

Sham contracting findings released

11 November 2011

The Fair Work Ombudsman today released the findings of its audits into sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries.

The operational intervention began in April in response to intelligence from various sources and concerns raised by key stakeholders, including employee and employer groups and members of parliament.

Sham contracting occurs when an employer attempts to disguise an employment relationship as an independent contracting relationship, thereby avoiding obligatory rates of pay and other entitlements, giving it an unfair competitive advantage.

Fair Work Ombudsman Nicholas Wilson today released a 25-page statement of findings on the Agency's assessment of almost 450 working relationships.

The Fair Work Ombudsman found a number of trading enterprises engaged contractors who should more properly have been classified as employees.

While Fair Work inspectors found that most of these arrangements were not deliberate, they did identify a number of employers whom they believe knowingly or recklessly misrepresented the employment relationship to their workers as one of independent contracting.

Legal action is being considered in some instances.

The Fair Work Ombudsman found misclassification of employees in each of the three industries scrutinised, but does not believe the problem is confined to these industries alone.

Misclassification can lead to a contravention of the National Employment Standards (NES), minimum wage orders and terms of a Modern Award or Enterprise Agreement.

It can also result in contraventions of employer obligations to provide employee records and pay slips and may expose employers to back-payment of outstanding entitlements.

The report calls for employers to exercise a greater degree of diligence over their contracted labour arrangements.

"It is difficult to see how a cleaner performing simple work for a single principle contractor who wears their uniform, operates their equipment and accepts little or no commercial risk can be defined as anything other than an employee," the report says.

"Similarly, while call centre workers may well be genuine contractors involved in supporting specialist products for which they have unique expertise, many call centre environments involve workers engaged in rigidly organised shift work and strictly enforced break periods and who are required to stick to tightly scripted conversations. It is difficult to see how workers in these circumstances exercise control over their own work and can be considered to be running their own businesses in an effort to make a profit."

The report says the Fair Work Ombudsman has also received complaints regarding "rent a chair" contracting arrangements in hair dressing salons and received concerns about the legitimacy of contracted massage therapists in day spas.

"While these occupations may require specific training or even formal qualifications, the degree of control over the working arrangements can result in these workers being assessed as employees," it states.

The report expresses concern that some parties may be complicit in avoiding their workplace relations responsibilities by knowingly entering into commercial arrangements with lowest-cost providers, resulting in the procurement of workers on below-award rates of pay.

"Turning a corporately-sanctioned 'blind eye' to outsourced work that is performed by another enterprise using contractors on below-award rates of pay may expose enterprises up the procurement chain to liability," the report states.

"All parties should undertake due diligence when outsourcing work to contracted workers, particularly to lowest-cost providers, to ensure lower costs are attributable to efficiencies in the business and not due to the potential exploitation of workers on below-award rates."

A number of employers had received advice from accountants on how to structure their operations and it appeared the legality or

appropriateness of the arrangements under relevant workplace laws was often not considered.

Employers and workers seeking advice or assistance regarding independent contracting and sham contracting can visit the Fair Work Ombudsman's website at www.fairwork.gov.au/contractors (www.fairwork.gov.au/find-help-for/independent-contractors) .

They can also contact the Fair Work Infoline on 13 13 94. An interpreter service is available by calling 13 14 50.

- [Report on the preliminary outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention \(PDF 425.5KB\)](http://www.fairwork.gov.au/ArticleDocuments/763/Report-on-the-preliminary-outcomes-of-the-Fair-Work-Ombudsman-Sham-Contracting-Operational-Intervention.pdf.aspx) (www.fairwork.gov.au/ArticleDocuments/763/Report-on-the-preliminary-outcomes-of-the-Fair-Work-Ombudsman-Sham-Contracting-Operational-Intervention.pdf.aspx)
- [Report on the preliminary outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention \(RTF 418.4KB\)](http://www.fairwork.gov.au/ArticleDocuments/763/Report-on-the-preliminary-outcomes-of-the-Fair-Work-Ombudsman-Sham-Contracting-Operational-Intervention.rtf.aspx) (www.fairwork.gov.au/ArticleDocuments/763/Report-on-the-preliminary-outcomes-of-the-Fair-Work-Ombudsman-Sham-Contracting-Operational-Intervention.rtf.aspx)

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For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94

Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94

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