



How to spot a Sham Contract in a Job Advertisement.

*Please note that this is general information
& may not be relevant to your particular
matter. This toolkit should not be taken as
legal advice.*

When applying for a new job it is important to understand exactly what type of employment relationship you may be entering. There can be serious legal consequences if the employment relationship is incorrectly labelled. For example, some job advertisements might state the position available is for an independent contractor when the true nature of the position is really an employee. Independent contractors and employees have different obligations and rights in relation to the work they perform. It is important to know the difference between the two so you can ensure you are receiving all your legal entitlements and that you are complying with any legal obligations.

What's the difference between an independent contractor and an employee?

There are a number of factors that assist in determining the difference between an employee and an independent contractor. In general:

Independent Contractors work for themselves and are their own boss. They set their own fee for the work that they perform and have control of when and how they work. They usually create and supply invoices to receive payment for their work based on the completion of a job. Independent contractors arrange and pay their own taxation and are required to have an Australian Business Number (ABN).

Employees work for someone else and are not running their own business. The employer controls how, where, and when the employee does their work. Employees are often paid by the hour and receive a wage or salary. Employees are not required to pay their own taxation and their employer will deduct taxation and pay it to the Australian Taxation Office (ATO). Employees are entitled to certain types of leave (i.e. long service and parental leave) and superannuation.

How can you tell which is which?

Sometimes the true nature of the relationship will be obvious but sometimes a more fulsome analysis of all the circumstances of the working relationship is required.

It is important to note that no single indicator can determine if a person is a contractor or an employee. Each assessment is based on the individual circumstances of the work arrangement in place. Courts always look at the totality of the relationship between the parties when determining the status of a person's working relationship.

What is sham contracting?

Sham contracting is where a person working as an employee is told they are an independent contractor when they are not. They may be treated like an independent contractor in some ways, for example they may be required to have an ABN, yet have no control over when and how they do their work or how much they get paid.

It is illegal for employers to misrepresent an employee as an independent contractor. Sham contracting is against the law and there are protections for workers who find themselves in sham arrangements.

For example, it is unlawful for an employer to:

- claim an employee is an independent contractor;
- say something false to convince an employee to become an independent contractor;
- dismiss or threaten to dismiss an employee if they don't become an independent contractor; or
- dismiss an employee and hire them as an independent contractor to do the same work.

Sham contracting is sometimes done on purpose or an employer may have acted carelessly and not fully understood their obligations at law. Sham arrangements are sometimes set up by employers who are trying to avoid responsibility for paying legal entitlements due to employees such as annual leave or superannuation.

How can you spot a sham contract in a job advertisement?

Have a look at the advertisement for a job below. It is not uncommon to find advertisements for jobs online that have some of these features. The advertisement below is problematic because it has features of a sham contracting arrangement.



Looking for work in SA

Group post by Mr Bossman - 27 April 2021

Howdy! I am looking for a reliable person, with attention to detail. I need someone who is a quick learner and can follow instructions.

You must have an ABN, a full driving license & your own car for transport.

Opportunity to work 3-4 days or 7 days a week, doing around 5 -7 hours a day, early starts everyday.

This position would suit someone with a background working as a: florist, cleaner, baker, hairdresser, pastry chef or website designer.

The requirement to “follow instructions” and start early points to an employment relationship. A true independent contractor running their own business would not be expected to follow instructions and should be able to negotiate when the work commences.

The requirement to work a certain number of days per week and certain number of hours per day points towards an employment relationship. It demonstrates the worker does not have control over when the hours are worked.

The requirement to have an ABN does not necessarily point to an independent contractor. Some employers will say you need an ABN but all the other elements of employment are present

Stating that the position would suit someone with a background of “baker, florist, pastry chef etc” indicates the position does not require any particular expertise. This points towards an employment relationship because someone truly running their own business would likely specialise in a particular field.

It is unlawful for an employer to pretend that they are offering a person a job as an independent contractor when the position actually involves entering into an employment contract. Before accepting a position like this, you should ask more questions about the true nature of the position and get some advice.

Case Studies

Have a read through these case studies for further guidance on how to spot a sham contracting arrangement:

CASE STUDY 1:

Stevie was offered a job in a beauty salon as a Beauty Therapist. Stevie is qualified to provide a full range of beauty treatments. Stevie was told she needed an ABN and would need to arrange to pay her own tax. Stevie was told she would be paid \$25 per hour and would be given four shifts per week. Her shift times were in line with the salon's opening hours which were 9am to 5:30pm. She was given a uniform with the Beauty Salon's logo which she was required to wear. Stevie was told to book and perform nail treatments only. The beauty salon owner told her she would need to bring in her own customers and generate patronage.

Employee or independent contractor?

Stevie is an employee. She has no control over where, when and how she worked. Even though she was told she needed an ABN and was required to pay her own tax, she was not running her own business and had no control over her work. Stevie may be entitled to a higher rate or pay and superannuation.

CASE STUDY 2:

Asma is an Electrician and performs work on a residential building site for a large building company called BuildPro. BuildPro engages Asma to wire the new house they have built. Asma gives Buildpro a quote for the job and says she will invoice BuildPro when the work is complete. BuildPro asks Asma to finish the job in three months. The job is too big for Asma to complete alone so she engages another worker to do the job with her. Asma has an ABN and has undertaken to work six days per week from 7am to 3pm to get the job finished.

Employee or independent contractor?

Asma is an independent contractor. She determined her fee for the work and invoiced BuildPro accordingly. Although BuildPro requested the work be done within three months, Asma was able to determine her hours of work and was able to employ someone else to delegate work to. Asma is running her own business and had control over many aspects of the job which all indicate she was an independent contractor.

What to do if you end-up in a Sham Contract Arrangement?

If you think you may be in a sham contracting arrangement you should contact the **Working Women's Centre** and make an appointment to speak with one of our Industrial Officers to get some advice.

Call **08 8410 6499** or fill in an online inquiry. <https://wwcsa.org.au/enquiry-form/>

If you are in a sham contract arrangement you may not be receiving your full entitlements. You may not be receiving the correct wages, leave entitlements or superannuation. If you have been underpaid, you may be able to claim any outstanding entitlements and apply for a pecuniary penalty (i.e. a penalty paid to you by the employer for breaking the law).

See our Guide to making an underpayment claim:

- <https://wwcsa.org.au/resources/underpayments-have-you-been-paid-correctly/>
- <https://wwcsa.org.au/resources/template-for-how-to-write-a-letter-of-demand/>

If your employer has not been with-holding taxation, it means you have not been paying income tax and you may owe the ATO. You can anonymously provide a tip-off to the ATO about a business that is incorrectly treating an employee as a contractor. There is more information about how to do this on the ATO website:

<https://www.ato.gov.au/>

You can also make a **General Protections application** to the Fair Work Commission where you can seek a pecuniary penalty. A claim of this nature will not be successful if the employer can prove that they did not know, and were not reckless, as to whether the engagement was not meant to be as an independent.