

New gateway test to be introduced for determining whether a worker is a contractor or employee

The Workplace Relations and Safety Minister has signalled upcoming changes to the Employment Relations Act 2000

On 15 September 2024 the Workplace Relations and Safety Minister (**WRS Minister**) said there would be upcoming changes to the Employment Relations Act 2000 (**Act**) to provide a new test to determine whether a worker was a contractor or employee.

Those upcoming changes would be to have a gateway test into the Act, which would be used by workers and businesses in determining whether a worker was an employee rather than contractor. If all factors in the gateway test were met, the worker would be considered a contractor.

Criteria in the gateway test

The criteria under the gateway test would be:

- A written agreement with a worker, specifying that they are an independent contractor;
- The business does not restrict the worker from working for another business (including competitors);
- The business does not require the worker to be available to work on specific times of the day or days, or for a minimum number of hours; OR the worker can sub-contract the work; and
- The business does not terminate the contract if the worker does not accept an additional task or engagement.

Business uncertainty

The WRS has commented that the current process for workers challenging their employment status through the courts can be costly for businesses and increase business uncertainty in general. The purpose of the

upcoming changes would be to address and remedy those uncertainties.

Current law on the contractor and employee distinction

Recently, the law on determining whether a worker is a contractor employee has been tried before the Employment Court and Court of Appeal.

In 2022, Chief Judge Inglis of the Employment Court issued a decision that found four Uber drivers were in an employment relationship when carrying out work in driving for Uber – i.e. not a contractor (*E TŪ INC v RASIER OPERATIONS BV LTD & ORS* [2022] NZEmpC 192)

The Court of Appeal heard the appeal of that decision and in August 2024, concluded that the findings in the Employment Court's decision were correct (*RASIER OPERATIONS BV v E TŪ INC* [2024] NZCA 403).

These conclusions were reached with reference to the existing legal test for distinguishing employees from contractors, found in section 6 of the Act.

Current legal test under the Act

The legal tests that the Employment Relations Authority and Employment Court refer to in determining whether the true nature of the relationship is one of employment include:

- the intention test: the type of relationship the parties to the contract intended. This can normally be worked out from the wording in parties' written agreement (if there is one);
- the control vs independence test: the greater the control exercised over the worker's work content, hours, and methods, the more likely it is that a person is an employee;
- the integration test: this looks at whether the work performed by a person is fundamental to the employer's business; and

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- the fundamental/economic reality test: this looks at whether the contractor is a person in business on their own account.

Next steps

The WRS Minister has said that these changes are expected to be reflected in an Employment Relations Amendment Bill introduced to Parliament in 2025.

- The public will have the opportunity to make submissions on that bill after it has been introduced to Parliament and passed its first reading. There will be significant interest from trade unions and business advocacy groups.

Want to know more?

If you have any questions, please contact our specialist [Employment Team](#).