

Audit principles when TES and Independent Contractors are used on a Farm/Packhouse:

When starting the process of evaluation, one must determine and define the difference between a Temporary Employment Service (TES) and an Independent Contractor. Also, please remember that the audit is done against the SIZA Social Standard and not necessarily solely the Labour Legislation although SIZA tries to ensure that the standard requirements remain in line with legislation.

1. What does the law say?

To understand the important aspects related to the inclusion and/or exclusion of a particular service provider, one must understand the legal provisions which are aimed at defining a TES and along with the common understanding on the role of the independent contractor and the producer.

Chapter 11 of the Basic Conditions of Employment Act provides the following:	Section 33 of Sectoral Determination 13 provides further stipulations:
<ul style="list-style-type: none"> • For the purposes of this Act, a person whose services have been procured for, or provided to, a producer by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person’s employer. • Despite subsection (1), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person. • The temporary employment service and the producer are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that producer, does not comply with this Act or a sectoral determination. 	<ul style="list-style-type: none"> • For the purpose of this Determination, a farm worker whose services have been procured for, or provided to, a producer by a temporary employment service is employed by of that temporary employment service, and the temporary employment service is that person’s employer. • The employment service and the producer are jointly and severally liable to comply with this determination in respect of its farm workers. • If the employment service is in default of its obligation to make any payment in terms of this determination to a farm worker for a period of thirty days, the producer concerned becomes liable to make payment. • A producer that in terms of this clause makes any payment that is owing to a farm worker is entitled to recover such amount from the employment service.

1.1. What does the SIZA Social Standard say?

Social Standard:
The SIZA Social Standard makes provision to include both a TES and an independent contractor to ensure any organisation/company/structure who does identify itself as a TES, but fulfils the role thereof, will still be included in the audit scope to ensure the best possible mitigation of risk within that business.
Definition contained in Social Standard:
<i>Labour Service Provider – organisation/person that supplies labour to a business for a specific purpose. This will include services of a Temporary Employment Service and Independent Contractor.</i>
The Code Requirements stipulate:
8.3.3.1. The business shall establish a service agreement with Labour Service Providers establishing their respective legal responsibilities with regards to the labour supplied by the labour service provider.
8.3.3.2. The business shall take steps to ensure that the Labour Service Provider is adhering to the applicable legislation in terms of the workers supplied by him/her. The business shall act on any instances where non-compliance’s are detected.

More information on page 51 of the [SIZA Social Standard](#).

2. DEFINITIONS

2.1. Independent Contractor:

An independent contractor renders the service itself and does not provide labour to another. An independent contractor is a person or entity undertaking to perform a specific service or task and on completion of the task or production of the result, its producer pays the independent contractor for the result or product. There is no employment (or even co-employment) relationship between the producer and the independent contractor or any relationship between the employees of the independent contractor and the producer, i.e., the producer does not have any responsibility towards the management or oversight of the employee, which need to be specified in the agreement between the producer and the independent contractor.

As the independent contractor provides a service or product to a producer, that producer has no control over the contractors' employees. The parties merely agree on the outputs, timeframes and cost. Plumbers, electricians, building contractors and irrigation companies serve as examples in this regard.

2.2 Temporary Employment Services:

A temporary employment service (TES), commonly referred to as 'labour brokers' is a common service in agriculture. A TES provides staff to producers or other employers, but the TES remains the employer. Although a TES compensates the employees and is responsible for meeting all legal requirements applicable to the employer, the TES and the producer are jointly and severally liable for complying with legislation.

A TES is defined by law as a person who, for reward, procures for, or provides to a producer, other persons (employees) who render services to, or perform work for the producer; and whose employees are remunerated by the temporary employment service. A TES must legally register as an employer.

3. How does one establish if it is a relationship with a TES or an independent contractor?

EMPLOYEES OF A TES	EMPLOYEES OF AN INDEPENDENT CONTRACTOR
Provide labour directly to the producer.	Provides a service to the producer.
Subject to the producer's condition of services, health and safety rules and supervision.	Subject to the independent contractor's condition of services and supervision.
The producer monitors individual employees' performance after which feedback is given to the TES.	The independent contractor monitors the workers' performance against the service level agreement. Therefore the producer only monitors and evaluates the the independent contractor and not the worker directly.

4. How can you distinguish between a TES and an Independent Contractor?

The Labour Relations Act and the Basic Conditions of Employment do not cover a specific definition for Independent Contractors and therefore TES's often prefer to be identified as Independent Contractors to avoid certain legal responsibilities. There are seven (7) criteria that could form the basis for a rebuttable presumption as to whether an employment relationship exists. (If any one is present the employees' employer is a TES and not an Independent Contractor).

Temporary Employment Service	Independent Contractor
The manner in which the employee works is subject to the conditions of service, health and safety rules, management, or direction of the producer.	The conditions of service and management of the employee is delegated by the independent contractor and not the producer.
The employee's hours of work are subject to the conditions of service, management, or direction of the producer.	The hours of work are determined based on the task or service and are not directed or managed by the producer but by the independent contractor based on the need of the service/task rendered.
In the case where a person works for an organisation (in this case a producer), that person forms part of that organisation's policies and procedures and subjected to the client's health and safety rules.	The person (employee) does not form part of the policies, procedures, and conditions of services of the producer's business in any way and only provides a third-party service/task.
The employee has worked for the producer for an average of at least 40 hours per month over the last three months. The producer is responsible for managing the hours worked by the employee (i.e., recording of hours, determining and monitoring the hours, etc.).	There is not necessarily any time allocation for work, and it is determined by the service/task as set by the contractor – in other words, the management of hours is not done by the producer, but rather determined by the independent contractor (hours worked are based on job/task and are not monitored by the producer).
In principle the employee is economically dependent on the producer for whom he or she renders services at a given period.	The employee who renders the service is not fully economically dependent on the producer and has other producers he/she services at any given time.
The employee is provided with tools of trade or work equipment by the producer.	The tools and work equipment are provided for by the independent contractor.
The employee (or group of employees) only works for or renders services to one producer for a specified time (normally a production season such as harvest, packing season etc.). The TES may then have more/different teams rendering the same services to other producers.	The independent contractor who renders the service can service many producers and is not dependent on one producer. The independent contractor most likely has supervision for different teams at different sites.

**Remember to specify in the written agreement between the farm and the TES/Independent Contractor the relevant relationship.*

For Independent Contractors it is important that their duties must be detailed in the agreement, clearly stating who is responsible for the management of hours, the overall oversight of employees, the health and safety and management of hours. The agreement should also establish how employees will be paid, who received the remuneration and who is responsible for ensuring the remuneration is correct. It will furthermore be good practice to establish other factors that may be relevant, such as accommodation, travel, food, etc.