



## Meaning of ‘employee’ and ‘employer’ in the *Fair Work Act 2009*

These amendments introduce an interpretive principle for determining whether an individual is an ‘employee’ or a person is an ‘employer’ for the purposes of the *Fair Work Act 2009*.

### What has changed?

This measure amends the *Fair Work Act 2009* (the Act), to insert an interpretive principle that applies when determining the meaning of ‘employee’ and ‘employer’.

For the purposes of the Act, the terms ‘employee’ and ‘employer’ would be determined by assessing the real substance, practical reality and true nature of the working relationship, by considering the ‘totality’ of the relationship. Eligible high income earning individuals can ‘opt out’ of the application of the interpretive principle.

### What does this change mean?

This change will mean a fairer test applies when determining whether an individual is an employee or an independent contractor, or a person is an employer or principal. It means the practical reality of the working relationship will be considered, as well as the written terms of any contract governing that relationship.

The intention is to return to the ‘multi-factorial’ assessment previously applied by courts and tribunals to determine whether a relationship was one of employment. This test had been in place for almost 30 years prior to the High Court’s decisions in February 2022 in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. This change applies to most workers and businesses covered by the Act. Some workers and businesses will not be affected by this change, including those who are only national system employees and national system employers due to a state’s referral of powers to the Commonwealth. This change will also generally not affect the meaning of the terms ‘employee’ and ‘employer’ as used in other Commonwealth legislation.

In practice, most workers and businesses will not be affected by this change, as it will be very clear where someone is an employee compared to a contractor. For those working relationships where it is less clear, a fairer test will apply when determining a person’s status.

An individual who earns above a high income threshold (to be set by regulation) can 'opt out' of the new interpretive principle. The effect of 'opting out' is that the new interpretive principle would not apply to the relationship between the individual and the person who engages them for work. Instead, the nature of the relationship would be determined primarily by reference to the terms of the contract as required by previous High Court decisions. An individual who chooses to 'opt out' can later revoke that decision, in which case the new interpretative principle will apply to the relevant relationship.

## **When will this change come into effect?**

The new interpretive principle will commence on 26 August 2024, or earlier by proclamation.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>