



Melissa Fitzpatrick
Industrial &
Employment
Relations Specialist

Melissa is the Industrial and Employment Relations Specialist for HR Business Direction, a team of multi-disciplinary HR specialists providing a powerful holistic approach of commercial and practical advice to clients.

Melissa has a law degree, international business degree and many years of experience in employment law. She also has experience in commercial law and is a member of the Queensland Industrial Relations Society.

About HR business direction

The company's 'emotionally intelligent' specialists, provide leadership and value that inspires organisational evolution. The expert team brings its collective passion and knowledge to creating powerful results for our clients and deals with industrial and employment relations, workplace health and safety, human resources strategy and workplace psychology.

**HR business
direction**

The contracting quandary

The perennial issue of whether a person is, or should be engaged as, a contractor or employee continues to baffle (and annoy) business owners, HR managers and contractors alike.

Part from the difficulty of establishing a contractor/employee's status, the problem arises of how business owners ensure productivity and engagement without blurring the lines between a contractor and employee at law.

The question often asked is: Why should the law intervene when two sufficiently savvy parties wish to enter into an independent contracting arrangement?

While there are valid arguments on either side of this question, the fact remains that many businesses are aware of, and ignore, the very real risks of engaging as contractors those whom the law would otherwise view as employees.

So what are these risks?

Obviously there are the legal risks, such as a Fair Work Commission (FWC) prosecution for sham contracting, the ATO hunting down the employer for failing to withhold PAYG tax or remit superannuation, or the relevant state workers' compensation authority imposing penalties for failing to effect a policy when required.

However, what about the risks to the firm's reputation should a prosecution or penalty result? For example, there is a strong risk that the business will be publicly judged and viewed as trying to circumvent workers' rights.

Then there is the financial risk of loss of business resulting from reputational damage, not to mention the costs of defending actions and paying fines.

What about the risk to employee morale because of the perception that contractors get paid more for doing the same job? The list goes on.

For many businesses, the decision to hire contractors often revolves around the need for flexibility as to the termination of the arrangement (without fear of an unfair dismissal claim).

For contractors, there is often a desire to be master of their own destiny (although the employee's reasons for wanting to work as a contractor should never be the primary reason for engaging them as such).

For employers worrying about termination and unfair dismissal, provided the process is handled properly the risks are, in reality,



The decision to hire contractors often revolves around the need for flexibility as to the termination of the arrangement (without fear of an unfair dismissal claim).

quite low. So why not give employment a go?

Here are some flexible ways in which the employment option can be used:

- Casual employment allows for flexibility both as to hours worked and terminating the arrangement without fear of unfair dismissal (provided the casual employment is not on a regular and systematic basis, without an expectation of ongoing work).
- Fixed-term employment contracts allow for a specified period of employment without fear of an unfair dismissal claim on termination at the end of the fixed term.
- Use of the minimum employment period (12 months for small-business employers or six months otherwise) allows the employee's performance to be assessed and the employer's ongoing need for the employee considered and, if necessary, terminated without fear of an unfair dismissal claim.

Of course, there are reasons, other than the need for flexibility, why businesses are not keen on engaging employees. But where the law sees a contractor as an employee, it is not worth ignoring the risks.

Employment may be a case of better the devil you know than the one you don't want to know (such as the FWC or the ATO).

What about when a contractor has been engaged? Managing the relationship frequently requires ensuring that contractors are productive and allowing contractors to retain their independence.

For businesses that rely heavily on contractors, ensuring they are productive while maintaining the relationship at arm's length is especially difficult, as relationships between the business and the

contractors often develop in the same way as does an employer/employee relationship. This can be by accident, but often it is, unwittingly, by design.

For example, consider a small business that engages many contractors to provide a personal service to its clients. The business has a well-drafted contractor agreement in place that clearly defines the relationship as that of a principal and contractor, but in an effort to 'engage' contractors and to ensure productive outcomes, the business puts in place a rewards system for the contractors.

Additionally, the business holds 'staff meetings' that the contractors are required to attend, provides uniforms bearing the business logo and pays contractors by the hourly service they provide.

Often, the situation is propelled from there. Businesses obviously want to ensure their brand is represented in the way they want and expect it to be. They want to ensure the contractor works with the business organisational values and that the business culture remains intact.

To achieve this, and to ensure productivity, businesses often engage contractors through a 'recruitment process' and motivate and engage them in the same way as they would employees.

While these practices might help the business achieve business goals, they also substantially blur the line between a contractor and an employee at law and set the business up for a showdown with, potentially, the ATO, the workers' compensation insurer and the FWC.

So how then do businesses ensure the productivity of their contractors without blurring this line?

There are various ways, but ensuring that tightly drafted clauses requiring measurable key outcomes is a must.

So, too, is ensuring there are no practices in place that tend to reward contractors in much the same way as an employer would reward its employees.

Remember that facing the consequences of getting this wrong will easily outstrip any gains those practices were designed to make. ♦