

Contractors and Workers

This Guideline applies from 1 January 2018

Introduction

In most cases it will be clear whether a person is your worker and therefore covered for workers compensation purposes. However this may not be so clear for your contractors.

It is your responsibility to find out whether your contractors are considered workers by WorkSafe. If they are, this may impact your total remuneration, which is one of the key factors that influence your premium and whether you need to register for WorkCover insurance. If your total remuneration exceeds \$7,500 per year, you must register for WorkCover insurance. Additionally, as the employer you may be liable if the contractor is injured while performing work for you.

Each time you hire a contractor, you need to determine whether they are considered to be a 'worker' by WorkSafe. If the person is considered a worker, you effectively become their employer for WorkCover insurance purposes, and you must include the money you pay them in your total remuneration.

It is important to get this right as it is against the law if you are not registered for WorkCover insurance and paying the correct premium. You risk having to pay the amount of premium that should have been paid and penalties of up to 100% of that amount.

The purpose of these guidelines is to help you to decide if a contractor you engage may be considered your worker for WorkCover insurance purposes.

These guidelines do not apply to you if you obtained the services of an individual through a labour hire (or on-hire) firm and pay that firm for the work undertaken in your business.

In addition, these guidelines do not apply to owner drivers, door-to-door sellers, timber contractors, taxi drivers, share farmers, outworkers and sporting contestants. For more information go to www.worksafe.vic.gov.au

Guidelines

How to apply the guidelines

If you have hired a contractor you must check whether the individual who actually does the work for you will be your worker for workers compensation purposes. You must do this regardless of the business structure that is being used by the contractor.

The term 'contractor' covers a wide variety of individuals who may operate as sole traders or through companies, partnerships or trusts.

The guidelines have 2 main steps.

If you have contracted with a sole trader to do work for you, apply step 1, then apply step 2.

If you have contracted with a company, trust or partnership for work to be done, go straight to step 2.

What is a sole trader?

A “sole trader” does not use a company structure or have business partners.

A sole trader may have their own A.B.N. (Australian Business Number). They may operate a business under their own name or under a registered business or trading name.

The business decisions for a sole trader are generally made by one person (usually the owner). However, this does not mean that there is only one person in the business who carries out all the work and responsibilities associated with the business. Like any business, a sole trader is able to employ others.

Step 1

Step 1 only applies if you have hired a sole trader to do the work.

Check whether the person who actually does the work for you fits all or most of the following descriptions:

- The person performs the work under your direction and control on an ongoing basis.
- The person generally works standard or set hours under your direction.
- The person cannot subcontract/delegate the contract work or pay someone else to do the work.
- The amounts payable by you for the work are for the time worked, a price per item or activity, or a commission rather than for a result achieved based on the quote provided.
- You provide all or most of the equipment, tools and other assets required to complete the contract work, or you provide an allowance to, or reimburse the sole trader.
- The sole trader is not operating independently of your business but works within and is considered part of your business.

If all or most of the above factors apply to the working agreement or contract, then it is likely that WorkSafe will consider the sole trader to be your worker. None of these factors are definitive. WorkSafe will consider the whole of the relationship between you and the person doing the work.

You should check this with WorkSafe or your WorkSafe agent.

Now go to step 2: even if the sole trader is not your worker under step 1, they can still be your worker under step 2.

Step 2

You should apply Step 2 if –

- you have hired a sole trader to work for you and you do not believe that the sole trader is your worker under step 1 (or you are not sure whether they are your worker), or
- you have contracted with a company, trust or partnership for work to be done.

How to apply step 2:

Step 2 has four main parts:

- First, you must identify the test period(s) (**see part A below**);

- Second, you must then check whether the conditions apply for each test period (**see part B below**).
- Third, if you believe the contractor is likely to be your worker (after applying parts A and B) but you also believe, based on the factors discussed in **part C below**, that they are carrying on an independent business while providing services to you, you should contact WorkSafe and ask it to determine whether the contractor is carrying on an independent business.
- Fourth, if you believe the contractor is your worker (after applying parts A, B and C), then you should calculate the correct remuneration for the worker (**See Part D below**).

Part A: Identify the test period(s)

First, you need to identify each financial year in which the services will be provided by the contractor under the contract. The contract can be written or verbal.

If the services will be provided in two or more financial years, you also need to identify the first 12 months and the last 12 months (if known) in which the services will be provided.

Each financial year or 12 month period is called a 'test period'.

For example, if the work under the contract starts on 1 February 2016 and finishes on 30 June 2016, then the 2015/16 financial year is the test period for the purposes of Step 2.

If on the other hand, the work under the contract starts on 1 July 2015 and finishes on 1 March 2017, then the test periods are –

- The 2015/16 financial year
- The 2016/17 financial year
- 1 March 2016 to 1 March 2017

Part B: check the conditions apply for each test period

Second, check whether all of the following conditions apply to the contract for a test period -

- 1) The sole trader, company, trust or partnership is doing work in or for your business, and
- 2) The same individual will personally be performing at least 80% of the overall contract work, and
- 3) The amounts payable by you to the sole trader, company, trust or partnership will be mainly for the supply of labour (rather than the supply of equipment or materials), and
- 4) Those amounts payable by you will be at least 80% of the overall gross income earned by the sole trader, company, trust or partnership from all sources, for services of the same kind.

If all of the four conditions apply for the test period, then WorkSafe is likely to consider the individual to be your worker for the test period (**unless the exception in part C applies**).

If one or more of the four conditions do not apply for the test period, then WorkSafe is likely to consider that the individual is not your worker for the test period.

You should check this with WorkSafe or your WorkSafe agent.

It is important that you do a separate check for each test period because the results may differ depending on the particular period.

Part C: Exception – independent business

Even if the four conditions in step 2 above apply for the test period, the individual will not be your worker for that period if WorkSafe decides that the contractor is carrying on an independent business while providing services to you.

If, after applying Parts A and B, you believe the contractor is likely to be your worker, but you also believe, based on the factors set out below, that they are carrying on an independent business while providing services to you, you should contact WorkSafe and ask it to determine whether the contractor is carrying on an independent business.

If you do not believe that the contractor is carrying on an independent business, you do not need to ask WorkSafe to make a determination.

You should consider the following factors. No one factor is decisive, but if a majority of them apply, the contractor may be carrying on an independent business:

- In operating their business the contractor is generating goodwill or other saleable assets;
- The contractor usually enters into work contracts under which they are free to work for other parties;
- The contractor has financial or other systems supporting its offering of services;
- The contractor regularly enters into arrangements at the same time (or one after the other) with different hirers;
- The contractor advertises (including by tender or word of mouth) that they are willing to perform contractor services;
- The contractor usually engages staff or employs sub-contractors.

Part D: Calculating Remuneration

You must calculate the correct remuneration for any contractor that (after applying Parts A, B and C) should be treated as your worker.

1. Calculate the contract payment

Calculate the total payments made to the contractor during the test period. This includes any labour and non-labour components (such as payment for materials).

2. Deduct GST

Where a contractor has charged you GST, deduct this amount from your total.

3. Consider whether a prescribed deduction applies.

You can deduct an approved non-labour component from the total if, during the test period, the following apply:

- (a) the contractor falls within one of the professions or trades in the following table;
- (b) the contractor provides their own materials, goods or equipment which have not been purchased from you, the employer; and
- (c) the amounts paid or payable to the contractor for the test period include amounts in respect of those materials or equipment (**non-labour component**).

If the contractor does not fall within one of the professions or trades in the table below, but they still satisfy parts (b) and (c), you may still be eligible for a deduction. Contact WorkSafe Victoria in writing for guidance at: premium@worksafe.vic.gov.au.

Type of contractor	Approved Deduction
Architects	5%
Bricklayers	30%
Building Supervisors (who provide their own vehicles and are required to supervise and inspect more than six different building sites each 7 day period)	25%
Cabinet makers	25%
Carpenters	25%
Carpet layers	25%
Computer programmers	5%
Draftspersons	5%
Driving instructors who provide their own vehicles	30%
Electricians	25%
Engineers	5%
Fencing contractors	25%
Painters	15%
Plasterers	20%
Plumbers	25%
Resilient floor layers	37%
Roof tilers or slaters	25%
Tree fellers	25%

The approved deduction applies to the entire remuneration amount for that contractor. For example, if the total contract payment made to a cabinet maker during the test period was \$10,000 (excluding GST), once the deduction of 25% is applied the remuneration will now be \$7,500 for the purposes of WorkCover insurance.

4. Determine the total remuneration amount

The total remuneration amount will be the total contract payments, minus GST, and minus any prescribed contractor deductions.

EXAMPLES

The following examples are intended to assist you applying the guidelines. However they cannot cover all of the facts that might be relevant to you. It is important to note that each situation is different and that WorkSafe will consider all of the facts relevant to the relationship between you and your contractors.

Example 1

Office Cleaning Pty Ltd has a contract to clean a small office building. A cleaner, Catherine, who has been hired by Office Cleaning Pty Ltd, cleans the building. Catherine is a sole trader and provides invoices to Office Cleaning Pty Ltd for her services every week, using her own ABN.

Catherine has access to the building. She is required to:

- clean the building each weeknight from 6.30pm – 10.30pm
- carry out the cleaning work as instructed by the business.

Office Cleaning Pty Ltd does regular checks to ensure Catherine's work is meeting the required standards.

If Catherine is unable to do her shift, she can organise for another cleaner (who also works for Office Cleaning Pty Ltd) to fill in. Catherine needs to let the cleaning business know and they will pay the other cleaner for the extra shift.

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Catherine is paid an hourly rate for the rostered shifts she works each week. Office Cleaning Pty Ltd pays her each week based on what is in her invoice.

Catherine uses the cleaning equipment and products supplied by Office Cleaning Pty Ltd. They are replaced or restocked at her request.

If Catherine damages anything when she is completing her work, she will need to let Office Cleaning Pty Ltd know and they will need to pay for the damage to be rectified.

Catherine is reliant on Office Cleaning Pty Ltd to assign her work and pay her for it. Catherine needs to do any work within her duty statement.

In this example -

- Office Cleaning Pty Ltd has control over the work.
- Catherine cannot subcontract/delegate the work.
- Catherine is paid for the time worked.
- Office Cleaning Pty Ltd provides the equipment and assets required to complete the work.
- Catherine is not operating independently of Office Cleaning Pty Ltd.

Conclusion: WorkSafe considers that Catherine would be a worker of Office Cleaning Pty Ltd under step 1. Office Cleaning would have to include the payments made to Catherine in their rateable remuneration for premium calculation purposes. Catherine will be covered under the WorkCover insurance of Office Cleaning Pty Ltd.

Example 2

Karl entered into an agreement with Office Cleaning Pty Ltd to clean a small office building for three years (starting on 1 July 2014 and finishing on 30 June 2017). Karl is a sole trader and invoices Office Cleaning Pty Ltd every fortnight, using his own ABN.

The agreement is to clean the building. It does not specify who needs to do the work. If Karl chooses, he can pay someone else to perform the work.

Karl quoted a set amount to clean the building. Payment is conditional upon the building being cleaned to the requirements of the agreement and within the specified timeframe.

Karl uses his own cleaning equipment and products to complete the work. He replaces equipment and products when required.

If Karl does not perform to the standard required or damages the office building, he can be held liable for any resulting losses.

Karl is required to perform the services as specified in the agreement. If Karl is offered additional cleaning work outside the agreement, he can either accept or reject this work.

Step 1

Under step 1, WorkSafe would not consider Karl to be a worker of Office Cleaning Pty Ltd because -

- Office Cleaning Pty Ltd does not have control over the work.
- Karl can subcontract/delegate the work.
- Karl is paid if the building is cleaned as agreed. He is not paid for time worked, a price per item or activity, or a commission.
- Karl provides the equipment and assets required to complete the work.
- Karl is able to operate independently of Office Cleaning Pty Ltd's business.

Because Karl would not be a worker under step 1, step 2 would need to be considered.

Step 2

Office Cleaning Pty Ltd hires Karl for the purposes of Office Cleaning Pty Ltd's business. Condition 1 would be satisfied for this reason.

For the 2014/15 financial year (the test period), Office Cleaning Pty Ltd is required to pay \$75,000 to Karl for the cleaning services. Karl's invoices to Office Cleaning Pty Ltd show that \$10,000 is for Karl's supply of cleaning equipment and materials and the rest is for labour. Condition 2 would be satisfied for the 2014/15 financial year because the work contract payments to Karl would be mainly for the supply of labour.

For the 2014/15 financial year (the test period), cleaning services were required to be performed during 240 nights. Karl did all of the work personally on 220 of those nights. For the other 20 nights, he hired someone else and paid them to take his place and do the required work. Condition 3 would be satisfied for the 2014/15 financial year because Karl did more than 80% of the contract work personally.

For the 2014/15 financial year (the test period), Karl obtained all of his gross income from the performance of cleaning services from Office Cleaning Pty Ltd. Condition 4 would be satisfied for the 2014/15 financial year for this reason.

Conclusion: Because all four conditions would be satisfied for the 2014/15 financial year (the test period), Karl would be a worker of Office Cleaning Pty Ltd for that test period.

There is nothing to suggest that Karl is carrying on an independent business, so Office Cleaning Pty Ltd does not ask WorkSafe to make a determination.

Office Cleaning would have to include the payments made to Karl in their rateable remuneration for premium calculation purposes. Karl would be covered under the WorkCover insurance of Office Cleaning Pty Ltd. Note: the 2015/16 financial year test period and the 2016/17 financial year test period would each need to be considered separately.

Disclaimer

Unless otherwise specified within this guideline, this guideline is WorkSafe's interpretation of the Law as it has operated to date and continues to operate. Guidelines do not have the force of law. Each decision is made on the merits of each individual case, including by considering all relevant law and having regard to any relevant guideline. It is an employer's responsibility to ensure that they are using the current version of a guideline.

If employers using the guidelines are unsure about whether a contractor they have hired is their worker they should contact WorkSafe or their WorkSafe agent, and/or seek their own legal advice.