

CONNECTIONS

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DISCOVER STORIES FROM YOUR PEERS

Working arrangements: Contractor or employee?

WorkPlacePLUS

When engaging staff (employees) in your practice, it is important to be up front from the start about a range of employment factors such as:

- Working arrangements and understanding the employment contract
- Salary, entitlements and managing pay expectations
- Supervision, training and your process for managing performance
- The workplace values, policies and processes that underpin and guide the running of your business

This article focuses a common HR hot spot for practice owners who are engaging staff: working arrangements.

What are working arrangements?

'Working arrangements' refers to the approved or agreed upon employer-employee relationship, particularly around the patterns and design of work hours and how work is performed.

It's important to have a clear understanding of the working arrangements in your practice and to be able to clearly communicate (and in some cases negotiate) these with you staff. For example:

- Is this an employee or independent contractor arrangement?
- Is the position casual or permanent? Part-time or full-time?
- What leave and entitlements are provided?
- What flexible working arrangements are available?
- Who supplies tools and equipment?
- Who is responsible for insurance and matters of work, health and safety?

Contractor or employee?

If your occupational therapy practice engages independent contractors, it is good practice to review the arrangements regularly to ensure compliance.

The Australian Tax Office (ATO) is clamping down on businesses that force workers to be independent contractors with so-called sham contracts as a way of avoiding paying an employee's statutory entitlements. If the courts find that you have classified your staff incorrectly, they may impose a penalty of up to A\$12,600 for individuals and A\$63,000 for corporations per contravention.

What's the difference?

An employee works in your business and is part of your business. An employee's minimum entitlements are set out in the National Employment Standards (NES) and awards. Employment contracts can provide further entitlements, but they can't be less than what's in the NES or any applicable award.

An independent contractor (a.k.a. contractor or sub-contractor) effectively runs their own business and operates under their own business name. They are responsible for their own business compliance and commitments such as insurance, PAYG, superannuation, workers compensation, ATO, GST, etc. Contractors do not receive paid leave and can be legally liable for the work performed under their contract.

The distinction between contractors and employees is not always clear-cut. Courts look at the relationship, and there is no single indicator to determine if a person is a contractor or an employee, which creates added complexity.

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Factors to consider:

Employees

- Employees perform work under the direction and control of their employer. The employer generally controls working hours, work location and how work is done.
- Employees carry no financial risk in relation to the business.
- Work equipment is generally provided by the employer, or a tool allowance is paid.
- Employees are required to do the work themselves. They can't ask someone else to go to their workplace and do their work for them.
- Permanent employees have an ongoing expectation of work. However, some employees may be engaged for a specific task or specific period or on a casual basis.
- Employees work standard or set hours (unless they're a casual employee, in which case their hours may vary from week to week).

Independent contractors

- Independent contractors have a high level of control over the work they perform, including their hours, work location and how they do the work. They can perform the task at the time of their choosing.
- Independent contractors carry the risk for making a profit or loss on each task or job. They are usually personally responsible and liable for poor work, or any injury sustained while performing the task, and generally have their own insurance policy.
- Independent contractors use their own equipment and resources, and don't receive an allowance or reimbursement for the cost of the equipment.
- Independent contractors can delegate or subcontract tasks to other people (dependant on contractors' agreement).
- Independent contractors are usually engaged for a specific task.
- Independent contractors have the skill and ability to perform services as specified in their contract.

- Independent contractors are paid via invoice arrangements for the result achieved, based on an hourly rate or price per service.
- Independent contractors usually negotiate their own fees and working arrangements and can work for multiple clients at a time.
- Independent contractors can accept or refuse additional work.
- Independent contractors do not necessarily work standard or set hours. Instead, an agreement is made between both parties regarding work hours to complete the specific task.

If you are unsure about how to interpret the working relationship between your occupational therapy practice and your staff, you can check your workers' circumstances against the ATO's online decision tool or seek advice from an HR consultancy that works closely with the allied health sector such as WorkPlacePLUS.

As the national HR and IR partner of Occupational Therapy Australia, WorkPlacePLUS provides support to OTA members on employment matters affecting your practice. For more information, contact Anna Pannuzzo on (03) 9492 0958 or visit www.WorkPlacePLUS.com.au.

Changes to workplace laws: fixed-term contracts

From 7 December 2023, under the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022, there will be limits to the use of fixed-term contracts. Instead of employees being on rolling fixed-term contracts, such as for six months or a year, employers will only be able to offer a maximum of two consecutive contracts or contracts that span two years – whichever of the two is shorter.

If your practice uses fixed-term or maximum term contracts, you should consider whether those contracts are necessary, and if so, seek advice on whether long-term or back-to-back arrangements will be lawful once the changes take effect.



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Cyber security breaches – an HR perspective

OTA spoke with WorkPlacePLUS for an HR perspective on mitigating the risk of cyber security/data breaches and what to do in the event of an attempted or actual data breach.

What steps should workplaces be taking to ensure customer and employee data is secure and protected from breaches?

- Develop comprehensive workplace policies, for example a Privacy Policy, IT Security Policy, Data Risk Management Policy, and Security Policy.
- Establish a business continuity plan and test this plan in the case of a security breach or cyber-attack.

- Conduct regular Data Risk Management and IT Security Risk training.
- Perform a risk assessment on the organisation's data, including where it is stored and the sensitivity of the data. This may mean conducting a risk assessment of any outsourced partners used to store any of the organisation's data.
- Back up all business data regularly in a secure site.

If a workplace thinks they may have been the target of an attempted or actual security breach, what actions should they take?

Investigate the possible IT breach through the IT department or specialist service providers.

If a data breach has been identified that creates a risk to the customer and/or staff, the organisation must follow the requirements of The *Privacy Act 1988*, such as communicating the breach to the individuals affected and reporting the breach to the Australian Information and Privacy Commissioner.

What are the consequences of a security breach?

The potential consequences of security breach include:

- Reputational risk with clientele or staff, which may lead to loss of clientele or staff
- Losing access to computers including data, resulting in business down time (i.e., no billing).

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