

Who is a worker?

Guidance for employers





WHO IS A WORKER?

This guide will

- help you, as an employer, determine who is a worker and therefore who you need to cover for workers' compensation insurance
- outline the tools available to help you make decisions on who you need to cover
- provide guidance for applying the relevant provisions of the *Workers' Compensation and Rehabilitation Act 2003* (the Act).

DEFINITION OF A WORKER

Section 11 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act):

- A worker is 'a person who works under a contract and, in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953* (Cwlth), schedule 1, part 2-5'.
- Only an individual can be a worker.

Relevant sections of the Act:

- Section 11 – Who is a “worker”
- Schedule 2, Part 1 – Certain persons who are workers
- Schedule 2, Part 2 – Certain persons who are not workers





FOUR KEY STEPS

To determine who is a 'worker', there are four key steps to be followed in the order as they appear.

Once a step shows that a person is a 'worker', no further tests need to be applied.

- **Step 1** – Is there a contract for performance of work?
- **Step 2** – Specific categories that are excluded
- **Step 3** – Specific categories that are included
- **Step 4** – Contract of Service (and not a Contract for Services)

STEP 1 IS THERE A CONTRACT FOR PERFORMANCE OF WORK?

The following contracts are **not** considered to be a contract for performance of work:

- contract of bailment
- granting a right to use property
- supplying or selling goods

Detailed information on this step can be found on [our website](#).

If it has been determined there is a contract for performance of work, you need to proceed to the next step.

STEP 2 SPECIFIC EXCLUSIONS

Certain persons are deemed not to be workers under Schedule 2, Part 2 of the Act:

- a contract to obtain services from a company, trust or partnership
- a director of a corporation (where the corporation is the employer)
- a trustee of a trust (where the trust is the employer)
- a partner working for their own partnership (where the partnership is the employer)
- a person who is engaged by the Commonwealth
- a professional sportsperson
- a member of the crew of a fishing ship who receives a share of gross earnings
- a person supplying and using a motor vehicle for tuition
- a person participating in an approved program or work for unemployment program
- a person has a personal services business determination (PSBD) from the ATO.

STEP 2 SPECIFIC EXCLUSIONS

Important note

A worker can only ever be an individual (Section 11(4) of the Act). This means that if a business engages a company, trust or partnership, then they will not in fact be a “worker”.

For example, Quick Plumbers Pty Ltd is engaged by Large Building Company Pty Ltd to do the plumbing on a unit block that is under construction. There is no employment relationship because Large Building Pty Ltd does not have a contract with an individual, but with a company, and only individuals can be “workers”.

Detailed information on this step can be found on [our website](#).

If the individual is not specifically excluded under the Act, you need to proceed to the next step.

STEP 3 SPECIFIC INCLUSIONS

Schedule 2, Part 1 of the Act, states that certain individuals are specifically included as a worker:

- Sharefarmer if they do not provide farming machinery and receive no more than 1/3 of the farm proceeds
- Salesperson paid entirely or partly by commission
- Labour hire, group training, holding company employees (they are workers of the relevant labour hire, group training, holding company).

Detailed information on this step can be found on [our website](#).

If the individual is not specifically included as a worker under the Act, you need to proceed to the next step.

STEP 4 CONTRACT OF SERVICE

Only at this step, will we use the [ATO online decision tool](#) to decide who should be covered for workers' compensation. Once the ATO decision tool determines a person to be an employee or a contractor, we will accept that decision for WorkCover insurance and claims purposes. Employers are encouraged to keep a copy of the decision.

The phrase 'contract **of** service' is generally used to refer to the contract between an employer and an employee. A large part of the workforce work under contract of service e.g. the PAYG system. It contrasts with the term 'contract **for** services', which is generally used to characterise a relationship with an independent contractor.

To determine whether a worker is an employee or a contractor, we need to consider the whole working arrangement and look at the specific terms and conditions between the parties under which the work is performed across [ATO's six key common factors](#).

Please note, there is no single common law factor that will be conclusive in determining whether the worker is an employee or contractor – the totality of the working arrangements needs to be considered.

STEP 4 CONTRACT OF SERVICE

Employee indicators

1. The worker cannot sub-contract the work – they cannot pay someone else to do the work
2. The worker is paid hourly for the time worked, piece work or a commission
3. The worker does not provide all or most of the tools, equipment and other assets required to complete the work, OR they do provide all or most but receive an allowance for this
4. The worker is not legally liable for the cost of rectifying any defects
5. The employer has the right to direct the way in which the worker performs their work
6. The worker is not operating independently from the employer's business. They work within and are considered part of the employer's business

Contractor indicators

1. The contractor is free to pay someone else (sub-contract) to do the work
2. The contractor is paid for a result achieved based on a quote they provided
3. The contractor provides all or most of the tools, equipment and other assets required to complete the work and does not receive an allowance for this
4. The contractor is legally responsible for their work and liable for the cost of rectifying defects
5. The contractor has the freedom in the way the work is done subject to the specific terms of any contract or agreement
6. The contractor is operating their own business independently from the employer. The worker is free to accept or refuse additional work

STEP 4 CONTRACT OF SERVICE

Understanding the ATO decision tool – practical example

Examples of who is not a worker:

- Individuals providing substantial plant / heavy machinery (truck drivers, earthmoving machinery, courier / delivery van) would be classed as a contractor
- Individuals who are or have specifically written in their contract (as long as the contract accurately reflects the true working arrangement) that they can subcontract / employ others to do the job will be classed as a contractor
- Individuals who quote for jobs (provides upfront total price for the job), and provide tools of their trade, and rectify defects at their own expense will also be a contractor and not workers

Examples of who is a worker:

- Individuals (e.g. plasterers, carpenters, tilers, bricklayers, painters, etc) providing tools of their trade, consumables and working on an hourly rate or piece work rates will be classed as an employee.

MISTAKES TO AVOID

Detailed information on each of these topics can be found on the [ATO website](#).

- **Having an ABN:** If an employment arrangement, an ABN will not make worker a contractor
- **Common industry practice:** Just because other employers treat workers as contractors, does not mean it is correct
- **Short-term work:** Length of job makes no difference – they can be either an employee or contractor
- **80% rule:** Relates to PSI and how a contractor reports their income and is not a factor to be used to determine relationship
- **Past use of contractors:** Need to examine working relationship with each person engaged
- **Registered business name:** Does not mean they will be a contractor for every job
- **Contracting on different jobs:** Workers can be employees on one job and potentially a contractor on the next
- **Specialist skills or qualifications:** Just because a worker has specialist skills or qualifications, regardless of whether blue collar or white collar, does not make them a contractor
- **Worker wants to be a contractor:** It is not a matter of choice and depends entirely on the working arrangement
- **Using invoices:** This does not automatically make the worker a contractor – the working arrangement need to be examined as a whole
- **Contracts:** If the worker is legally an employee, a contract saying the worker is a contractor will not make the worker a contractor at law

MORE INFORMATION

For more guidance or information on determining who is a worker:



Visit [worksafe.qld.gov.au](https://www.worksafe.qld.gov.au)



Contact your Relationship Manager or call 1300 362 128

WorkCover
QUEENSLAND

[worksafe.qld.gov.au](https://www.worksafe.qld.gov.au)