



ON THE RIGHT PATH?

PAT MANNIX FROM PHYSIO ACCOUNTANT HELPS CLARIFY
WHETHER YOU ARE EMPLOYING AN EMPLOYEE
OR CONTRACTING A CONTRACTOR.



Are you employing a contract physiotherapist or an employee? Many of the businesses we see are getting this wrong; that is, they think they are contracting with a contractor when in fact, they are employing an employee. It is incredibly important to get this right, because, with penalties applying, it could cost you a lot of money not to.

THE BUSINESS ENGAGING THE CONTRACTOR

The ATO is targeting businesses wrongly treating workers as independent contractors. What does an ATO review mean for you? It means that if the ATO determines that you are employing employees instead of contractors, you will be held liable for the superannuation you owe the contractor. You will also be subject to various penalties and some superannuation tax deductions will be disallowed.

In addition, you may be subject to payroll tax for those employees, and leave entitlements (sick leave, annual leave and long service leave).

If you are audited by the ATO, you will probably also incur increased accounting fees from your tax accountant for help with the audit.

Fair Work Australia has its own set of penalties that will apply, as do the various workers' compensation authorities around Australia where you fail to take out workers' compensation insurance or adequate workers' compensation insurance.

Therefore, getting this wrong could end up being a large expense for your business. Could you afford it?

If you think you are at risk, we recommend you contact your accountant and your lawyer, and ensure that the contracts that you have in place comprise bona fide contracts with independent contractors.

CONTRACT REQUIREMENTS

To ensure your contracts with your contractors comprise bona fide 'contractor' agreements from the ATO's perspective, we recommend the agreements state:

- that there is no entitlement to any leave or benefits such as long service leave, annual leave or sick/carers leave
- that the contractor is an independent contractor
- exactly what services are to be undertaken by the contractor (the payer has the right to specify how the contracted services are to be performed. However, this must be specified in the terms of the contract. If not, the payer will not have any control on how the services are to be performed)
- that any additional services to be provided by the contractor can only be performed through the execution of another agreement
- that the payment for the services provided is dependent on the performance of the contracted services—not on the period of time worked, or on a commission basis
- that the contractor must bear the legal risk regarding the work done—hence they must have their own professional indemnity (PI) insurance. In addition, the contractor must fix any defective work at their own expense
- that the contractor is able to subcontract or delegate the work they are contracted to do (whether or not they actually do this)
- that the contractor has to provide their own (or most of their own) equipment
- that the contractor is free to accept or refuse work offered by the payer (that is, the contractor is not restricted in this manner)
- that the contractor can charge the agreed rate *plus* GST (therefore, should the contractor register for GST in the future, they will not be out of pocket—nor will the business/payer as all GST paid is refundable)

- that the hours to be worked by the contractor are not specified in the agreement
- that there is no exclusivity clause—that is, the contractor should be free to provide services to the general public and other businesses (whether or not he/she does).

Each time you hire a contractor, you also have to determine whether they should be insured for workers' compensation insurance in your respective state within Australia. The requirements for this vary in each state. You should also consult the *Fair Work Australia Act* when engaging a contractor to ensure you comply in good faith with the Act.

Generally, however, should all of the above factors be applied both within the contract and in the actual substance of the contractual relationship that results, your contractual arrangement should satisfy the requirements for workers' compensation insurance and the *Fair Work Australia Act*.

THE EMPLOYEE'S PERSPECTIVE

What does it mean if you are the independent contractor who is really an employee? From your perspective, you will not be held liable for any of the costs mentioned above. However, what it does mean is that you are not being paid superannuation when you should be, nor are you accruing leave entitlements (ie, sick leave, annual leave and long service leave).

It probably also means that you are incurring the cost of PI insurance, when your employer would bear this cost if you were an employee. You possibly also have less job security.

Further, should you be injured, you will have no recourse. We therefore recommend at the very least that you take out income protection insurance (if you are a sole trader or a member of a partnership, you are not a worker of your own business and therefore you cannot take out workers' compensation insurance for yourself).

THE CONTRACTOR'S PERSPECTIVE

If you are a sole trader, our recommendation is that you use your own name as your business trading name. Otherwise, if your trading name is not your exact name, you will have to register your business name with the ASIC.

You also should ensure your payment for your services adequately compensates you for the superannuation and the other benefits you would get if you were an employee (eg, annual leave, sick leave, etc).

Additionally, we recommend you ensure that your agreed rate is specified in the contract, plus GST. If you do not specify that it is 'plus' GST, you may have to take GST out of the amount you get from your remuneration when you register for GST.

EXAMPLE 1

Jane is working two days a week at Physio Extraordinaire, and has started her own business on the side working from home one day a week. Jane's contract with Physio Extraordinaire states that:

- she is a contractor
- she must have her own ABN
- she will be paid an hourly rate plus GST
- she will work set hours, from 9.00 am to 5.00 pm Monday and Wednesday at a set location
- Physio Extraordinaire will provide Jane with equipment and will pay PI insurance for Jane
- Jane has to perform the work (ie, no one else can).

Is Jane a contractor or an employee?

Jane would most likely be considered to be working as an employee for Physio Extraordinaire. However, she is also working as a small business owner at her home.

As stated above, the fact that Jane might be considered to be an employee does not impact Jane's obligations. The onus is on the employer—they are at risk of not complying, and not providing Jane the benefits they should be as an employer.

EXAMPLE 2

Ted is working at Physio Fast. He has signed a contract that states that he is a contractor. Ted has to have an ABN in order to enter into the contract. In addition, the contract states:

- Ted will be paid a set rate per treatment plus GST, and lists the various rates per treatments
- Ted has agreed to work when requested by Physio Fast, if he is available
- Ted has no leave entitlements
- Ted must have his own PI insurance
- there is equipment available for Ted to use but all other equipment must be provided by Ted
- Ted will most likely be considered to be working as a contractor. The contract does not contain all of the clauses we recommend, but Ted would more likely be considered to be a contractor, especially if he can demonstrate that the substance of his relationship with Physio Fast agrees with the other factors we mentioned above.

It is incredibly important for a business employing the services of a contractor or employee to know which services they are employing, and to ensure that their contracts and the substance of their relationship with this person correctly reflect the relationship. It is also very important for the contractor or employee to ensure that they are correctly compensated for whatever role they perform. If you are unsure, go and see your accountant as soon as possible. Getting this wrong will cost your business too much.

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