



Case studies:

Building and construction





From 26 August 2024, a new definition was added to the Fair Work Act to help determine the meaning of 'employee' and 'employer'.

Applying the new definition may:

- ▶ mean that some working relationships are characterised differently
- ▶ result in different rights and obligations for people affected.

These case studies aim to provide practical guidance for the building and construction industry about how they may be impacted by the changes.

Scenarios include:

- ▶ a business proactively reviewing their contractors against the new definition of employment
- ▶ a person who is engaged as an independent contractor when they should have been an employee and potential outcomes
- ▶ an example of a genuine contractor.

For more information about workplace rights and obligations in the building and construction industry, including information about contractors, visit fairwork.gov.au/building.

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this resource is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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Case study 1

Proactively reviewing contractors against the new definition of employment

Sandy and her husband Dominic run a small painting business, Dom's Painting Pty Ltd. Sandy works as the bookkeeper and is responsible for payroll and scheduling jobs. She makes sure to keep up to date with changes to workplace laws so she is subscribed to the Fair Work Ombudsman's email updates.

In August 2024 Sandy gets an email which explains that from 26 August 2024 a definition of employment will be introduced in the Fair Work Act which will change the way employees and independent contractors are defined, including a new 'whole of relationship test'. The 'whole relationship test' is used to determine if an individual is an employee or contractor by considering the true nature of the relationship, based on factors including the terms of the contract and how it is performed in practice.

Sandy and Dominic engage 2 trade qualified painters as independent contractors. The painters have their own ABNs and send Sandy an invoice each week for the hours they've worked. They work for multiple businesses across different sites and work sporadic hours for Sandy depending on demand.

Sandy made sure to have both painters sign a written contract when they started working for the business that sets out the details of how they would work for her. While she'd heard of people just using verbal contracts, she knows that it's best practice to have the contract in writing. As per the contract, she pays them a flat rate of \$30 per hour.

To make sure that the painters are being treated appropriately, Sandy decides to call the Fair Work Ombudsman (FWO) to confirm her understanding of the changes. She is provided information on factors to consider when determining if a relationship is an employment or contracting relationship. She is also told that she should use the 'whole relationship test' on 26 August to determine if the painters are employees or contractors from that date, and is emailed the relevant FWO webpage.

On 26 August, Sandy and Dominic sit down and go through the whole relationship test together for both Kieran and Ashlea.

Sandy and Dominic realise that applying the new test, Kieran and Ashlea are appropriately classified as contractors. This is because, consistent with their written contracts, the painters:

- ▶ work across different sites for multiple businesses
- ▶ use their own painting supplies
- ▶ have a high level of control over how they perform their work
- ▶ have their own ABNs and insurance policies, and
- ▶ decide whether they accept or decline a job.

Sandy and Dominic understand that if these arrangements change in future, then they may need to reconsider the nature of the relationship again at that point in time. This is because the whole relationship test requires consideration of both the terms of the contracts and how the contracts are performed in practice.



Case study 2

Employee incorrectly engaged as a contractor

Corey recently finished high school in December 2024 and is looking for work. Corey's dad tells him that his friend Wayne is looking for labourers to help out in his bricklaying business. Corey's dad gives Wayne a call and arranges for Corey to attend the job site on Monday for a paid trial as a general labourer.

At the end of the trial, Wayne offers Corey full-time work. He tells Corey,

'I'll pay you \$24 an hour, flat rate – that's good money for an 18-year-old! You'll just need to get yourself an ABN though, that's how I pay all my people.'

Wayne knows that agreements don't have to be in writing and thinks that if Corey accepts his offer to be a worker with an ABN rather than an employee, he won't have to pay Corey employee entitlements.

Corey thinks the pay Wayne has offered sounds pretty good, so he asks his dad to help him set up an ABN. When setting up the ABN, Corey and his dad notice that the Australian Business Register website says that an employer shouldn't ask you to get an ABN as a condition of employment. Corey shows Wayne this information but Wayne brushes him off telling Corey,

'don't worry about that, it doesn't apply to you.'

Corey doesn't really understand what having an ABN means, but he knows Wayne has been running his business for around 20 years so thinks he must know what he's talking about.

A few months later, Corey is planning a holiday and wants to know if he has any annual leave. He asks Wayne about it.

Wayne tells him,

'You're a contractor, so you don't get paid for any time off.'

This is all news to Corey – Wayne has never mentioned any of this before. Corey hasn't put any of his pay aside for leave and he's worried he won't be able to afford to take unpaid time off.

When Corey gets home that night he decides to do some research and finds some information on the FWO website about the differences between independent contractors and employees.

Corey looks at all the different factors on the FWO webpage and thinks that he should have been engaged as an employee, not a contractor. He notes that:

- ▶ Wayne hired him to work full-time hours, on an ongoing basis rather than for a specific job
- ▶ he only works for Wayne and can't take on any other jobs
- ▶ he has no control over how he completes his work. He's required to attend a specific job site from 7:30am to 4:00pm Monday to Friday
- ▶ he doesn't own any of his own equipment, drives the company vehicle and uses Wayne's tools
- ▶ he never received a written contract and was offered the job on a 'handshake' verbal agreement, without consideration of the nature of the work, and with no record of what was discussed.

Corey knows that some of his workmates are in the same position as him. He isn't sure what to do, so he calls the FWO for more advice.

The Infoline adviser provides some information to help Corey discuss the issue with Wayne and encourages him to complete the FWO's free **Difficult conversations in the workplace** online course.

During the conversation, Corey also learns what the hourly pay rate is under the Building and Construction General On-site Award for a full-time unqualified labourer with more than 3 months experience, and about entitlements to overtime, penalty rates and

paid leave. The flat rate Corey initially agreed to doesn't include any of these entitlements and is less than the hourly rate paid under the award.

The next day Corey tries to speak to Wayne about what he's found out, but Wayne brushes him off and tells him,

▮ 'That's just how it's done in this industry.'

Corey suspects that Wayne has classified him as a contractor as a way to pay him less. He lodges an online request with FWO for further assistance. The FWO undertook an assessment of the request in accordance with their **Compliance and Enforcement Policy** and decided it would be appropriate for a Fair Work Inspector to make additional enquiries into the potential non-compliance.

A Fair Work Inspector attempts to contact Wayne to discuss the issue. **The outcome in this scenario will depend on how Wayne responds.**

? Outcome A

Wayne agrees to paying Corey as an employee

Wayne speaks with the Fair Work Inspector who talks him through the differences between an employee and an independent contractor.

Wayne is also made aware of the definition of employment that took effect from 26 August 2024.

Wayne considers the factors that help determine whether someone is an employee or an independent contractor.

He also seeks his own legal advice and ultimately agrees with Corey that Corey should actually be an employee. He backpays Corey what he's owed as an employee.

The inspector educates Wayne on his record-keeping and pay slip obligations. Wayne corrects his records and ensures Corey receives his employment entitlements going forward.

He follows up with the Fair Work Inspector to confirm the issue is resolved.

? Outcome B

Wayne does not respond to FWO and is taken to court

Wayne doesn't respond to the Fair Work Inspector's contact attempts and is issued with a Compliance Notice for breaches of the Building and Construction Award and the NES relating to unpaid employment entitlements. Wayne also ignores the Compliance Notice.

The FWO takes Wayne to court for failure to comply with the Compliance Notice. The court considers and agrees the Fair Work Inspector held a reasonable belief that Corey was an employee and not a contractor and finds that Wayne has not complied with the Compliance Notice.

Wayne's business is ordered to backpay Corey's entitlements as an employee. The business also receives a penalty of \$16,500 for not complying with the Compliance Notice. As Wayne is an accessory to the non-compliance, he also receives a personal penalty of \$3,300.



Case study 3

Genuine independent contractor

Jade is a trade qualified carpenter. She completed an apprenticeship and worked full-time for a small construction company for a few years before deciding to start her own company in September 2024.

Jade has developed relationships with a few local construction companies who contact her throughout the year to offer her work on various residential building projects. Each time she starts a new project she writes up a contract which includes:

- ▶ the names of each party involved in the contract and their registration details
- ▶ a general description of the work, goods or services that will be provided
- ▶ the cost to complete the work – this could be a fixed cost or details of how the cost will be calculated
- ▶ the estimated timeframe to complete the work.

Jade makes sure that any costs she quotes in her contracts have factored in her tax, super and insurance obligations, plus other expenses like maintaining her work vehicle and tools. She sends an invoice each week for the work she has completed. Jade also makes sure that any agreement she makes is in writing as she knows that's best practice.

Jade doesn't work exclusively for any one company. In between bigger projects she often advertises her services on social media or on-demand task apps and picks up small home maintenance jobs for extra cash.

In this scenario, Jade would be considered a genuine independent contractor under the statutory definition of employment because she:

- ▶ accepts work that fits into her own schedule and has full control over how and when she completes the work
- ▶ uses her own tools, including a vehicle with her company logo
- ▶ has the freedom to work for multiple clients at the same time if she chooses to
- ▶ negotiates and sets the price she will charge for each contract or project and is paid by submitting invoices
- ▶ is responsible for all other costs associated with running her business, including tax, super and insurance, and is also liable for any risks associated with her work
- ▶ can hire her own employees or subcontract the work if she chooses to.







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