

Sham contractors still a risk

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Legislative provisions designed to stop employers from engaging employees as independent contractors was introduced by the Howard Government, and then apparently all but disappeared.

Neither the unions, nor the regulators have shown a great deal of interest in enforcing the legislation. That is now changing, with the Australian Building and Construction Commission launching a prosecution against a Canberra building company and its directors. The ABCC alleges that the directors called a group of employees into a meeting and basically told them that they would, henceforth, be independent contractors.

The ABCC is seeking maximum penalties of \$33,000 against the company and \$6,600 against the directors. The case is a timely reminder that employers need to exercise caution before deciding they will engage contractors rather than employees. The Courts will look closely at the relationship between the parties, regardless of how it's described and will make an assessment based on the substance of the relationship as to whether it is an employment or a contracting relationship.

The Courts will look at who pays tax, superannuation and work cover premiums, as well as examining the practical workings of the relationship: who determines how and when the work is done, who supplies the tools and materials, who is actually taking the business risk of making a profit or loss. Each case will inevitably have its own complexities and the Courts will make their best judgment by weighing up all of those considerations.

Employers who wish to employ a structure in which it engages contractors rather than employees should get advice before proceeding to ensure that what they are proposing is legitimate. Employers who are reckless about describing their arrangements as independent contractor relationships, when they might in fact be employment relationships risk falling foul of the sham contractor provisions.

Under the provisions which have been reproduced in the Fair Work Act, an employer must not:

- Misrepresent that there is a contractor relationship when an employment relationship exists;
- Dismiss an employee in order to engage them as an independent contractor;
- Make false statements to encourage or persuade a person to become a contractor rather than an employee.

As well as the sham contractor provisions, employers must remember that the "adverse actions" provisions of the legislation also have application to contractors, not just employees. Contractors who have complaints about their working conditions or circumstances need to be taken seriously and their grievances dealt with legitimately.

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