



Employees vs Independent Contractors

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Introduction

This document aims to provide editors with guidance to determine when they are independent contractors or employees in any particular engagement.

The determination as to whether an editor is an independent contractor or employee is usually relevant in the context of determining the parties' rights and obligations in terms of labour and tax legislation.

It is important to note at the outset, however, that the determination as to whether an editor is an independent contractor or employee differs in terms of labour and tax legislation. This can lead to much confusion, as an editor can be an independent contractor in terms of labour law and an employee in terms of tax legislation.

Since there is confusion about when someone is truly an independent contractor or rather an employee, we would like to bring the Basic Conditions of Employment Act (BCEA) to the attention of our members.

Contracts available

SAGE has invested in a contract designed specifically for Independent Contractors, which can be found on our website.

SAGE members who would like to use a standard employee contract should consider the template available on this website.

At the start of a project, editors and producers should aim to reach agreement regarding the nature of their relationship. In other words, it would be ideal for the parties to determine whether they intend to have a relationship as independent contractor/client, or whether it should be a relationship of employee/employer.

This determination, however, must be done in relation to each engagement. Most important, though, is the fact that the actual circumstances of the engagement will determine whether the editor will be considered to be an employee or an independent contractor (in terms of applicable law), and not the label the parties attach to the engagement. A court or tribunal tasked with assessing the relationship of the parties will consider the substance, and not the form, of the engagement.

Set out below is a list of comparative indicators that can be used in making such determination. Please note, however, that no single factor in the list is decisive – in the context of any single engagement, consideration must be given to all of the factors.

A quick comparison

A quick comparison of indicative factors as to whether the parties are in a relationship of independent contractor/client or employer/employee.

Employee	Independent Contractor
Works for only one employer at a time	Generally provides services to more than one person or company at a time
Works the hours set by the employer	Sets his or her own hours
Usually works at the employer's place of business and uses their equipment	Works out of his or her own office or home and uses own equipment
Is entitled to annual and sick leave	Is not entitled to any leave
Often receives employment benefits, such as medical aid or bonuses	Does not receive employment benefits from the employer
Works under the control and direction of the employer	Works relatively independently
Receives a net salary after employer has deducted income tax and UIF	Is a provisional taxpayer and responsible for paying his or her own taxes

The Basic Conditions Of Employment and Labour Relations acts

The Labour Relations Act (LRA) defines an employee as:

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

Paragraph (b) of the definition was intended to prevent employers from evading the provisions of labour legislation by concluding contracts that would be considered as independent contractors contracts as opposed to employment contracts.

Section 200A of the LRA and Section 83A of the Basic Conditions of Employment Act (BCEA) create a series of rebuttable presumptions as to who is an employee, which applies to all workers earning below the prescribed threshold each year.

Therefore, according to Section 200A of the LRA, unless the contrary is proved, a person who works for or renders services to any other person is presumed, regardless of the form of the contract, to be an employee if any one or more of the following factors are present:

- The manner in which the person works is subject to the control or direction of another person;
- A person's hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organisation, the person forms part of that organisation;
- The person has worked for that other person for an average of at least 40 hours per month over the last 3 months;
- The person is economically dependent on the other person for whom he or she works or renders services;
- The person is provided with tools of trade or work equipment by the other person;

- The person only works for or renders services to one person;
- A person who falls within one of the above categories is also entitled to approach the CCMA if there is a dispute with the employer.

Since Independent Contractors are excluded from the BCEA and the LRA, they would not be entitled to:

- Annual leave,
- Sick leave,
- Claim unfair dismissal.

The BCEA makes no differentiation of the following terms:

Temporary employees, part-time employees, fixed term contract employees, flexi-time employees or any other terms which are sometimes used to describe the services editors render to a producer or production company.

These terms are often devised by the employer, but the BCEA itself simply refers to “employees”. There are only two exceptions, “independent contractors” and “senior managerial employee”. The latter is defined by the BCEA as a person who has the authority to hire, discipline and dismiss employees, and to represent the employer internally and externally.

An employee typically signs a contract with the employer, usually at the start of a new job. However, please note that when there is no written contract, all terms and conditions of the BCEA will still apply.

In contrast, an independent contractor doesn't have a contract of employment but a contract of work. This contract is defined as follows:

“The letting/hiring of piece work is a reciprocal contract between an employer and an independent contractor in terms of which the latter undertakes to build, manufacture, repair or alter a corporeal thing within a certain period and the employer undertakes to pay the contractor a reward in return therefore.”

For example, a plumber, painter or electrician is a true independent contractor. They give the prospective client a quote for a specific job, which the client has to accept and then pay after the job is completed. When the quote is accepted the two parties enter into a contract of work, which ends when the job is done.

A true independent contractor:

- Is a registered provisional taxpayer;
- Determines his/her own hours;
- Runs his/her own business, or trade in their own name;
- Is free to carry out work for more than one employer at the same time;
- Invoices the employer for each project and is paid accordingly;
- Is not subject to the deduction of PAYE or UIF from his/her invoice, will not receive any allowances, medical aid or bonus, and will not be eligible for any kind of leave.

The Dominant Impression Test

In order to assist with the distinction between an employee and an independent contractor, the courts have formulated the dominant impression test. The following factors are considered in determining an employee:

- Whether a specific result must be produced or a personal service must be provided on an ongoing basis.
- Whether or not the work is supervised by the “employer”.
- Whether the contract is terminated by the death of the “employee”.

The dominant impression test was accepted by the Labour Appeal Court in *SABC v McKenzie*.

Some of the important characteristics of the contract of employment and the contract of work (independent contractors) are:

1. The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract. In contrast, the object of the contract of work is the performance of a certain specified work or the production of a certain specified result.
2. According to a contract of service, employees will be subservient to the employer and render their personal services at the behest of the employer. Independent contractors, on the other hand, may hire others as assistants or employees to perform the work or to assist them in the performance of the work.
3. The independent contractor is bound to perform a certain specified service or produce a certain specified result within a time fixed by the contract of work or within a reasonable time where no time has been specified.
4. The employee is managed by the employer and is obliged to follow the lawful commands, orders or instructions of the employer. The independent contractor, however, is on an equal footing with the employer and is bound to the terms of the contract of work. Independent contractors are not under the supervision or control of the employer, nor are they under any obligation to obey any orders of the employer in regard to the manner in which the work is to be performed.
5. A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work does not necessarily terminate it.
6. A contract of service terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result.

Additional criteria to assist in determining the true relationship between the parties:

1. *The contract*
Usually a contract states the intention of the two parties to the contract, stipulating whether it is an employer/employee relationship or an independent contractor relationship. The courts will not accept a contract at face value, but will investigate the true nature of the relationship and will not bind themselves to what the parties have chosen to call the relationship, even when the contract emphasises throughout that the relationship is that of an independent contractor.
2. *The entrepreneurial nature of self-employment*
The courts will examine the circumstances of an independent contractor. Usually, an independent contractor will have an established business, such as a closed corporation or company, be responsible for all the risks, profit and loss, and will have more than one client.
3. *The risk of profits and losses*
An employee is unlikely to invest money into the business of the employer, or be liable for the failure of the

business. However, some companies might offer profit-sharing or profit-based bonuses for the employees. An independent contractor in contrast has to invest money in the equipment and resources of his/her own business.

4. *The personal nature of services*

Employees render their services personally to the employer, while independent contractors don't have to carry out the delivery of the agreed end result themselves, but are allowed to use their own employees to do so.

5. *Taxation*

An employer is obliged by law to deduct tax from the earnings of the employees. The employer doesn't have the same obligation with respect to independent contractors. Independent contractors are responsible for their own tax liability. Sometimes there are exceptions to the rule, like where an employee elects to be responsible for his/her own tax liability or an independent contractor may prefer the client to deduct tax from his/her invoice.

6. *Fixed working hours and annual leave*

Usually, an independent contractor doesn't have fixed working hours, and doesn't receive paid annual leave.

On 1 December 2006, the Code of Good Practice: Who is an Employee? was published in GN 1774, in terms of sections 200A read with 203 of the LRA.

The purpose of the Code is set out in section 2, as follows:

- (a) to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act and other labour legislation;
- (b) to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee;
- (c) to ensure that a proper distinction is maintained between employment relationships which are regulated by labour legislation and independent contracting;
- (d) to ensure that employees - who are in an unequal bargaining position in relation to their employer - are protected through labour law and are not deprived of these protections by contracting arrangements;
- (e) to assist persons applying and interpreting labour law to understand and interpret the variety of employment relationships present in the labour market including disguised employment, ambiguous employment relationships, atypical (or non-standard) employment and triangular employment relationships.

The Code requires that any person who is interpreting or applying any of the following Acts, must take the Code into account for the purpose of determining whether a particular person is an employee, in terms of the LRA, the BCEA, the Employment Equity Act 55 of 1998 (EEA); or the Skills Development Act 97 of 1998 (SDA).

Fixed Term Contracts

A fixed term Contract of Employment terminates on a specific date or after the completion of a specific undertaking as determined in the contract. The contract is valid for a "defined period of time" and the termination date is "fixed" and usually not negotiable. There is no time limit on the period of validity of a fixed term contract, but the duration of employment should be clearly indicated.

If the services of the employee are required for a further period of time, a new contract can be entered into. The continuation of a fixed term contract is often referred to as "rolling over" when the original contract expires. However, a fixed term contract can't be renewed again for a third period. If the contract needs to continue, then a Contract of Permanent Employment should be offered.

The fixed term contract the employer should state whether benefits such as pension, medical aid, etc are applicable or not.

In 2015, an amendment to the Labour Relations Act (LRA) added protection to employees on fixed term contracts, especially those for a period of more than 3 months. Such a contract must give an indication to why the specific job is for a limited duration, must be in writing, and should also specify a "justifiable reason" for being a fixed term contract.

The LRA lists the following as examples of "justifiable reasons":

- Replacing another employee who is temporarily absent from work;
- A temporary increase in work volume which is not expected to endure beyond 12 months;
- A student or recent graduate who is employed to undergo training or gain work experience;
- Exclusive work on a specific project that has a limited or defined duration;
- A non-citizen who has been granted a temporary work permit;
- Seasonal work;
- An official public works scheme or similar public job creation scheme;
- The position is funded by an external source for a limited period;
- The employment of a person beyond the normal or agreed retirement age.

The LRA has also afforded additional provisions and protections to employees on fixed term contracts. However, please note that these are not intended for high earners, but to protect low earning employees from possible abuses. Employees who earn more than the relevant threshold determined by the Minister from time to time (currently about R205 00 per annum), are excluded. Small businesses employing less than 10 employees, or employers that employ less than 50 employees and whose business has been in operation for less than two years, are excluded.

Taxes

Any employee who works for more than 24 hours per month, should be paying UIF by law.

The employee contributes 1% of his/her gross salary to the Unemployment Insurance Fund (UIF) and the employer also contributes 1% of the employee's gross salary to UIF.

Any employee with a salary below the tax threshold, will only pay UIF and not yet Pay As You Earn (PAYE). You are liable to pay Pay As You Earn (PAYE) tax if you earn more than a nett monthly salary of about R5900¹ in the 2015 year of assessment, and are younger than 65 years of age.

Please note that even when an employer pays you per hour, regardless of the amount of money, if you work for more than 24 hours in a month for this specific employer, the employer is liable to pay UIF.

The South African Revenue Service (SARS) will consider you an employee if you answer yes to all of the following questions:

- Do you earn more than 80% of your income from this one company?
- Do you get paid the same amount every time and do you receive it at regular intervals, for example weekly or monthly?
- Do you work mainly from the company's offices?
- Do you have a manager at the company who supervises you and determines your working hours, and when you are allowed to take leave?
- Your employer will be responsible for deducting tax from the amount that they pay you, and must pay it over to SARS. They should then provide you with an IRP5. If they don't and are caught out, they will be facing a 10% penalty.

Remember that as long as you are considered an employee by SARS, the liability to deduct and pay over your tax to the taxman rests with your employer.

If you answered "no" to all of the questions above, SARS will regard you as an independent contractor or consultant. That means that you are responsible for paying your own income tax. You should also invoice each company you work for. Since PAYE will not be deducted from the amount you invoice for, you will have to file at least two provisional tax returns and make payments during the tax year.

The deadlines for filing provisional tax returns are the end of August and the end of February every year. On your provisional tax returns you will have to estimate your yearly income and pay tax on this, using the normal tax tables or a tax calculator. Depending on how much you earn every month, you might have to pay more tax on your provisional return than your earnings for that month. Remember that you might face penalties and interest if you underestimate your income on your provisional tax returns.

Your annual tax return might be slightly different, because it will be an accurate record of your actual income. You have to keep updated records of all the invoices that you issued, as well as proof of expenses incurred. You will be able to deduct the expenses you incurred to help you produce this income. SARS may ask to see these invoices and proof of expenses after you have submitted your annual tax return, and it is advised to keep records for at least 5 years.

Please note that if you have received income as an independent contractor as well as an employee both these sources of income must be reflected on your tax forms.

¹ The exact amount will differ from year to year.

More information about Provisional Taxes is available on the [SARS website](#):

- [SARS tax types](#)
- [Guide for provisional tax](#)
- [Employees' Tax: Independent Contractors](#)

25% PAYE vs income tax table

25% Pay-As-You-Earn is usually deducted by the employer when an employee has only worked for a short period of time on a specific project.

It applies to non-standard employees who work for less than 22 hours per week for the specific employer.

The following people are exempt from this:

If an employee works regularly for less than 22 hours per week and provides the employer with a written undertaking that he or she does not work for anyone else, then they will be regarded as being in standard employment and tax must be deducted according to the normal weekly or monthly tables.

An employee who is in standard employment (in other words, who works for one employer for at least 22 hours per week).

This income should be indicated under code 3616, which is the same as for independent contractors, but the employer is responsible for deducting and paying PAYE. This enables the taxpayer to claim allowable expenses against the income earned. If the taxpayer is registered for VAT and provided a tax invoice, the 25% PAYE is to be deducted on the value of the invoice, thereby excluding VAT. This would then enable the taxpayer to claim allowable expenses against the income earned.

Tax assessments for employees

Once a year, your employer must issue you with an IRP5 tax certificate that shows your total earnings and the total tax that was deducted.

If you earn less than R120,000² a year, you don't have to submit a tax return provided certain criteria are met. Visit the SARS website for more information: www.sars.gov.za.

If you earn more than R120,000 a year SARS will do an assessment of your earnings when you submit your tax return, which must be submitted together with any IRP5 certificates to SARS.

SARS will then assess whether the correct amount of tax was paid. If you've paid too much tax, SARS will refund you.

Visit the [SARS website](#) for more information, and also see the [Guide on the Employers' Tax Responsibilities with regard to Artists/Models/Crew in the Film Industry](#).

² Please note that the exact amount varies from year to year.

Sources and additional information

- The [Basic Conditions of Employment Act](#)
- The [CCMA's Labour v Independent Contractor guide](#)
- Employee status
 - [Independent contractors](#)
 - [Contracts of Employment](#)
 - [Temporary employment in 2015](#)
 - Labourwise.co.za on [fixed contracts update](#)
- [Worklaw.co.za on Codes of Good Staff Practice](#)
- A generic [contract of permanent employment](#)
- Fin 24 on [SARS and independent consultants](#)