

GUIDE TO LABOUR CONTRACTING



Why use this guide?

Contracting with another business to provide labour is a common business practice. Some business owners contract another business in order to focus on their core business, or to gain access to specialised skills such as cleaning, security and bookkeeping when and where they need it.

When you contract another business to provide you with labour, the contractor you engage may hire new staff or have existing employees that carry out the services for you. Or they might subcontract the work to another business.

There are variety of ways workers could be engaged by your business, for instance by outsourcing work to a contractor who in turn engages workers as employees (the focus of this guide) or independent contractors, or a combination of both. A business could also engage staff through a third party labour hire service provider. It's good business practice to understand how the workers in your business will be engaged so you can mitigate against the risk of non-compliance with workplace laws.

It is important that you engage contractors who do the right thing by those employees by following workplace laws, which cover things like minimum wages, leave and other employment entitlements. This helps to protect your business against a number of significant risks including:

- ▶ damage to the reputation of your business – your bottom line may be affected if customers leave because your contractor broke the law.
- ▶ being held legally responsible for your contractor's actions – this is known as 'accessorial liability' and can result in your business facing financial penalties in court.



Accessorial liability – You can be liable if your contractors break the law

Businesses may be held legally responsible when their contractor (or subcontractor) is underpaying their staff. It's not just direct employers who can be held liable for contraventions such as underpayments – any person knowingly involved in contraventions could be found legally responsible. This could extend to directors, managers, accountants or other businesses involved in the supply chain.

Find out more about accessorial liability and what it means for individuals and businesses at www.fairwork.gov.au/about-us/news-media-releases/newsletter/august-2016/what-is-accessorial-liability.

You can help minimise your risks when engaging contractors by following these five easy steps:

1. Know the pay and conditions that apply
2. Ask potential contractors about their workplace practices
3. Check the contract price to make sure it's enough to cover wages
4. Set clear expectations
5. Make sure you know of subcontracting arrangements.

You can also adapt the templates at the end of the guide to suit your business:

- A. Questionnaire for potential contractors
- B. Sample contract clauses



Step 1: Know the pay and conditions that apply

Before you engage a contractor, it's a good idea to find out more about the pay and conditions that apply to the industry you're contracting work to. This will help you to make a more informed decision about which contractor to engage, as well as assist you to spot any issues when reviewing quotes.

The key things you need to know are:

- ▶ the pay rates, penalties and allowances for the relevant industry
- ▶ the National Employment Standards which cover leave entitlements.



Practical Tip – Check your knowledge with the Workplace Basics quiz

To check your knowledge of workplace laws, start with using the FWO's Workplace Basics quiz. The quiz will provide you with tailored feedback and resource links to brush up on any areas you need help with. You can access the quiz at www.fairwork.gov.au/basicsquiz.



Step 2: Put your commitment to workplace compliance in writing

Before you select a contractor, you can find out more about their workplace practices by asking them about these as part of the tender process. You can use the *Questionnaire for potential contractors* at the end of this guide to help you. You can also add extra questions which might be relevant to your business, or request further details/records.



Practical Tip – Verify your contractor's workplace compliance

When checking your potential contractor's answers to the *Questionnaire for potential contractors*, flag any areas of concern and discuss these with them. If unsure, it might be a good idea to seek advice from your employer association or workplace relations professional.



Step 3: Check the contract price to make sure it's enough to cover labour costs

Wages are often a major part of all quotes or tenders. When you're considering a quote or negotiating a contract, it's important to understand the cost of employment to ensure that the contracted price adequately covers the contractor's labour costs. Your contractor will also have overheads, and needs to make a profit to be sustainable.



Practical Tip – Use our Pay and Conditions Tool

The FWO's Pay and Conditions Tool (PACT) calculates base pay rates, allowances and penalty rates (including overtime). Knowledge of pay rates and entitlements will allow you to easily identify possible workplace compliance issues in the proposed contract. You can access PACT at www.fairwork.gov.au/pact.



Step 4: Set clear expectations

When you engage a contractor, it's a good idea to let them know upfront that you expect them to comply with workplace laws. Businesses tell us that setting out expectations from the start reduces the risk of problems in the future. You can make your expectations clear by including contract requirements to:

- ▶ comply with the *Fair Work Act 2009* and the *Fair Work Regulations 2009*
- ▶ allow you to conduct random inspections of the contractors' employment records to verify compliance
- ▶ carry out regular self-audits to verify compliance

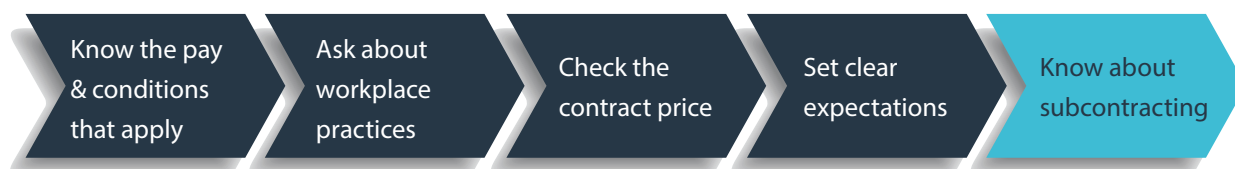
You can adapt the *Sample clauses* for contractors at the end of this guide.



Practical Tip – Written employment contracts

One way you set clear expectations is to include a clause in your contract that requires the contractor to have written employment contracts with all of their employees. Written employment contracts set out the terms and conditions of employment. They can prevent future disputes by ensuring that both the employee and the employer have clear expectations of the employment relationship. There are free letter of engagement templates available at www.fairwork.gov.au/templates.

We also recommend you encourage your contractors to self-audit their business regularly. They can do this by following the five easy steps in our *Guide to self-auditing your business*.



Step 5: Make sure you know about any subcontracting arrangements

It's good business practice to know who your contractors are subcontracting to. Sometimes businesses find out that there are more levels of subcontracting than they realised. Having visibility of subcontracting helps you keep track of where the money you have allocated for the work is going to and ensures that it is reaching the people you intended it for.

The best way to address this risk is to require your contractors:

- ▶ get your approval prior to engaging any subcontractors, or
- ▶ notify you of any new subcontractors.



Case study – Know when your work is subcontracted

Louise, who owns a large grocery store decides to contract out the daily cleaning of the store. After making a few calls and sending emails to check quotes, Louise decides to go with Tidy Cleaners as they can clean the store for the cheapest price. Louise isn't told that Tidy Cleaners intends to subcontract the work out to 'Suburban Cleaners'.

Months later, an audit from the Fair Work Ombudsman finds Suburban Cleaners isn't paying its workers correctly. Louise is shocked that a cleaner in her store is being underpaid by a subcontractor she hasn't heard of.



Baiada Group Case Study – Proactive Compliance in Action

It's always a better option to implement systems to safeguard you from non-compliance than to have to take corrective action when things go wrong. Many businesses are getting on the front foot with their supply chain compliance by introducing innovative measures to ensure they have the necessary governance arrangements in place to prevent non-compliance.

One such business is the Baiada Group. Baiada is a privately owned Australian company which provides premium quality poultry products throughout Australia. In 2013, a number of employees raised concerns that they were being underpaid by subcontractors. After inquiries conducted by the Fair Work Ombudsman, Baiada entered into a compliance partnership to help address the issues and prevent future non-compliance within their supply chain network. Baiada has continued to make significant progress and has instigated further changes to its contracting processes to more easily detect and respond to non-compliance.

The initiatives Baiada have taken to help address these issues include:

- ▶ establishing and maintaining a telephone hotline and email service that enables all current workers, former workers and members of the public to make enquiries, lodge complaints or report potential non-compliance with workplace laws
- ▶ ensuring all workers are issued with an ID card which includes their full name, the employing entity's name and the employing entity's ABN
- ▶ implementing an electronic time-keeping system to monitor and maintain accurate records of the start and finish times of workers
- ▶ terminating the services of some contractors for failing to comply with workplace or taxation laws
- ▶ conducting workplace relations training programs for all supervisors, managers and staff
- ▶ engaging a third party auditor to conduct a self-audit of compliance with workplace laws
- ▶ investigating underpayment claims and overseeing the back-payment of workers
- ▶ requiring contractors to outsource all payroll services to a Baiada-approved entity
- ▶ significantly reducing the number of contractors engaged at its processing sites and prohibiting further subcontracting by its contractors.

Baiada's Managing Director Simon Camilleri says that the Proactive Compliance Partnership with the Fair Work Ombudsman is a core priority for the company.

We are committed to protecting the rights of contractors' employees at our sites. That's why we introduced a stringent contractor compliance system that is enforced across all our processing locations.

In addition to identifying and rectifying breaches, our systems help us to anticipate where future non-compliance may occur so we can take preventative action.

Baiada will continue to be proactive to ensure contractor compliance across our supply chain.

Need further help?

For guidance on how to manage any contracts you have in place, check out our **Guide to monitoring your labour contracting**.

You or your contractors can use our **Guide to self-auditing your business** to ensure you're complying with workplace laws.

Both guides are available at www.fairwork.gov.au/supplychain.

For tailored advice and assistance, you can contact ASIAL on 1300 127 425 or visit www.asial.com.au.

Template A: Questionnaire for potential contractors

Instructions for using this template

You can use this template to help you identify if potential contractors are complying with workplace laws.

Suggested steps for using this questionnaire

Step 1: Before you select a contractor

Ask potential contractors to complete this questionnaire as part of their response to your request for quote. You can then take their answers into account when selecting a contractor.

In addition, ask potential contractors to provide evidence to support their answers (eg. sample pay slips) and to complete a statutory declaration stating that all information that they have provided in the questionnaire is true and correct.

You might also choose to provide potential contractors with information about their obligations under workplace laws. Our range of free tools and resources are available at www.fairwork.gov.au.

While this questionnaire currently only includes questions about compliance with the *Fair Work Act 2009* and *Fair Work Regulations 2009*, you could choose to include questions about compliance with other workplace laws (eg. workplace health and safety, workers' compensation, superannuation, equal opportunity and privacy).

Step 2: After you select a contractor

Once you've selected your contractor, you may also ask them to complete the Fair Work Ombudsman's *Guide to self-auditing your business* (eg. once every six months). Ask them to notify you if any of the answers that they've given in the questionnaire change at any time.

Questionnaire

Subcontracting	Response	Optional further details
<p>Do you subcontract any of the services you provide to us?</p> <p>If yes, briefly state why they are independent contractors rather than employees. Find out more at www.fairwork.gov.au/contractors.</p>		List independent contractors and the services they provide.
Do you monitor your subcontractor's compliance with workplace laws?		
Employee entitlements	Response	Optional further details
<p>Do you directly employ any staff to carry out the services you provide to us?</p> <ul style="list-style-type: none"> ■ If yes, please list the award or registered agreement that applies to them. ■ If they're not covered by an award or registered agreement, are you paying these employees the National Minimum Wage? 		List employees engaged to carry out the services you provide to us and what they are covered by (eg. award, registered agreement).
Are you providing your employees with all of their entitlements under their award or agreement (eg. base pay rate, casual loading, penalties, overtime, allowances, leave, meal and rest breaks)? Find out more at www.fairwork.gov.au/employeeentitlements		Provide a sample of payroll records within the last pay cycle (eg. timesheets, pay slips, rosters).
Do you provide all of your employees with a copy of the Fair Work Information Statement when they start work with you? Find out more at www.fairwork.gov.au/fwis		Provide a sample of a pay slips from the last pay cycle.
Do you provide all of your employees with their entitlements under the National Employment Standards (eg. annual leave, sick/carer's leave, compassionate leave, parental leave, long service leave)? Find out more at www.fairwork.gov.au/nes		Provide a sample of payroll records from the last pay cycle (eg. leave records, records of hours worked/ timesheets).

<p>Do you keep employee records:</p> <ul style="list-style-type: none"> ■ for seven years ■ in a format that is readable, in English and readily accessible ■ that contain all details required? <p>Find out more at www.fairwork.gov.au/recordkeeping</p>		<p>Provide a sample of payroll records from the last pay cycle (eg. records of hours worked/timesheets, rosters, leave records).</p>
<p>Do you give your employees pay slips:</p> <ul style="list-style-type: none"> ■ within one working day ■ that contain all details required? <p>Find out more at www.fairwork.gov.au/payslips</p>		<p>Provide a sample of a pay slips from the last pay cycle.</p>
<p>Do you let your employees decide whether or not to join a union?</p> <p>Find out more at www.fairwork.gov.au/employee-entitlements/industrial-action-and-union-membership/union-membership</p>		

Compliance history	Response	Optional further details
In the last 5 years, have you or your business been investigated by the Fair Work Ombudsman?		
In the last 5 years, have you or your business been involved in any court proceedings in relation to non-compliance with workplace laws?		
In the last 5 years, have you or your business had any compliance issues relating to superannuation or workplace health & safety?		
If yes, please provide details.		

Questionnaire completed by:

Name: _____

Position: _____

Company: _____

Date: _____

Template B: Sample clauses for contractors

Instructions for using this template

You can use this template to help you identify if potential contractors are complying with workplace laws.

To help you complete the questionnaire you simply need to replace the < insert tag > with the information applicable to your employee and situation.

Explanatory information is shown in **[bold]** to assist you and should be deleted once you have completed the agreement.

Suggested steps for using these sample clauses

- You can use one or more of these sample clauses in your contracts with your contractors to require them to comply with workplace laws.
- As with any commercial arrangement, you should get independent legal advice before entering into contracts with your contractors. In particular, you should get independent legal advice about how these sample clauses interact with the other clauses in your contracts. You should also get independent legal advice if you intend to rely on these clauses to terminate the contract.
- While these clauses currently only relate to compliance with the *Fair Work Act 2009* and *Fair Work Regulations 2009*, you could choose to include clauses relating to compliance with other workplace laws (eg. workplace health and safety, workers' compensation, superannuation, equal opportunity and privacy).

Sample clauses

1. **[Where you used the Questionnaire for potential contractors]** The Contractor warrants that all information provided to the Business *[meaning you]* during or in connection with the tender process was accurate, current and complete at the time at which it was provided, including but not limited to information about its workplace policies and practices, compliance with its obligations under the *Fair Work Act 2009* and *Fair Work Regulations 2009* and contract management practices.
2. **[Where the questionnaire for potential contractors was used]** During the term of the Contract, the Contractor must notify the Business in the event of material change to any of the information provided to the Business during or in connection with the tender process, including but not limited to information about its workplace policies and practices, compliance with its obligations under the *Fair Work Act 2009* and *Fair Work Regulations 2009* and contract management practices.
3. During the term of the Contract, the Contractor must comply, and take all reasonable steps to ensure that its subcontractors comply, with all applicable obligations under the *Fair Work Act 2009* and *Fair Work Regulations 2009*.
4. Within < insert time > of the commencement of this Contract, the Contractor will communicate the following information to employees and as far as practicable to all of the employees of its subcontractors:
 - a) A specified representative of the Contractor that employees, including employees of subcontractors, are invited to contact if the employees have any concern about the payment of wages, loadings, allowances and penalties owed to them for any work performed during the term of the Contract; and
 - b) Where to access further information about workplace rights and entitlements including www.fairwork.gov.au or the Fair Work Infoline 13 13 94.
5. During the term of the Contract, the Contractor must provide the Business with any information that the Business reasonably requires to confirm that the Contractor is complying, and as far as practicable that its subcontractors are complying, with all applicable obligations under the *Fair Work Act 2009* and *Fair Work Regulations 2009*.
6. During the term of the Contract, the Contractor will undertake audits < insert frequency > to determine that the correct wages, loadings, allowances and penalties have been paid to its employees, and the Contractor will rectify any underpayments within < insert time > of identifying the underpayment.
7. During the term of the Contract, the Contractor must inform the Business of any:
 - a) compliance action taken by the Fair Work Ombudsman, including but not limited to penalty infringement notices, compliance notices, enforceable undertakings, proactive compliance deeds or court orders; or
 - b) the court orders; arising from non-compliance with the *Fair Work Act 2009* or *Fair Work Regulations 2009* by the Contractor, and any remedial action that the Contractor is required to take, has taken or proposes to take as a result of the compliance action or court order.

8. During the term of the Contract, the Contractor must actively and cooperatively participate in all compliance activities associated with its obligations under the *Fair Work Act 2009* and *Fair Work Regulations 2009*, including but not limited to participating in investigations of workplace complaints and audits undertaken by the Fair Work Ombudsman or other regulatory agencies.
9. The Contractor must not subcontract or assign the Contract or any part of it without the written approval of the Contractor.
10. The Contractor must ensure that all subcontracts impose obligations on subcontractors equivalent to the obligations under clauses < insert clause number > – < insert clause number > above.
11. The Contractor must commit all necessary resources, financial or otherwise, and meet all necessary expenses associated with the effective implementation of the requirements of clauses < insert clause number > – < insert clause number > above.
12. The Business reserves the right to terminate the Contract in the event that the Contractor fails to comply with any of the above clauses.

Disclaimer: The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this guide is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.