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Health Professional Contractor Arrangements By Wayne Staal CA

A common question we receive from both practice operators and the workers themselves.... “When someone is contracting to a Practice, should they be a contractor or employee?”

When the question is asked, it tends to centre on the belief that you will be better off under one method or the other... so let’s look at a few of the considerations when making the choice and whether you will be better off under one or the other.

It’s not a choice!

The first and most important point is that it is technically not a choice. It is actually a question of fact, and more often you are deemed to be an employee (in my opinion), rather than a contractor.

Employee relationships are generally viewed as Master and Servant Relationships, where there is a degree of control and influence over the workers activities. Contract wording or titles won’t change the underlying relationship either – it is a matter of substance over form. Another common issue is the assumption that workers working for more than one employer makes you a contractor, when in fact you might have multiple casual or part time employment jobs.



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Below is a table outlining some differences:

Employee	Contractor
Ability to delegate is limited to approved people within the business	Little, or no, limitation on the ability to delegate. That is, they can pass that work onto another contractor/provider.
Remuneration – typically based on a salary, commission or hours. Remuneration tends to be consistent and regular.	Remuneration is based on work quoted for, an activity or outcome, rather than time. Remuneration is based on an invoice and payment terms.
Equipment, tools and other assets are provided by the employer/business.	Equipment, tools and other assets are provided by the contractor.
Commercial risks are limited. When something goes wrong, it is rectified, but at the businesses cost, not the worker. The worker will often be paid to rectify their mistake.	Commercial risks reside with the contractor. If they make a mistake, they correct it at their own cost.
Independence – the worker is not operating independently of your business. They work within and are considered part of your business.	Independence – the worker is operating their own business independently of your business. The worker performs service as specified in their contract and is free to accept or refuse additional work elsewhere.
Wearing a uniform	Likely to be wearing their own uniform / business logo.

There is a very useful tool provided on the ATO website to assist people work through this very scenario. <https://www.ato.gov.au/calculators-and-tools/employee-or-contractor/>

If you work through the above and they are an employee (more indicators than not), then treat them as an employee.

If they are a contractor, then document the contract carefully. This should be done by a HR Employment specialist. If you are using an old template from 5 years ago, it is no longer relevant and should be updated.



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Which is better?

However, we still haven't answered one of the most important bits... is it better to be or to hire, in one form or another.

The truth is there should be little (if any) difference between the two for either party.

- The tax outcomes will all be the same....tax on \$100k, is tax on \$100k... whether it is contractor income, salary and wage, or interest.
- Deductions the worker can claim are similar, often because of items like Personal Services Income legislation, and any difference is often outweighed by additional compliance and accounting costs associated with being a contractor.
- Contractors should be lifting their hourly rate to ensure they are compensated for lost benefits like sick leave, annual leave, maternity provisions in future and no long service leave. Essentially, just like a casual's hourly rate goes up.... So does a contractors... to compensate for less entitlements and security. So the overall cost to a business shouldn't change either. They should also increase their rate for the additional costs of operating their structure... such as accounting fees, insurance, GST compliance so-on.
- Both are eligible for superannuation.... As noted above, contractors just increase their rate/charge to allow for it. Even when they do not increase their rate, they may be legally entitled to superannuation, as the definition of employee under the superannuation rules is broader than other areas of legislation. We have seen legal cases where a "contractor" subsequently argues they should have been an employee and wins superannuation entitlements after the fact.
- Contractors and employee payments can both be liable for Payroll Tax Obligations and Workcover. In fact, [a recent case in Victoria](#) has imposed Payroll Tax obligations on the Optical Store operations despite a service charge and contractor contracts.
- Percentage splits of income do not mean it is contractor income. A good example would be real estate agents... they are paid a commission (after fee/split with business), but are considered employees in almost all cases. Health Professionals on income splits are essentially no different.

It is important to note, that how the arrangement is "setup" may not have any impact on the actual outcome... as noted above many of the legislative areas are able to overrule the contract and apply Superannuation, Workcover and other benefits retrospectively.



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So when might it work?

There can be situations where one suits, but these are specific to the situation, rather than a blanket rule.

For example, people temporarily working in Australia might prefer a contractor relationship where they can control the mandatory superannuation (to a degree), thus limiting the funds tied up in superannuation when they leave the country. The overall cost to the business and income earned by the worker wouldn't change, but the mix of super and cash might benefit the worker in this situation.

Another might be where you are paying for a defined output (specialist work – payment per Denture made) and the work is adhoc/infrequent. This can be suitable and motivating for both parties.

It really is case by case. In fact a business might have a combination of employees and contractors.

Exceptions to the rule

I think there can be an exceptions to the rule for medical practices and GPs in particular, or any other Health Professional specifically billing under Medicare. Where you provide this type of service, it can be argued that you own the patient and simply hire the room.

Care must be taken to ensure it is clearly the Health Professionals patient, billing demonstrates the same, and the employee vs contractor factors above sway towards a contractor. The agreement should be documented and all record keeping should be done in line with that agreement (invoices raised so-on).

In most cases, it is safer to ensure the worker is contracting to the business through a company or Trust (rather than sole trader) to reduce exposure.

The key is documentation and sticking to it.

Penalties if you get it wrong?

The maximum penalty for the employer for contravening the “sham contracting’ provisions is \$12,600 for individuals and \$63,000 for companies per contravention.

Probably the worst penalty is the lack of certainty... we have seen cases where subcontractors have come back after the fact (examples include terminated employees, unhappy employees, injured and can't work) and claimed they should have been treated as an employee and were owed Workcover (for the injury), unpaid hours, and superannuation entitlements... and won, despite a contractor agreement being in place.