

Who is an 'employee' under the SRC Act?

1. Purposes

The purposes of this Circular are to:

- provide advice on who may or may not be an 'employee' for the purposes of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act); and
- remind Commonwealth agencies that their responsibilities under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS (CE) Act) extend beyond their own 'employees'.

2. Background

With the current trend in the Public Service towards outsourcing and the use of contractors, it is more important than ever that agencies are aware of who are 'employees' for the purposes of coverage under the SRC Act.

3. Definition

In order to determine whether a person is an 'employee' for the purposes of the SRC Act, the definition of 'employee' in section 5 of the SRC Act is relevant.

Generally speaking, a person is an 'employee' under the SRC Act if the person is employed by:

- a) the Commonwealth; or
- b) a Commonwealth authority; or
- c) a licensed corporation.

The way in which this person may be employed is under:

- a) a law of the Commonwealth; or
- b) a law of a Territory; or
- c) a contract of service; or
- d) apprenticeship.

Most Public Servants are employed by the Commonwealth or a Commonwealth authority under what amounts to a contract of service. However, at times, it may not be clear whether the definition of 'employee' applies to other individuals. Then it is necessary to look at the relationship between the employee and the employer, and, in particular, whether there exists a contract of service, or a contract for service.

4. Contract of service – usually an 'employee'

The key elements of a contract of service are:

- the employer has the power to hire the person engaged for the job;
- payment is in the form of wages and the employer deducts tax;

- the employer has the right to suspend or dismiss for misconduct; and
- the employer has the right to supervise and control the manner in which the employee does his or her work.

5. Contract for service – may not be an 'employee'

If none of the above criteria apply, the potential claimant may be engaged under a contract for service. Below are some questions that may be asked to help establish whether a person is employed under a contract of service, or a contract for service.

- *How much control may be exercised by the employer as to how, when and where the person performs his or her duties? Can the 'employee' sub-contract?*
 - Little control by the employer over duties, and the person can sub-contract. Indicates he/she may not be an 'employee' under the SRC Act.
 - Control by the employer over performance of duties and the person cannot sub-contract. Indicates he/she may be an 'employee' under the SRC Act.
- *Is the person in business on his or her own account? Does he or she have a business set up, so he or she could be labelled a 'contractor'?*
 - Yes. Indicates he/she may not be an 'employee' under the SRC Act.
 - No. Indicates he/she may be an 'employee' under the SRC Act.
- *Does the person provide his or her own tools or equipment?*
 - Yes. Indicates he/she may not be an 'employee' under the SRC Act.
 - No. Indicates he/she may be an 'employee' under the SRC Act.
- *Is the person paid through the normal payment system or is he or she paid in a lump sum? Does the employer deduct tax?*
 - Yes. Payment of wages is through the normal pay system, with deductions of tax. Indicates he/she may be an 'employee' under the SRC Act.
 - No. Payment is in the form of a lump sum without tax being deducted. Indicates he/she may not be an 'employee' under the SRC Act.

6. Are people undertaking 'work experience' covered?

Legal advice obtained by Comcare indicates that apart from not receiving remuneration from the employer, persons participating in work experience or similar programs with Commonwealth agencies are under no obligation to perform a task for the benefit of the employer.

As persons participating in work experience or similar programs with Commonwealth agencies fail to meet the criteria of any of the tests referred to in paragraph 5, they cannot be considered to be employed under a contract of service and therefore do not meet the definition of 'employee' under the SRC Act.

No category of persons participating in work experience or similar programs with Commonwealth agencies has been declared a class of person to be covered under subsection 5(6) of the SRC Act. (See paragraph 8 below).

7. Who can determine whether a person is or isn't an 'employee' under the SRC Act?

The answers to the questions in paragraph 5 may indicate whether or not a person is an 'employee' for the purposes of the SRC Act. However, it is important to remember that an employer/agency cannot decide whether or not a person is an 'employee' under the SRC Act. Only Comcare can determine this.

If a person wishes to claim compensation, and there is doubt as to whether he/she is an 'employee' then the agency should submit the claim to Comcare and include with it their comments as to whether or not they consider the claimant to be an 'employee'.

8. Ministerial notices

Subsection 5(6) of the SRC Act gives the Minister for Employment, Workplace Relations and Small Business authority to gazette groups of people, undertaking certain acts, to be automatically covered by the SRC Act as 'employees'. They include:

- certain volunteer project workers and bush fire fighters;
- those undertaking Commonwealth employment placement schemes (rehabilitees); and
- Defence Force cadets.

The list of 'gazetted groups' is too long to reproduce in this Circular, so, for full details of which groups of people have been gazetted please contact Comcare.

9. People specifically excluded from coverage under the SRC Act

Subsection 5(8) of the SRC Act states it does not apply to:

- a member of Parliament or a Minister of State;
- a person who is a Judge as defined by section 4 of the *Judges' Pensions Act 1968*;
- an officer or employee of the Public Service of an external Territory; or
- a seaman to whom the *Seafarers' Rehabilitation and Compensation Act 1992* applies.

10. Employees working overseas

A related issue is whether employees working overseas are covered by the SRC Act. Such employees can claim for compensation for conditions they consider are attributable to employment whilst overseas. Sections 6 and 7 of the SRC Act set out the circumstances in which an employee is covered. For more information on this issue, please refer to the article on page 6 of the April 2000 issue of *Working With You*, available on Comcare's website.

11. Locally engaged overseas employees

Separate provisions apply to employees who were engaged outside Australia, for employment outside Australia, and who are performing the duties of their employment outside Australia. Section 117 of the SRC Act refers. For further information on coverage for this category of employee, please call our Enquiry Line.

12. Agencies' obligations under the OHS(CE) Act

Even though the SRC Act may only cover 'employees' as defined by the SRC Act, a Commonwealth employer still has a responsibility under section 17 of the OHS (CE) Act to take "all reasonably practicable steps to ensure that persons at or near a workplace under the employer's control who are not the employer's employees or contractors are not exposed to risk to their health or safety arising from the conduct of the employer's undertaking".

The OHS (CE) Act deals with the subject of contractors in a number of sections:

- subsection 5(1) for a definition of "contractor";
- section 9 for a definition of "employees"; and
- subsection 16(4) deals with the obligations of an employer in respect of contractors.

Comcare has issued a booklet that assists Commonwealth employers fulfil their responsibility towards everyone at the workplace, including employees and contractors. The booklet is called *A Practical Guide To Integrating OHS Into Effective Contractor Management*, and is available on Comcare's website.

13. Further information

For further information on the question of who is an 'employee' please call our Workers' Compensation Enquiry Line 1300 366 979. For OHS information, please call the OHS Hotline 1800 642 770.

14. Disclaimer

The contents of this Circular are provided for general information. Please contact Comcare before any action or decision is taken on the basis of the contents of this Circular. Also, advice from an appropriately qualified professional person should be obtained before relying on the contents of this Circular.

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