



## ENGAGEMENT AS EMPLOYEE OR CONTRACTOR?

While it is generally considered that there is a business advantage engaging an individual as an Independent Contractor rather than as an employee there can be little difference.

If the individual is not engaged through a separate entity (eg a Company) and they are considered by the Australian Tax Office to be only providing labour (rather than creating an end product/service) then the business will be liable to make a superannuation contribution to the relevant superannuation fund. While there is no direct obligation to withhold income tax you can enter a voluntary arrangement with the contractor.

You could also be required to declare payments made to an individual contractor for the purposes of assessment of liability for payroll tax. The NSW Office of State Revenue sets out on its website nine criteria and if any of these are satisfied then payments to the contractor need not be declared. These criteria include whether the individual provides the services to other persons/entities or the contract is for a short period of no more than 90 days. You should also be mindful of workers compensation legislation.

Any individual contractor engaged by the business, who would otherwise be covered by

a relevant Modern Award as an employee, must be paid at the same rate as they would have been if engaged as employee (*Independent Contractor Act (Cth) 2006*).

If the individual is a current or recent former employee and they are engaged as a contractor or you are engaging someone for the first time albeit as a contractor when they are truly an employee at law you run the risk of being in breach of the “*sham contracting*” provisions under the *Fair Work Act (Cth) 2009*. Penalties for breach of these provisions can result in not insignificant penalties for the business and any individual who was involved in the breach (including directors and human resources managers). Failure to correctly categorise an individual as a contractor can result in the business also being liable for leave entitlements and other entitlements under industrial instruments.

We believe that one of the most important things in setting up these arrangements is that you have a well drafted contractor agreement and you are well aware of your obligations and liabilities before you enter into any such arrangements. If you are not familiar with your obligations you can contact us for a free over the phone chat on your obligations.