

Dear Member,

AAT News

Welcome to the July 2019 edition of the AAT Australia's eNews and Views. In this edition you'll find out all about:

- Tax cuts have passed the Senate
- The importance of a letter of engagement
- Unreported 'cash in hand' payments are non-deductible from 1 July 2019
- MyGov lodgements are not for registered agents
- Reminder – Minimum wage increases 3% from 1 July 2019
- Payroll matters: contractor versus employee
- MYOB Partner Connect 2019 – Success is personal

Tax cuts have passed the Senate

On 4 July 2019 the Treasury Laws Amendment (Tax Relief So Working Australians Keep More of Their Money) Bill 2019 passed all stages of Parliament in its original form and subsequently received Royal Assent on the 5th of July 2019, so is now officially law.

This means that more than 10 million Australians will receive a tax cut of up to \$1,080 in their 2019 income tax return. The ATO have been hammered with phone calls from eager taxpayers wanting to know how to access their offsets. The ATO have advised that they will "automatically include any new offset amounts taxpayers are entitled to when we process their tax returns".

The ATO are further urging tax payers not to lodge their tax returns until they are sure their employers have either provided them with a payment summary OR finalised their pays if they are under the new Single Touch Payroll (STP) reporting regime. Employers have until the 31st July 2019 to finalise their employee's income statements (accessible via the employees personal myGov account). Employee's therefore risk lodging incorrect returns if they jump the gun and lodge prior to the pay finalisation.

The importance of a letter of engagement

A member recently contacted the AAT team advising that they had completed work for a relatively new client and the client was disputing their invoice. Worse than that, the client was also making accusations about the member's competence in a particular software product. The member had followed instructions and completed work requested by the client, unfortunately no letter of engagement in place specifying the terms of the working relationship and the service engagement.

Whilst it is not a requirement to hold a letter of engagement under the Tax Agent Services Act (TASA) or the TPB Code of Conduct, AAT strongly encourage members to protect themselves and their clients by having an engagement agreement in place prior to commencing work with a business. This helps providing clarity and avoiding the possibility of miscommunication and misunderstandings.

The TPB recommends that a letter of engagement should cover:

- The work to be completed
- Who will complete the work
- How the work will be completed
- When it will be done
- The cost of the services to be provided.

AAT Australia provides a sample letter of engagement in the resources section of the website for members. For more information related to letters of engagement and the TPB's recommendations you can read more [here](#).

Unreported 'cash in hand' payments are non-deductible from 1 July 2019

The Australian Taxation Office (ATO) reminded businesses that they would not be able to claim an income tax deduction for cash payments made to contractors or employees, where these payments were not being appropriately reported.

Any payment made to an employee should have a withheld amount to meet an employers' Pay-as-you-go Withholding (PAYGW) obligations. The salary and wages along with the PAYGW reported to the ATO via Single Touch Payroll (STP) pay events and again on the Business Activity or Instalment Activity statements lodged monthly or quarterly.

A business making payments (cash or any other kind) to contractors must hold a valid Australian Business Number (ABN) for those contractors. If the contractor fails to supply a valid ABN then the business is required to withhold the highest marginal tax rate (currently 47%) from the payment and report then remit this payment to the ATO on the next BAS or IAS. Failure to withhold and report where no ABN is supplied means the payment made to the contractor will no longer be a tax deduction, even if it is a valid business transaction. Penalties may also apply for the failure to withhold and/or report, equivalent to the amount that was required to be withheld *plus* the business is required to pay the amount they failed to withhold. This means they are paying double the withholding requirement, and there is not tax deductibility for any of

the payments made to the ATO or the contractor.

It is important to note that making cash payments to employees or contractors is acceptable, however, they must be reported for the income tax deduction to be allowed.

This change comes from recommendations made by the Black Economy Taskforce is just one of the initiatives to hold businesses accountable for complying with the law. You can read more about the initiative from the ATO [here](#).

myGov lodgements are not for registered agents

The ATO have come out reminding and advising registered agents that the MyTax service via an individual's myGov account "is not an approved lodgement channel for registered agents and is a breach of the ATO online terms and conditions", the ATO has stated. Consequently, agents found logging in to an individual's myGov account using their personal details is a breach of the TPB's Code of Conduct and agents found accessing private accounts will likely be referred to the TPB for further action.

With the onboarding of new employee's process changing and including the provision of an employee's TFN information along with Superannuation detail via their myGov platform, it is an important reminder to BAS agents not to access an employee's private myGov account

Reminder – minimum wage increases from 1 July 2019

The minimum wage has increased by 3% to \$740.80 per week commencing the first full pay period from 1 July 2019. For employees covered by a modern award, these pay rates will also increase by 3% and the Fair Work Ombudsman is in the process of calculating these increases to include them in each award. Consequently, all employees pay rates should be reviewed and updated to accommodate for these changes.

Payroll matters: Contractor versus employee

When a business considers engaging someone to perform work, often the decision is about whether to engage them as an employee or as a contractor. The decision is sometimes quite difficult, and the difference has implications for items such as, yet not limited to, taxation, superannuation, control and liability.

In this update, we review the characteristics of both a contractor and an employee and provide some tips on what to consider when engaging workers to ensure risks are minimised.

What are the key differences between an employee and a contractor?

The Fair Work Act, the Australian Taxation Office and other legislation places controls on the engagement of both contractors and employees.

To correctly determine whether a worker is an employee or contractor, the whole working arrangement needs to be examined. For example, a worker is not automatically a contractor just because they have an ABN or specialist skills or you only need them during busy periods or if the worker simply wants to be a contractor for personal reasons.

Here are some common indicators that may contribute to determining whether a person is an employee or an independent contractor:

Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	Under agreement, decides what hours to work to complete the specific task.
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week).	Has a high level of control in how the work is done.
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	Usually engaged for a specific task.
Risk	Bears no financial risk (this is the responsibility of their employer). Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.
Superannuation	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation contributions).
Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Uses their own tools and equipment (note: alternative arrangements may be made within a contract for services).
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.

Method of payment	Paid regularly (for example, weekly/fortnightly/monthly).	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.
Leave	Entitled to receive paid leave (for example, annual leave, personal/carers' leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees.	Does not receive paid leave.

Extracted from the Fair Work Ombudsman website www.fairwork.gov.au

Some laws apply to both the employment and independent contract relationships

Often there is confusion (or incorrect assumption) in regard to what laws apply to employees and or contractors. It is important to understand that there is legislation that apply to both.

Employees

A relationship of employment gives rise to several obligations for an employer, including yet not limited to:

The Fair Work Act 2009 (Cth) - this is the major employment legislation that covers most employees (excepting for some state government employees covered under relevant state employment legislation);

- workers compensation insurance to cover injury to workers;
- compliance with work, health and safety laws;
- long service leave, annual leave and parental leave;
- compliance with unfair, unlawful dismissal and adverse action laws;
- compliance with Modern Awards and if relevant, State Awards;
- payment of PAYE/income tax, payroll tax, fringe benefits and superannuation; and
- compliance with anti-discrimination and anti-bullying laws.

Contractors

The independent contractor relationship is typically governed by the contract between the organisation and the independent contractor and is not covered by employment laws.

Independent contractors need to manage their own business and typically procure their own insurance for potential negligence and also income protection.

In the past, independent contractors were in the spotlight with the potential for exploitation and unfair contracts. This resulted in the introduction of the Independent Contractors Act 2006 (Cth). This is subsequently supplemented further by the sham contracting provisions in the Fair Work Act 2009 (Cth).

Laws that relate to both Employees and Contractors

The following relate to both Employees and Contractors. Examples include, yet are not limited to:

- work, health and safety;
- anti-discrimination;
- anti-bullying;
- adverse action claims
- workers compensation (in some cases); and
- superannuation (in some cases).

What are sham contracts?

Sham contracting arrangements happen where an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done for the purposes of avoiding responsibility for employee entitlements.

The Fair Work Act contains sham contracting provisions and employers cannot:

- misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor
- make knowingly false statements to encourage or influence an employee to become an independent contractor.

Risks: what if you get it wrong?

Organisations must take steps to become aware of the differences between an employment relationship and an independent contractor relationship. Failing to do so risks exposure to sham contracting and other breaches.

The employment relationship is more heavily regulated than a contractor relationship. This often results in breaching laws by incorrectly classifying an individual as a contractor when at law they are in fact an employee.

If you incorrectly classify an individual as an employee or contractor, you may be liable for:

- **superannuation charges**, where you have failed to make superannuation contributions for the benefit of the individual either because they are an employee at common law or because they are an 'employee' under the extended definition in the Superannuation Guarantee (Administration) Act 1992 (Cth).
- **additional payroll tax** (including penalties and interest) where you have incorrectly claimed contractor exemptions on payments made to employees (for which there are no exemptions available).
- **back pay** under a modern award or even an enterprise agreement, where you have incorrectly classified an individual as a contractor. Most non-management employees are covered by a modern award and will have entitlements under the award to a minimum wage, overtime, penalty rates, allowances and leave

loading. As well as liability for back pay, there are penalties for breaching modern awards.

- **unpaid annual and long service leave**, where you have incorrectly classified an individual as a contractor. All employees are entitled to paid annual leave, and may be entitled to long service leave upon reaching the required number of years' service.
- **compensation for unfair dismissal** or for other prohibited conduct. Many employees have access to an unfair dismissal regime, and to other remedies where their employer acts to the detriment of the employee. For example, under the Fair Work Act 2009 (Cth), an employer must not take adverse action against an employee because the employee makes a complaint about safety matters affecting the employee's employment.

The Fair Work Ombudsman

The Fair Work Ombudsman is strongly mandated to ensure that sham contracting and poor contracting practices are eliminated and where necessary, prosecuted in the Courts. Fair Work Inspectors can seek the imposition of penalties for contraventions of sham contracting arrangements. The courts may impose a maximum penalty of over \$50,000 per contravention.

A notable recent matter has involved the food delivery start up, Foodora, being accused of sham contracting and worker underpayment by the Fair Work Ombudsman in a case that has been called "unquestionably significant" for the future of Australia's gig economy.

The Fair Work Ombudsman alleges that upon engaging the workers in 2015, Foodora fell foul of sham contracting laws by misrepresenting the workers as independent contractors, rather than employees of the company.

Despite each worker having an ABN and signing an 'Independent Contractor Agreement' with the company, the Fair Work Ombudsman alleges that the workers' responsibilities and conditions meant the three workers should have been considered employees, and were therefore entitled to minimum wage rates and entitlements as per the Fast Food Industry Award.

It is well known that Foodora has now ceased operations in Australia and many commentators support the view that the Fair Work Ombudsman's prosecution has been the major contributing factor.

Summary

It is important that when an organisation is engaging workers that consideration is given to the appropriate method of engagement i.e: employee or contractor. As indicated in this article, there are many factors to consider. Managing this process correctly will assist to mitigating potential risk to the business and also shows consideration to ensuring the individual being engaged is being on-boarded under the appropriate terms and conditions.

Needing advice and help?

If you would like assistance with understanding the arrangement of work, modern award terms or optimising your workforce, the team of advisors at AB Phillips can

assist you with practical advice and support.

For support and assistance, please contact our team of advisors at AB Phillips, Monday to Friday between 9:00 am and 5:00 pm AEST by phone on 1300 208 828 or email advice@abphillips.com.au.

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