# Contractor or Employee?

Farmers may choose to engage an independent contractor when they have a specific job which needs to be done by a person with a particular skill, for example, silage making or hay making.

It is important that you know the difference between an independent contractor and an employee as the law imposes different rights and obligations on those who engage independent contractors and those who engage employees.

## What is a Contractor?

A contractor is someone who you pay for a service. They can choose to take the job or they can delegate who does the task. Contractors are responsible for getting the job done and they supply their own equipment. They have an ABN and are usually responsible for their own WorkCover and superannuation.

## What is the difference between a Contractor and an Employee?

An Independent Contractor is a person who works under a commercial contract or a ***contract for services****.* The independent contractor can operate as an individual or through a partnership, company, or trust.

An Employee is defined as a person who works under an employment contract or a ***contract of service***. A company or partnership cannot be an employee.

If a person has nothing else to sell other than labour, then they will more than likely be an employee, not a contractor. Someone does not become a contractor simply by supplying an ABN.

# The Law

## Sham contracts

The federal industrial laws make it an offence to do any of the following and significant penalties apply:

* dismiss an employee for the purpose of engaging them as an independent contractor;
* represent an employment relationship as independent contracting
* make a false statement for the purpose of influencing or persuading an individual to enter into an independent contract.

Common law  
An employee is always an individual (as opposed to a company or partnership) and their employment is regulated by state and federal industrial relations laws including awards. An employee does not have the right to control how and when work is performed and cannot delegate work to others.

Some laws, such as workers compensation, taxation, and superannuation laws, deem workers to be employees regardless of the common law definition.

Because industrial laws about employment do not apply to independent contractors some people think that if they call a person a contractor they will be able to avoid these responsibilities. This is not the case.

Calling a person an independent contractor, when the true nature of their engagement is as an employee, does not avoid these laws applying.

# Contractor v. employee test questions

There are a number of questions which can be asked to help determine whether a person is an independent contractor at common law. The answers to the various questions are then weighed up to decide whether ‘on balance’ the total picture points to employment or independent contracting.

If the answer to the majority of the questions is ‘yes’, then the person you have employed is most likely an independent contractor.

* Is the work the type of work that people do as part of a business as opposed to employment?
* Is the person doing similar work for other people?
* Do they advertise their services to the public?
* Can they employ others to help out with the work rather than do it personally?
* Does the person have invoicing systems, standard terms of trade, insurance, appropriate financial records etc. commonly used by businesses?
* Does the work lead to an ability to make a profit?
* Was the contract price negotiated commercially?
* Does payment depend on the person providing a satisfactory result?
* Does the person bear the risk for poor performance and use their own assets, tools & equipment to do the work?
* Does the person have the right to decide how and when the work is done?
* Does the person represent the work as part of their own business?
* Is the person providing the work financially independent from the other business?
* Does the person benefit from goodwill?
* Has the person agreed to provide a particular outcome or result and when the result has been achieved will they leave?

Read more about the differences between independent contractors and employees at [www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/contractors-and-employees-whats-the-difference](http://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/contractors-and-employees-whats-the-difference)