

# INDEPENDENT CONTRACTOR OR EMPLOYEE

- It is critical to correctly document whether individuals are being engaged by your business as an independent contractor or employed.
- If an individual is engaged as a contractor but is determined to be an employee, the company may be liable to make substantial back-payments for annual leave, public holidays, and PAYE.
- It is important to consider the tests which will be applied by the Employment Relations Authority and the IRD, to assess what is the real nature of the relationship.
- Any savings made in engaging the individual as a contractor will quickly evaporate if the individual is subsequently determined to be an employee.
- In determining the “real nature” of the relationship the Employment Relations Authority and Employment Court, apply various tests:
  - a) the Control Test;
  - b) the Integration Test; and
  - c) the Fundamental / Economic Reality Test.

## CONTROL TEST

- The test looks at the degree of control or supervision exercised by the company over the work of the individual.
- The greater the degree of control, the more likely the relationship is one of employment.

## INTEGRATION TEST

- The test looks at whether the work done by the individual is an integral or core part of the business of the company.
- If work done by the individual is not an integral part of the business but is more accessory to the business, then that is more likely to indicate an independent contractor relationship.

## FUNDAMENTAL / ECONOMIC REALITY TEST

- Considers how the individual engages themselves with the company to perform the services, including is the person in business on their own account, methods of payment, taxation arrangements and GST invoices. What are the indicators that the individual is in business on his/her own account?

## RELEVANT FACTORS CONSIDERED BY THE EMPLOYMENT RELATIONS AUTHORITY AND EMPLOYMENT COURT

1. Any industry practice which applies.
  2. What does the agreement between the company and the individual say?
  3. Have the terms of the contract been implemented by both parties in practice?
  4. What is happening in practice?
- Even if the agreement records the individual is engaged as an independent contractor, applying the above tests, the Employment Relations Authority and/or Employment Court will not consider that to be determinative of the “real nature of the relationship”. The intention of the parties is relevant but not decisive.
  - It is important to take expert advice to ensure you correctly document the nature of the relationship. Failure to do so can expose a company to significant costs if the real nature of the relationship is ultimately found to be one of employment.