

WorkCoverSA

Guide to definition of worker

Workers Rehabilitation and Compensation Act 1986

March 2008

Disclaimer

The information produced by WorkCover Corporation of South Australia in this publication is provided as guide only. While every effort has been made to ensure the accuracy of this guide, it is not a substitute for the *Workers Rehabilitation and Compensation Act, 1986* or the Regulations or determinations made under the Act.

Contents

Disclaimer	2
Introduction.....	4
Who is a worker?.....	4
Important information you should be aware of before reading this guide	4
Definition of worker	4
Definition of 'contract of service'	5
Who is not considered a worker?	5
Important notes.....	6
Excluded persons under the Act	7
'Contract of service' vs 'contract for service'	8
Key indicators of whether a contract is 'of service' or 'for service'	8
Intention of parties	8
Control test	9
Results test.....	9
Risk test.....	10
Place of performance	10
Hours of work	10
Leave entitlements	11
Payment.....	11
Expenses	11
Integration test.....	11
Appointment	11
Termination.....	12
Terms of engagement	12
Delegation	12
Extended definition of 'contract of service'.....	13
Prescribed classes of work.....	13
Contract of apprenticeship.....	14
Work under a contract, arrangement or understanding to receive on-the-job training in a trade or vocation.	14
Workers employed under a contract of service where territoriality may be an issue	14

Introduction

This brochure has been produced to help employers and/or workers who may be uncertain about the status of a person as a worker under the *Workers Rehabilitation and Compensation Act, 1986* (the Act).

The information provided in this publication is correct at the time of printing and is provided as general information only. The specific issues relevant to your workplace should be considered in light of this general information.

To ensure correct information is being used, or if you are in doubt after reading this guide please telephone us on 13 18 55.

Who is a worker?

The *Workers Rehabilitation and Compensation Act, 1986* provides for the rehabilitation and compensation of workers in respect of disabilities arising from their employment. The Act requires that an employer (unless exempted) register with WorkCoverSA and pay a levy on remuneration paid to workers in their employ in respect of employment to which the Act applies.

Important information you should be aware of before reading this guide

Because you engage a person who describes themselves as 'contractor', 'consultant' or 'self-employed' does not necessarily mean you are exempt from WorkCover.

Just because a contractor uses a company or business name or Australian Business Number (ABN), it does not necessarily exempt you from WorkCover.

Rulings/decisions from other regulatory bodies (eg, Australian Taxation Office) do not necessarily apply to WorkCover. For example:

- You should be aware that in certain circumstance(s) the Act provides an extended definition of contract of service that establishes a person who otherwise holds the status of independent contractor as a worker.

Definition of worker

Worker is defined under the Act to mean:

- a person by whom work is done under a contract of service (whether or not as an employee)
- a person who is a worker by virtue of section 103A*
- a self-employed worker **

and includes a former worker and the legal personal representative of a deceased worker.

* A special provision for prescribed classes of volunteers (currently in respect to volunteer fire fighters with the Country Fire Service).

** WorkCover has not extended the protection of the Act to a self-employed worker. Such protection may be extended under section of 103 of the Act.

Definition of 'contract of service'

Under common law, the term 'contract of service' normally represents a relationship formed between an employer and employee.

In South Australia, the Act defines 'contract of service' to mean:

- a contract under which one person (the worker) is employed by another (the employer)
- a contract, arrangement or understanding under which one person (the worker) works for another (the employer) in prescribed work or work of a prescribed class
- a contract of apprenticeship
- a contract, arrangement or understanding under which a person (the worker):
 - receives on-the-job training in a trade or vocation from another (the employer) and
 - is, during the period of that training, remunerated by the employer.

Examples of workers

An employee performing work on a full-time, part-time and casual basis.

An apprentice or trainee engaged under a contract of training.

Working directors.

Certain persons otherwise a contractor ie, deemed workers by virtue of performing work of a prescribed class if relevant elements are met. Prescribed classes of work include:

- Building work
- Cleaning work
- Council drivers
- Taxi drivers
- Driving or riding for fee or reward a vehicle, other than a commercial motor vehicle
- Entertainers
- Outworkers
- Ministers of religion but there are exceptions
- Boxers/wrestlers, if employed for a fee
- Apprentice jockeys authorised under the *Racing Act 1976*

Who is not considered a worker?

A member of the crew of a fishing boat who is remunerated by a share in profits or gross receipts obtained by working the boat is **not** a worker for the purposes of the Act.

Important notes

1. Whether a worker is engaged to perform work on an ongoing basis, or for a short period, eg, for as little as one hour on a given day, or on a casual basis, an obligation exists on the employer to include remuneration paid to any such worker in their calculation of levy payable.
2. There are several steps to identify if a person is a worker under the Act.

The first step is whether the person is in employment that is specifically excluded from coverage under the Act.

If not specifically excluded, the second step is to determine if the person is working under a common law contract of service, contract of apprenticeship or a contract to receive on-the-job training in a trade or vocation.

The third step is to consider if the person is covered under the expanded definition of contract of service under the Act. This includes if the person is working under a contract of apprenticeship, a contract to receive on-the-job training in a trade or vocation. It also includes if the person is in work that is of a prescribed class where otherwise independent contractors are deemed to be workers, subject to certain criteria.

3. The legal entity of a business may have an impact on contract of service. Under common law, a sole trader (meaning the sole owner of an unincorporated business) cannot contract with themselves. The business is not recognised as a separate legal entity so cannot form a contract of service with itself, the sole owner. Similarly, as a partnership is not recognised as a separate legal entity from the partners, it therefore cannot employ the partners and the partners cannot contract with each other.
4. Where a person (principal) is contracting with a sole trader or contracting with any of the partners of a partnership, then the principal needs to go through the tests for contract of service.
5. Where a principal hires a contractor, the principal should ensure that the contractor is registered as an employer with WorkCover. This is because, if a contractor (who employs) is not registered, section 3(6)* of the Act may apply and the principal is then deemed the employer. It is therefore in the principal's best interests to ensure that any contractors, who may also employ, are registered and paying levy on their workers.

Section 3(6) of the Act states:

“Where in a prescribed industry or in prescribed circumstances a person (the principal) contracts with another person (the contractor) for the performance by the contractor of work undertaken by the principal, the principal shall, for the purposes of this Act, be deemed to be the employer of workers employed by the contractor.”

Excluded persons under the Act

The Regulations under the Act exclude specified classes of workers wholly or partially from the application of the Act. The following persons are excluded from the application of the Act:

- A minister ministering within The Anglican Church of Australia in South Australia.
- A priest or other member of a religious order ministering within the Catholic Church of South Australia.
- A pastor ministering within the Lutheran Church of Australia, South Australia District Inc.
- An ordained minister, deaconess or lay pastor of The Uniting Church in Australia ministering in South Australia in an approved placement under the 'Classification of Ministers' of that church.
- An officer of The Salvation Army appointed in South Australia under the orders and regulations for officers of The Salvation Army.
- In relation to that part of employment where a worker who is employed by an employer to participate as a contestant in a sporting or athletic activity (and to engage in training or preparation with a view to such participation, and other associated activities)

but does not apply to:

- a person authorised or permitted by a racing controlling authority within the meaning of the *Authorised Betting Operations Act 2000* to ride or drive in a race within the meaning of that Act or
- a boxer or wrestler employed or engaged for a fee to take part in a boxing or wrestling match.
- A person (the driver) who is employed or engaged by another (the principal) to transport goods or materials (including money) by motor vehicle in the course of or for the purposes of a trade or business carried on by the principal where **all** the following apply:
 - the motor vehicle is a commercial motor vehicle and the motor vehicle is owned, leased or hired by the driver
 - the motor vehicle is not owned by, leased from or hired out, or otherwise supplied, by (directly or indirectly) the principal or a third person who is related to the principal, and
 - the goods or materials are not owned (and have not been previously owned) by the driver or by the principal.
- A person to whom the *Seafarers Rehabilitation and Compensation Act 1992* of the Commonwealth applies is excluded from the application of the Act.

‘Contract of service’ vs ‘contract for service’

Under common law, a relationship may be a contract of service (employer/employee) or a contract for service (principal/independent contractor). The courts have provided a clear distinction between:

- a contract for service (ie, where the contractor is self-employed and works on his or her own account) and
- a contract of service (ie, where the person is employed by another person and works on account of, or in the business of, that other person).

Just because someone is labelled as a contractor does not necessarily mean at law they are a contractor.

The courts have provided certain indicators of the true nature of the relationship; however, those features are only ever a guide to answering that question. It is necessary in each case to examine all the terms of the contract and to determine whether, on balance, the person is working in the service of another (ie, as an employee) or is working on his or her own behalf (ie, as an independent contractor).

A contract may be express or implied and may be verbal or in writing.

There is no single objective test that will give the answer, however, the courts over time have indicated that it is the totality of the relationship between the parties that must be considered and the question is one of degree for which there is no exclusive measure.

Key indicators of whether a contract is ‘of service’ or ‘for service’

Generally, it is clear whether a person is an employee or not.

In more difficult cases, the courts have developed a number of key indicators (tests) to determine whether or not the person is an employee or an independent contractor.

Intention of parties

Where there is a written contract, the express and implied terms of the contract provide evidence of the intention of the parties at the time of its formation. Those terms are identified and construed according to the circumstances surrounding the making of the contract. Conduct after formation of the contract is only relevant where it can be shown to amount to a modification of the original contract.

A clause in a contract that purports to characterise the relationship between the parties as that of principal and independent contractor and not that of employer and employee must be considered with all the other terms of the contract.

Control test

Employee – contract of service	Independent contract – contract for services
<p>Under a contract of service, the employer usually has the right to direct the manner of performance. Of course, where the nature of the work involves the professional skill or judgement 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 employer.</p>	<p>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.</p>

Control – the lawful authority to command

While control is important, it is not the sole indicator of whether or not a relationship is one of employment.

A high degree of direction and control is not uncommon in contracts for services. The principal has a right to specify how the contracted services are to be performed but such control must be expressed in the terms of the contract, otherwise the contractor is free to exercise his or her discretion (subject to any terms implied by law). This is because the contractor is working for himself or herself.

Under a contract of service, the employer has an implied right, within the limits imposed by industrial relations laws, to direct and control the work of an employee. This is because the employee is working in the employer's business and the owner of a business has the right (within the confines of applicable law) to manage that business as the owner sees fit.

Results test

Employee – contract of service	Independent contract – contract for services
<p>Tasks are performed at the request of the employer.</p> <p>The worker is said to be working in the business of the employer and generally fills a position with an ongoing role unrelated to a specific task.</p>	<p>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.</p>

Results

Where the substance of a contract is to achieve a specified result, there is a strong (but not conclusive) indication that the contract is one for services.

In a contract for services, the contract specifies the services to be performed in return for an agreed payment. Satisfactory completion of the specified services is the 'result' for which the parties have

bargained. Conversely, under a contract of service, payment is not necessarily (but may be) dependent on, and referable to, the completion of specified services.

Therefore, while the notion of 'payment for a result' is expected in a contract for services, it is necessarily inconsistent with a contract of service, for example, in contracts for commission-only sales. Accordingly, the other terms of the contract must still be considered to determine the true character of the contract.

Risk test

Employee – contract of service	Independent contract – contract for services
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.	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 their own insurance policy.

Risk

Where the worker bears little or no risk of the costs arising out of injury or defect in carrying out his or her work, he or she is more likely to be an employee. The higher the degree to which a worker is exposed to the risk of commercial loss (and the chance of commercial profit) the more he or she is likely to be regarded as being independent. Typically, a worker who derives piece rate payments and sustains large outgoings would be so exposed. The higher the proportion of the gross income that the worker is required to expend in deriving that income, and the more substantial the assets that the worker brings to his or her tasks, the more likely it is that the contract is for services.

Place of performance

Employee – contract of service	Independent contract – contract for services
A worker under a contract of service will generally perform the tasks on the employer's premises using the employer's assets and equipment.	A contractor, on the other hand, generally provides all their own assets and equipment.

Hours of work

Employee – contract of service	Independent contract – contract for services
An employee generally works standard or set hours.	An independent contractor generally sets their own hours of work.

Leave entitlements

Employee – contract of service	Independent contract – contract for services
The contract generally provides for annual leave, long-service leave and other benefits or allowances.	Generally, an independent contract does not contain leave provisions.

Payment

Employee – contract of service	Independent contract – contract for services
An employee is generally paid an hourly rate, piece rates or award rates.	Payment to an independent contractor is based upon performance of the contract.

Expenses

Employee – contract of service	Independent contract – contract for services
An employee is generally reimbursed for expenses incurred in the course of employment.	Generally, an independent contractor incurs their own expenses.

Integration test

Employee – contract of service	Independent contract – contract for services
<p>An employee is generally an integral part of, or presented to the public as emanating from, the business carried on by the employer.</p> <p>An employer has no ability to accumulate goodwill or saleable assets in the performance of their duties.</p>	<p>Generally, an independent contractor represents their own business to the public.</p> <p>Generally, an independent contractor has the ability to accumulate goodwill and saleable assets in the performance of their duties.</p>

Appointment

Employee – contract of service	Independent contract – contract for services
An employee is generally recruited by the employer.	An independent is likely to advertise their services to the public at large.

Termination

Employee – contract of service	Independent contract – contract for services
An employer reserves the right to dismiss an employee at any time (subject to State or Federal legislation).	An independent contractor is contracted to complete a set task. The payer may only terminate the contract without penalty where the worker has not fulfilled the conditions of the contract. The contract usually contains terms dealing with defaults made by either party.

Terms of engagement

Some conditions of engagement are intimately associated with employment and may therefore be persuasive indicators. For example:

- provision of benefits such as annual, sick and long-service leave
- superannuation contributions
- provision of other benefits prescribed under an award for employees
- where the worker uses assets and materials provided by the payer or is reimbursed, or is paid a compensatory allowance, for expenses incurred in respect of using their own assets and materials and
- where there is payer discretion (within the constraints of industrial relations laws) in respect of task allocation and termination of engagement.

However, this list is not exhaustive and it must be emphasised that there is not a standard set of conditions applicable to an employee and a different set of conditions applicable to an independent contractor.

Delegation

Employee – contract of service	Independent contract – contract for services
An employee has no inherent right to delegate tasks to another. However, there may be a power to delegate some duties to other employees.	An independent contractor may delegate all or some of the tasks to another person, and may employ other persons.

Power to delegate

An unlimited power to delegate work (with or without the approval of the principal) is an important indication that the service provider is an independent contractor. Under a contract for services, the emphasis is on performance of the agreed services (achievement of the 'result'). Unless the contract expressly requires the service provider personally to perform the contracted services, that person may arrange for his or her employee(s) to perform all or some of the work or may subcontract all or some of the work to another service provider.

The notion of the payer not requiring the payee personally to perform any work at all under the contract is contrary to the employment concept of a person working in the service of another. However, delegation clauses are considered in context of the contract as a whole, to determine if they are consistent with the apparent essence of the contract or if they are merely self-serving statements.

Extended definition of ‘contract of service’

Prescribed classes of work

The following classes of work under a contract, arrangement or understanding are prescribed classes of work:

- Building work (other than wall or floor tiling)
- Cleaning work
- Driving a motor vehicle used for the purposes of transporting goods or materials (whether or not the vehicle is registered in the driver’s name) where the driver is paid under the Local Government Employees Award or the Adelaide City Corporation Award
- Driving a taxi-cab or similar motor vehicle
- Driving or riding for fee or reward a vehicle, other than a commercial motor vehicle
- Performing as an entertainer
- Performing work as an outworker
- Work of a minister, priest or other member of a religious order **other than:**
 - a minister ministering within The Anglican Church of Australia in South Australia
 - a priest or other member of a religious order ministering within the Catholic Church of South Australia
 - a pastor ministering within the Lutheran Church of Australia South Australia District Inc
 - an ordained minister, deaconess or lay pastor of The Uniting Church in Australia ministering in South Australia in an approved placement under the ‘Classification of Ministers’ of that church, or
 - an officer of The Salvation Army appointed in South Australia under the orders and regulations for officers of The Salvation Army
- Thoroughbred riding work by a jockey, including an interstate jockey or an apprentice jockey, licensed by TRSA.

Note: Separate specific guides are available for each of the following prescribed classes:

- Guide to deemed workers - building work (June 2007)
- A guide to taxi drivers
- A guide to council drivers
- A guide to owner drivers
- A guide to cleaning work

- A guide to outworkers
- A guide to miscellaneous classes
- A guide to fishing crews

The guides are available at the website of WorkCoverSA www.workcover.com

Contract of apprenticeship

An 'apprentice' includes:

- a. a person undertaking training in a declared vocation under the *Vocational Education, Employment and Training Act 1994*
- b. a person undertaking training in a scheme approved by WorkCoverSA for the purposes of this definition

and 'apprenticeship' has a corresponding meaning.

Work under a contract, arrangement or understanding to receive on-the-job training in a trade or vocation

Where a person under a contract, arrangement or understanding receives on-the-job training in a trade or vocation, provided the person is remunerated by the employer during the period of that training, then under the Act, in such circumstance there exists a contract of service.

Workers employed under a contract of service where territoriality may be an issue

If the person identified as a worker under the Act is employed by one employer in more than one state, then a decision will need to be made on which state to include workers compensation coverage for the person. To assist in this decision, refer to the cross-border guidelines contained in the *Guide to cross-border workers compensation provisions* on the WorkCover website at www.workcover.com

This page has been intentionally left blank

WorkCoverSA
100 Waymouth Street, Adelaide South Australia 5000
General enquiries: 13 18 55
Fax: (08) 8233 2211
Email: info@workcover.com
Website: www.workcover.com

Free information support services: TTY (deaf or have hearing/speech impairments): (08) 8233 2574. Languages other than English: call the Interpreting and Translating Centre - (08) 8226 1990 and ask for an interpreter to call WorkCover on 13 18 55. Braille, audio, or e-text: call 13 18 55 and ask for help in an alternative format.

Document: Guide to definition of worker

File name: GuideDefinitionWorker0308.doc

Last updated: March 2008

The information produced by WorkCover Corporation of South Australia in this publication is correct at the time of printing and is provided as general information only.

WorkCover is a statutory authority funded by employers to rehabilitate and compensate South Australians injured at work.

