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FREE GUIDE · EMPLOYMENT & HR COMPLIANCE

Employee or independent contractor? How the CCMA and SARS decide

In South Africa, calling someone an “independent contractor” doesn’t make them one. Labour law looks at how the relationship works in practice, and for people earning below the earnings threshold, it presumes they’re an employee if any one of seven factors is present. SARS applies its own tests to decide whether you must deduct PAYE. The two can reach different answers about the same person.

REVIEWED BY THE ELS TEAM

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AT A GLANCE

- The contract's **label doesn't decide** whether someone is an employee.
- Below the earnings threshold (R269,600.90 a year), **any one of seven factors** triggers a presumption of employment.
- **SARS applies separate tests** to decide whether you must deduct PAYE.
- Mislabelling can lead to **CCMA claims, unpaid UIF and COIDA, and PAYE liability**.

Why the difference matters

Getting it wrong affects both sides of the law:

- **Labour law:** an employee is protected against unfair dismissal and is entitled to BCEA minimums such as leave, notice and overtime pay. A "contractor" who is really an employee can bring those claims at the CCMA.
- **Contributions:** employers must register employees for UIF and the Compensation Fund (COIDA) and pay contributions.
- **Tax:** if SARS decides you should have deducted PAYE, you as the payer can be held liable for the tax you didn't withhold.

How labour law decides

The reality, not the label

The Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA) exclude independent contractors, but neither lets the contract's wording decide the question. The CCMA and the Labour Court look at the substance of the relationship. A contract titled "Independent Contractor Agreement" is evidence of what the parties intended, but it can be outweighed by how the work actually happens.

The presumption of employment (earning below the threshold)

Section 200A of the LRA and section 83A of the BCEA create a presumption. A person who earns below the earnings threshold (R269,600.90 a year from 1 May 2026) is presumed to be an employee if **any one** of these seven factors is present:

1. The way they work is subject to your control or direction.
2. Their hours of work are subject to your control or direction.
3. They form part of your organisation.
4. They have worked for you for an average of at least 40 hours a month over the last three months.
5. They are economically dependent on you.
6. You provide their tools of trade or work equipment.
7. They only work for, or render services to, you.

> **A presumption isn't the final answer.** It shifts the burden: once one factor is shown, it's up to you to prove the person is genuinely independent. The Code of Good Practice: Who is an Employee guides how this is applied.

Above the threshold: the dominant impression

For people earning above the threshold, the presumption doesn't apply, but the same questions still matter. The courts weigh up the whole relationship. They look especially at your right to supervise and control the work, whether the person is an integral part of your business, and how economically dependent they are on you.

How SARS decides

SARS isn't bound by a CCMA finding, and it asks a narrower question: must you deduct employees' tax (PAYE) from what you pay this person? Its approach is set out in Interpretation Note 17 (Issue 5).

The statutory tests

Under the Fourth Schedule to the Income Tax Act, a person is generally treated as **not** carrying on an independent trade if both of these apply:

1. **The premises test:** they must perform their services mainly at your premises; and
2. **The control or supervision test:** you control or supervise how they do the work or their hours.

There's an important exception. A contractor who employs three or more full-time employees in their business (who aren't connected persons) is generally not caught by these tests.

The common law tests

If the statutory tests don't settle it, SARS applies a "dominant impression" test similar to the one used in labour law. It weighs indicators such as control, who provides tools and equipment, whether the person is paid for results or for time, and whether they're free to work for others. SARS stresses that there's no simple checklist.

Labour law vs SARS at a glance

QUESTION	LABOUR LAW (CCMA, LABOUR COURT)	SARS
What's being decided	Is this person protected as an employee?	Must the payer deduct PAYE?
Starting point	Presumption of employment if one of seven factors is present (below the threshold)	Statutory premises and control tests, then the common law tests
Main factors	Control, hours, integration, economic dependence, tools, exclusivity	Premises, control or supervision, staff employed, overall dominant impression

QUESTION	LABOUR LAW (CCMA, LABOUR COURT)	SARS
If you get it wrong	Unfair dismissal claims, BCEA entitlements, UIF and COIDA	Liability for PAYE that wasn't withheld

Signs you may have an employee, not a contractor

- They work set hours that you decide.
- They work only for you, often for months on end.
- They use your laptop, email address and office.
- You tell them how to do the work, not just what result you need.
- They're paid a fixed monthly amount regardless of output.
- They appear in your organogram or team meetings like any staff member.

None of these alone is decisive, but several together point strongly to employment.

How to structure a genuine contractor relationship

If the relationship really is independent, make sure the paperwork and the practice both show it:

- **Define the deliverables,** not the hours. Pay for results or milestones where possible.
- **Let them control the method:** how, when and where they do the work.
- **Don't make them exclusive** unless there's a genuine commercial reason.
- **Expect them to use their own tools** and invoice you like a business.
- **Put it in writing,** with clear terms on scope, payment, confidentiality and who owns the work.

> **Paperwork must match practice.** A written agreement won't save a relationship that works like employment. But a clear agreement that matches reality is your best evidence if the question is ever raised.

Frequently asked questions

Can I avoid labour law by calling everyone a contractor?

No. The label doesn't decide the relationship, and below the earnings threshold the law presumes employment if any one of seven factors is present.

If the CCMA says someone is a contractor, does SARS have to agree?

No. SARS applies its own tests for PAYE purposes, and they can lead to a different answer.

What if I've been treating an employee as a contractor?

Take advice on your specific situation. The fix usually involves putting the relationship on a proper employment footing, but the tax and labour implications depend on the facts.

Get the right agreement in place

The ELS **Independent Contractor Agreement** is drafted to reflect a genuine independent relationship and confirms that you own the work you pay for. If the relationship is really employment, the **Employment Agreement** covers the BCEA's written particulars.

SEE THE CONTRACTOR AGREEMENT

TAKE THE FREE LEGAL HEALTH CHECK

INFORMATION, NOT ADVICE

ELS provides legal information, not legal advice. Nothing in this guide creates an attorney-client relationship. For advice on your specific situation, consult a qualified attorney. The law is stated as at 29 September 2026.

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