

Identifying and responding to sham contracting

What is sham contracting?

'Sham contracting' occurs when an employer attempts to disguise an employment relationship as an independent contracting arrangement, meaning the contracting arrangement is fake, or a sham.

Employees are entitled to protections and entitlements that independent contractors are not. By 'misclassifying' someone as an independent contractor, employers attempt to avoid providing employees with their lawful minimum entitlements.

It is unlawful for employers to engage in sham contracting. Employers who engage in sham contracting can be required to pay compensation and significant fines.

Employee vs Independent Contractor

There is no one factor that determines whether someone is an employee or independent contractor, the entire relationship must be considered.

The following factors must be considered:

	Employee	Independent contractor
Control	Your employer controls how you work	You control how you work
Hours of work	Your hours are set by your employer	You set your own hours of work
Nature of work	You have an ongoing expectation of work (unless you are casual)	You are engaged to do specific tasks or projects
Method of pay	You are paid a regular wage and receive payslips	You issue invoices for your work and are paid under an ABN
Leave	You get leave	You don't get leave
Taxation	Your employer contributes tax on your behalf	You pay your own tax
Tools of trade	Your employer provides tools and uniforms	You provide your own tools and uniforms
Delegation	You cannot delegate your work to other people	You can delegate (or sub-contract) your work to other people

Risk	Your employer assumes financial risk associated with your work	You assume financial risk associated with your work
Good will	You generate good will for your employer	You generate good will for your own business

What can you do if think you're in a sham contracting arrangement?

Any or all the following options are available to you.

Raise the issue with your employer

Raise your concerns with your employer in writing, either by sending a letter or an email. If you have a discussion with your employer, you should take notes.

Sometimes breaches of the law occur when an employer is not aware of their legal obligations. Raising the issue with your employer can sometimes be sufficient to resolve it.

Report the problem to the Australian Taxation Office

An employer who is engaging in sham contracting is probably not meeting their tax or superannuation obligations.

The Australian Taxation Office accepts complaints, including confidential complaints, about failures to pay superannuation and tax properly. More information about making a complaint can be found [here](#).

Make a complaint to the Fair Work Ombudsman

The Fair Work Ombudsman can deal with complaints about sham contracting. The Fair Work Ombudsman's complaint form can be found [here](#).

The Fair Work Ombudsman can:

- Investigate complaints;
- provide your employer with information about sham contracting and its obligations under the law;
- issue compliance notices; and
- take legal action against your employer.

Get legal advice about making a claim

Speak to a lawyer about your specific circumstances to get tailored legal advice about your options. Depending on the facts of your case, you may be able to commence a general protections (not involving dismissal) claim or an underpayment claim. Both claims have a 6-year limitation.