) operates a cleaning business. The business does not have established premises; rather, cleaners attend a client's premises to undertake their duties. Some of the cleaners were employed by ABC under conventional contracts of employment, while other cleaners were engaged as independent contractors. While similar duties were undertaken by both kinds of cleaners, the terms and conditions differed significantly between the 2 kinds of arrangements.*

50. *Maria was one of ABC's window cleaners who was engaged as an independent contractor. After working for ABC for several years, Maria ceased her engagement with them. Subsequently, she lodged an unpaid superannuation query with the ATO claiming she should actually have been classified as an employee of ABC.*

51. *When Maria was engaged, ABC gave Maria the choice of entering into either kind of arrangement, noting that she would not be required to do the work herself if she was*

engaged as an independent contractor. Maria chose the independent contractor arrangement.

52. *ABC also identified the following facts that show it satisfied the very low-risk criteria in Table 4 of this Guideline in determining the risk zone of the arrangement:*

- *a written contract of engagement was provided to and signed by Maria which comprehensively outlined the role, responsibilities and remuneration*
- *email exchanges between ABC and Maria demonstrated that both parties understood and acknowledged the tax and superannuation implications of engagement as an independent contractor rather than an employee*
- *Maria's subsequent actions did not suggest any significant deviation from the contracted arrangement; she acted consistently with the arrangement, including invoicing ABC for her work using an ABN and charging GST*
- *ABC had obtained administratively binding advice from the ATO indicating that the appropriate worker classification had been reached for both kinds of arrangements and that workers in Maria's circumstances would not be employees under the extended definition for superannuation purposes; they discussed the findings from both pieces of advice with Maria in explaining to her their position that she was not entitled to superannuation, retaining minutes of that discussion, and*
- *ABC complied with all of the taxation and reporting obligations arising from its engagement of Maria as a contractor, including voluntarily reporting payments made to Maria through TPAR.*

53. *The arrangement is rated in the very low-risk zone. While the ATO investigates Maria's unpaid superannuation query to determine the risk zone, no further compliance resources will be applied to scrutinise whether Maria should instead have been classified as an employee of the business. The ATO will notify Maria of this outcome in response to her unpaid superannuation query.*

Example 3 – low risk – extended definition of employee for superannuation purposes not considered

54. *CCC Pty Ltd engages workers to deliver pamphlets of their products to encourage local sales. Frank was offered a job and signed a written contract stating he was an independent contractor. CCC Pty Ltd did not pay Frank superannuation and complied with all relevant tax and reporting obligations regarding Frank as an independent contractor.*

55. *CCC Pty Ltd has minutes of a meeting with Frank in which they discussed the independent contractor classification with him and its consequences, and he indicated his understanding and acceptance.*

56. *CCC Pty Ltd had previously obtained professional advice regarding the classification of workers in Frank's role as being independent contractors and discussed Frank's classification based on this advice with him.*

57. *However, CCC Pty Ltd did not consider or obtain any advice concerning whether a contractor in Frank's role would be captured under the extended definition of 'employee' in the SGAA.*

58. *Although he follows the duties outlined in the contract, given the nature of the role, Frank considered he might be entitled to superannuation and lodged an unpaid superannuation query with the ATO.*

59. *As CCC Pty Ltd has not taken action to obtain advice on the extended definition of an employee under the SGAA, or discussed any conclusion on that extended definition*

with Frank, the arrangement cannot be rated in the very low-risk zone. The arrangement is instead rated in the low-risk zone and compliance resources will be applied to consider whether Frank satisfied the extended definition of an employee.

Example 4 – medium risk – engaging entity and worker agreed to relationship but no comprehensive written agreement

60. *Truck Takers Pty Ltd (Truck Takers) operates a courier service for parcels. It engages some workers as employees while others that are engaged for 'overflow' delivery services during busy periods are classified as independent contractors.*

61. *The following facts show that Truck Takers satisfied the medium-risk criteria in Table 4 of this Guideline in determining the risk zone of the arrangement:*

- *the overflow workers are engaged by Truck Takers via an email offer which described them as independent contractors and included some high-level terms of the engagement, however, there is no signed written contract with comprehensive terms*
- *Truck Takers complied with all of the taxation and reporting obligations arising from its engagement of the overflow workers, including reporting payments made to them through TPAR, and*
- *the business had obtained independent advice from an employment lawyer regarding arrangements for workers providing their overflow delivery services, which indicated that the classification was correct under both the ordinary meaning and the extended definition of employee.*

62. *The arrangement is rated in the medium-risk zone, as while there is evidence the parties intended for the overflow workers to be engaged as independent contractors, there is no comprehensive written contract governing the entire relationship.*

63. *The ATO identified Truck Takers' arrangements with their workers for review, based on risk factors and known information. Based on the arrangement being rated in the medium-risk zone, compliance resources would be applied to consider whether the overflow workers have been correctly classified.*

Example 5 – high risk – changing circumstances not considered

64. *Sasha entered into a fixed-term contract with a mining company to undertake a safety audit. Sasha was engaged as an independent contractor and the written contract between Sasha and the company reflected this relationship.*

65. *At the time, the arrangement was rated in the very low-risk zone as the actions of Sasha and the company demonstrated they intended to enter into an independent contracting relationship and that all parties fully understood the consequences of this classification. The mining company had also obtained professional advice from an employment lawyer regarding their arrangement with Sasha and their resulting tax and superannuation obligations. This indicated that the classification was correct and Sasha did not satisfy the extended definition of employee for superannuation purposes.*

66. *When the project concluded, the company decided to engage Sasha on a permanent basis. Her role and responsibilities changed, however, this was not reflected in a new or updated written contract between the parties. At no time did the company obtain professional advice regarding how the changed circumstances may impact their classification of Sasha as a worker. Nor did they discuss with Sasha whether the new arrangement might mean that she became their employee.*

67. *When Sasha ultimately left the company, she was concerned that the company may owe her superannuation. She lodged an unpaid superannuation query with the ATO.*

68. *While the arrangement may have previously been rated in the very low-risk zone, given the events that occurred when Sasha's engagement with the company changed, the arrangement is now rated in the high-risk zone as the company cannot demonstrate any agreement, professional advice or understanding about the classification of the new engagement. Compliance resources will be given the highest priority to scrutinise whether Sasha should instead have been classified as an employee from the time her role and responsibilities changed.*

Example 6 – high risk – no evidence of an agreed relationship

69. *A restaurant hires Sam, however, no formal agreement is entered into. Sam is unsure if he is an employee or independent contractor. The restaurant simply asserts to Sam that he is working as an independent contractor and will require an ABN. Sam is told to accept the arrangement if he wants to be hired.*

70. *Sam becomes concerned his remuneration does not include superannuation. After reading guidance on the ATO website, he reflects on the relationship and suspects he is actually an employee of the restaurant.*

71. *Sam lodges an unpaid superannuation query with the ATO.*

72. *Given the lack of a written contract and lack of evidence of the characteristics of the arrangement that were agreed to, the restaurant is unable to demonstrate that the contractual rights and obligations of the parties resulted in an independent contractor relationship.*

73. *Furthermore, the restaurant could not demonstrate they obtained professional advice from an appropriately qualified professional about the classification or that they worked with Sam to ensure he understood the classification and consequences.*

74. *The working arrangement is rated in the high-risk zone and compliance resources will be given the highest priority to scrutinise whether Sam should instead have been classified as an employee of the restaurant.*

Commissioner of Taxation
6 December 2023

References

Previous draft:

PCG 2022/D5

Related Rulings/Determinations:

SGR 2005/1; MT 2008/2; TR 2005/16; TR 2022/D3

Legislative references:

- ITAA 1997 Pt 2-42
- TAA 1953 12-35
- SGAA 1992 12(3)
- Fair Work Act 2009 Pt 3-1 Div 6

Cases relied on:

- Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1; 279 FCR 631
- ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2
- Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation [2008] HCA 21; 238 CLR 516; 2008 ATC 20-029; 68 ATR 170; 246 ALR 406
- WorkPac Pty Ltd v Rossato [2021] HCA 23; 271 CLR 456; 392 ALR 39

ATO references

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