Who is a worker?

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# This guide has been produced to help employers and/or workers who may be uncertain about coverage under the *Return to Work Act 2014* (the Act). For further information please call ReturnToWorkSA (RTWSA) on 13 18 55.

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# **Who is a worker?**

The Act provides for the recovery and financial support of workers who suffer an injury arising from their employment.

The Act requires that an employer register with RTWSA and pay an insurance premium based on remuneration paid to workers in their employ (unless they are exempted – see the RTWSA website for information on the small employer registration exemption). Under the Act, ‘worker’ has a broader definition than ‘employee’.

## Important information you should be aware of before reading this guide

Because you engage a person(s) who describes themselves as a ‘contractor’, ‘consultant’ or ‘self-employed’ does not necessarily mean you are exempt from registering with RTWSA or do not need to include remuneration paid to such persons from your remuneration return or reconciliation statement.

Just because a contractor uses a company or business name or an Australian Business Number (ABN), it does not necessarily exempt you from registering with RTWSA or including remuneration paid to such persons from your remuneration return or reconciliation statement. The exception to this would be if the contract was with a company to provide specified service, but in that event you need to ensure that the company with which you have contracted is registered with RTWSA – refer to point 5 on the second page.

Rulings/decisions from other regulatory bodies (e.g. Australian Taxation Office) do not necessarily apply to the Act or RTWSA.

You should be aware that the Act provides an extended definition of contract of service, in certain circumstance(s), that establishes a person otherwise holding the status of independent contractors is taken to be a worker for the purposes of the Act.

# **Definition of worker**

Worker is defined under the Act to mean:

* a person by whom work is done under a contract of service (whether or not as an employee)
* a person who is a worker by virtue of Schedule 1\*
* a self-employed worker. \*\*

This includes a former worker and the legal personal representative of a deceased worker.

\* A special provision for prescribed classes of volunteers, in combination with regulation 69 of the *Return to Work Regulations 2015* (the Regulations) (currently volunteer SACFS members, volunteer SASES members and volunteer marine rescue members).

\*\* RTWSA has not to date extended the protection of the Act to a self-employed worker. Such protection may be extended under section 175 of the Act.

# **Definition of ‘contract of service’**

Under common law, the term ‘contract of service’ normally represents a relationship formed between an employer and employee.

In South Australia, the Act defines ‘contract of service’ to mean:

* a contract under which one person (the worker) is employed by another (the employer); or
* a contract, arrangement or understanding under which one person (the worker) works for another (the employer) in prescribed work or work of a prescribed class; or
* a contract of apprenticeship; or
* a contract, arrangement or understanding under which a person (the worker):
  + receives on-the-job training in a trade or vocation from another (the employer) and
  + is during the period of that training remunerated by the employer.

**An ‘apprentice’** includes:

1. a person undertaking training as a trainee in a trade, declared vocation or other occupation under a contract of training under the *Training and Skills Development Act 2008* (or former Act)
2. a person undertaking training in a scheme approved by ReturnToWorkSA for the purposes of this definition and ‘apprenticeship’ has a corresponding meaning.

**Examples of workers**

* An employee performing work on a full-time, part-time or casual basis.
* An apprentice or trainee engaged under a contract of apprenticeship or training.
* Working directors i.e. persons who are directors of a company but are also engaged in a role for the purposes of the trade or business of that company.

Certain persons who are otherwise a contractor i.e. taken to be workers by virtue of performing work of a prescribed work or work of a prescribed class if relevant elements are met. Prescribed classes of work include:

* Building work
* Cleaning work
* Council drivers
* Taxi drivers
* Driving or riding a vehicle, other than a commercial motor vehicle, for fee or reward
* Entertainers
* Outworkers
* Ministers of religion (there are exceptions)
* Boxers/wrestlers, if employed for a fee
* Thoroughbred riding work performed by a licensed jockey.

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# **Who is not considered a worker?**

A member of the crew of a fishing boat who is remunerated by a share in profits or gross receipts obtained by working the boat is not a worker for the purposes of the Act.

**Important notes**

1. Whether a worker is engaged to perform work on an ongoing basis, or for a short period e.g. for as little as one hour on a given day, or on a full time, part time or casual basis, an obligation exists on the employer to include remuneration paid to any such worker in the calculation of premium payable.
2. There are several steps to identify if a person is a worker under the Act. The first step is whether the person is in employment that is specifically excluded from coverage under the Act.

If not specifically excluded, the second step is to determine if the person is working under a common law contract of service, contract of apprenticeship or a contract to receive on-the-job training in a trade or vocation.

The third step is to consider if the person is covered under the expanded definition of contract of service under the Act. This includes if the person is working under a contract of apprenticeship, a contract to receive on-the-job training in a trade or vocation. It also includes a person who is in work that is of a prescribed kind or class where otherwise independent contractors are taken to be workers, subject to certain criteria (often referred to as ‘deemed’ workers).

1. The legal status of a business may have an impact on whether there is a contract of service. Under common law, a sole trader (meaning the sole owner of an unincorporated business) cannot contract with themselves. The business is not recognised as a separate legal entity so a sole owner cannot form a contract of service with themselves. Similarly, as a partnership is not recognised as a separate legal entity from the partners, it therefore cannot employ the partners and the partners cannot contract with each other.
2. Where a person (principal) is contracting with a sole trader or contracting with any of the partners of a partnership, then the principal needs to go through the tests for contract of service.
3. Where a principal hires a contractor, the principal should ensure that the contractor is registered as an employer with RTWSA. This is because if a contractor (who employs a worker(s)) is not registered, section 4(4)\* of the Act may apply and the principal is then taken to be the employer of the workers employed by the contractor. It is therefore in the principal’s best interests to ensure that any contractors, who may also employ workers, are registered with RTWSA by requesting them to provide a copy of a certificate of registration.

Section 4(4) of the Act states:

*Where in a prescribed industry or in prescribed circumstances a person (the* ***principal****) contracts with another person (the* ***contractor****) for the performance by the contractor of work undertaken by the principal, the principal will, for the purposes of this Act, be taken to be the employer of workers employed by the contractor.*

Regulation 5(8) of the Regulations states:

*For the purposes of section 4(4) of the Act, a prescribed circumstance is where a person (the principal) contracts with another person (the contractor) who is not registered as an employer under the Act.*

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# **Excluded persons under the Act**

The Regulations under the Act exclude specified classes of workers wholly or partially from the application of the Act.

The following persons are excluded from the application of the Act even if they are engaged under a contract of service:

* A minister ministering within The Anglican Church of Australia in South Australia.
* A priest or other member of a religious order ministering within the Catholic Church of South Australia.
* A pastor ministering within the Lutheran Church of Australia, South Australia District Inc.
* An ordained minister, deaconess or lay pastor of The Uniting Church in Australia ministering in South Australia in an approved placement under the ‘Classification of Ministers’ of that Church.
* A worker who is employed by an employer to participate as a contestant in a sporting or athletic activity (and to engage in training or preparation with a view to such participation, and other associated activities)

but does not apply to:

* a person authorised or permitted by a racing controlling authority within the meaning of the *Authorised Betting Operations Act 2000* to ride or drive in a race within the meaning of that Act **or**
* a boxer or wrestler employed or engaged for a fee to take part in a boxing or wrestling match.
* A person (the driver) who is employed or engaged by another (the principal) to transport goods or materials (including money) by motor vehicle in the course of or for the purposes of a trade or business carried on by the principal where all the following apply:
* the motor vehicle is a commercial motor vehicle and
* the motor vehicle is owned, leased or hired by the driver and
* the motor vehicle is not owned by, leased from or hired out, or otherwise supplied, by (directly or indirectly) the principal or a third person who is related to the principal, and
* the goods or materials are not owned (and have not been previously owned) by the driver or by the principal.
* A person to whom the *Seafarers Rehabilitation and Compensation Act 1992* of the Commonwealth applies is excluded from the application of the Act.

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# **‘Contract of service’ vs ‘contract for service’**

Under common law, a working relationship may constitute a contract of service (employer/employee) or a contract for service (principal/independent contractor). The courts have provided some guidelines to distinguish between:

* a contract for service (i.e. where the contractor is self-employed and works on his or her own account) **and**
* a contract of service (i.e. where the person is employed by another person and works on account of, or in the business of, that other person).

Just because someone is referred to as a contractor does not necessarily mean that in law they are a contractor. The courts have provided certain indicators of the true nature of the relationship; however, those features are only ever a guide to answering that question. It is necessary in each case to examine all the terms of the contract and the relationship and to determine whether, on balance, the person is working in the service of another (i.e. as an employee) or is working on his or her own behalf (i.e. as an independent contractor). A contract may be expressed or implied and may be verbal or in writing.

There is no single objective test that will give the answer, however, the courts over time have indicated that it is the totality of the relationship between the parties that must be considered and the question is one of degree for which there is no exclusive measure.

# **Key indicators of whether a contract is ‘of service’ or ‘for service’**

Generally, it is clear whether a person is an employee or not. In more difficult cases, the courts have developed a number of key indicators (tests) to determine whether or not the person is an employee or an independent contractor.

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## Intention of parties

Where there is a written contract, the express and implied terms of the contract provide evidence of the intention of the parties at the time of its formation. Those terms are identified and construed according to the circumstances surrounding the making of the contract. Conduct after formation of the contract is only relevant where it can be shown to amount to a modification of the original contract.

A clause in a contract that purports to characterise the relationship between the parties as that of principal and independent contractor and not that of employer and employee must be considered with all the other terms of the contract and the conduct of the parties.

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## Control test

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| **Employee – contract of service** | **Independent contract –**  **contract for services** |
| Under a contract of service, the employer usually has the right to direct the manner of performance. Of course, where the nature of the work involves the professional skill or judgement of the worker, the degree of control over the manner of performance is diminished. What is important is the lawful authority to command that rests with the employer.  More importantly is the power to control the provision of work i.e. the right to ‘hire or fire’. | The hallmark of a contract for services is said to be that the contract is one for a given result. The contractor works to achieve the result in terms of the contract. The contractor works on his/her own account.  There is no right to ‘hire or fire’ as this is a contractual arrangement, although the contract may include grounds which allow for the principal to lawfully terminate the contract. |

**Control – the lawful authority to command**

While control is important, it is not the sole indicator of whether or not a relationship is one of employment.

A high degree of direction and control is not uncommon in contracts for services. The principal has a right to specify how the contracted services are to be performed but such control must be expressed in the terms of the contract, otherwise the contractor is free to exercise his or her discretion (subject to any terms implied by law). This is because the contractor is working for himself or herself.

Under a contract of service, the employer has an implied right, within the limits imposed by industrial relations laws, to direct and control the work of an employee and the provision of work to an employee. This is because the employee is working in the employer’s business and the owner of a business has the right (within the confines of applicable law) to manage that business as the owner sees fit.

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## Results test

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| Tasks are performed at the request of the employer.  The worker is said to be working in the business of the employer and generally fills a position with an ongoing role unrelated to a specific task. | An independent contractor enters into a contract for a specific task or series of tasks. The contractor maintains a high level of discretion and flexibility as to how the work is to be performed. However, the contract may contain precise terms as to materials used and methods of performance and still be one for services. |

**Results**

Where the substance of a contract is to achieve a specified result, there is a strong (but not conclusive) indication that the contract is one for services.

In a contract for services, the contract specifies the services to be performed in return for an agreed payment. Satisfactory completion of the specified services is the ‘result’ for which the parties have bargained. Conversely, under a contract for service, payment is not necessarily (but may be) dependent on, and referable to, the completion of specified services.

Therefore, while the notion of ‘payment for a result’ is expected in a contract for services, it is not necessarily inconsistent with a contract of service, for example, in contracts for commission-only sales. Accordingly, the other terms of the contract must still be considered to determine the true character of the contract.

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## Risk test

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employee bears little or no risk. An employee is not exposed to any commercial risk. This is borne by the employer. Further, the employer is generally responsible for any loss occasioned by poor workmanship or negligence of the employee. | An independent contractor stands to make a profit or loss on the task. They bear the commercial risk. The contractor bears the responsibility and liability for any poor workmanship or injury sustained in performance of the task. Generally, a contractor would be expected to carry their own insurance policy. |

## Risk

Where the worker bears little or no risk of the costs arising out of injury or defect in carrying out his or her work, he or she is more likely to be an employee. The higher the degree to which a worker is exposed to the risk of commercial loss (and the chance of commercial profit) the more he or she is likely to be regarded as being independent. Typically, a worker who derives piece rate payments and incurs large outgoings would be so exposed. The higher the proportion of the gross income that the worker is required to expend in deriving that income, and the more substantial the assets that the worker brings to his or her tasks, the more likely it is that the contract is for services.

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## Place of performance

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| A worker under a contract of service will generally perform the tasks on the employer’s premises using the employer’s assets and equipment. | A contractor, on the other hand, generally provides all their own assets and equipment. |

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## Hours of work

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| --- | --- |
| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employee generally works standard or set hours. | An independent contractor may set their own hours of work, depending on the nature of the work. |

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## Leave entitlements

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| The contract generally provides for annual leave, sick leave, long-service leave and other benefits or allowances. | Generally, an independent contract does not contain leave provisions. |

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## Payment

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employee is generally paid an hourly rate, piece rates or award rates. | Payment to an independent contractor is based upon a negotiated rate or amount and performance of the contract. |

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## Expenses

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| --- | --- |
| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employee is generally reimbursed for expenses incurred in the course of employment. | Generally, an independent contractor incurs their own expenses (and would have had such costs in mind when negotiating a rate or amount with the principal). |

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## Integration test

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employee is generally an integral part of, or presented to the public as emanating from, the business carried on by the employer.  An employee has no ability to accumulate goodwill or saleable assets in the performance of their duties. | Generally, an independent contractor represents their own business to the public.  Generally, an independent contractor has the ability to accumulate goodwill and saleable assets in the performance of their duties. |

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## Appointment

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employee is generally recruited by the employer. | An independent contractor is likely to advertise their services to the general public and tender/bid for contracts. |

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## Termination

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employer reserves the right to dismiss an employee at any time (subject to State or Federal legislation). | An independent contractor is contracted to complete a set task. The principal may only terminate the contract without penalty where the contractor has not fulfilled the conditions of the contract. The contract usually contains terms dealing with defaults made by either party. |

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## Terms of engagement

Some conditions of engagement are closely associated with employment and may therefore be persuasive indicators. For example:

* provision of benefits such as annual, sick and long-service leave
* superannuation contributions
* provision of other benefits prescribed under an award for employees
* where the worker uses assets and materials provided by the employer or is reimbursed, or is paid a compensatory allowance, for expenses incurred in respect of using their own assets and materials and
* where there is employer discretion (within the constraints of industrial relations laws) in respect of task allocation of work and termination of services.

However, this list is not exhaustive and it must be emphasised that there is not a standard set of conditions applicable to an employee and a different set of conditions applicable to an independent contractor.

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## Delegation

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| **Employee –**  **contract of service** | **Independent contract –**  **contract for services** |
| An employee has no right to delegate tasks to another. However, there may be a power to delegate some duties to other employees, but that would only be with the authority provided by their employer or part of their job description. | An independent contractor may delegate all or some of the tasks to another person, and may employ other persons. |

**Power to delegate**

An unlimited power to delegate work (with or without the approval of the principal) is an important indication that the service provider is an independent contractor. Under a contract for services, the emphasis is on performance of the agreed services (achievement of the ‘result’). Unless the contract expressly requires the service provider personally to perform the contracted services, that person may arrange for his or her employee(s) to perform all or some of the work or may subcontract all or some of the work to another service provider.

However, delegation clauses are considered in context of the contract as a whole, to determine if they are consistent with the apparent essence of the contract or if they are merely self-serving statements.

# **Extended definition of ‘contract of service’**

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## Prescribed classes of work

The following classes of work under a contract, arrangement or understanding are prescribed classes of work:

* Building work (other than wall or floor tiling)
* Cleaning work
* Driving a motor vehicle used for the purposes of transporting goods or materials (whether or not the vehicle is registered in the driver’s name) where the driver is paid under the Local Government Employees Award or the Adelaide City Corporation Award
* Driving a taxi-cab or similar motor vehicle
* Driving or riding a vehicle, other than a commercial motor vehicle, for fee or reward
* Performing as an entertainer
* Performing work as an outworker
* Work of a minister, priest or other member of a religious order **other than:**
* a minister ministering within The Anglican Church of Australia in South Australia
* a priest or other member of a religious order ministering within the Catholic Church of South Australia
* a pastor ministering within the Lutheran Church of Australia South Australia District Inc
* an ordained minister, deaconess or lay pastor of The Uniting Church in Australia ministering in South Australia in an approved placement under the ‘Classification of Ministers’ of that church
* an officer of The Salvation Army appointed in South Australia under the orders and regulations for officers of The Salvation Army
* Thoroughbred riding work by a jockey, including an interstate jockey or an apprentice jockey, licensed by TRSA.

**Note:** Separate specific guides are available for each of the following prescribed classes:

* Building work (other than wall or floor tiling)
* Taxi drivers
* Driving or riding, a vehicle other than a commercial vehicle, for fee or reward
* Cleaning work
* Outworkers
* Miscellaneous classes
* Fishing crews
* Entertainers.

These guides are available from ReturnToWorkSA by calling 13 18 55.

# **Workers employed under a contract of service where territoriality may be an issue**

If the person identified as a worker under the Act is employed by an employer in more than one State, then a decision will need to be made on which State that worker’s employment is connected to for the purpose of determining in which State that worker needs cover. To assist in this decision, refer to the cross-border guidelines contained in the *Insurance cover for cross-border workers* on www.rtwsa.com.

Disclaimer

The information produced by ReturnToWorkSA in this publication is correct at the time of printing and is provided as general information only and not as legal advice. In utilising general information about workplace health and safety and work injury management, the specific issues relevant to your workplace should always be considered and advice obtained. This publication is not intended as a substitute for the requirements of the *Return to Work Act 2014* or the *Work Health and Safety Act 2012.*