

Step One – Workforce Analysis

Generally, workers engaged by an organisation are either paid employees, independent contractors/consultants or unpaid workers, including volunteers.

Comprehensive information and advice on these categories of workers is provided by the Fair Work Ombudsman on website www.fairwork.gov.au and on the Fair Work Infoline 13 13 94. Two useful documents from the Fair Work Ombudsman, *Unpaid work fact sheet* and *Independent contractors and employees* are provided in full as Attachments One and Two to this Guide.

To analyse a workforce role in your organisation first you need to decide if it should be paid or unpaid. If unpaid, you next need to decide if it would be suitable and appropriate for a volunteer. In undertaking this analysis it is helpful to consider the particular characteristics of paid work, of lawful unpaid work and of volunteer work.

Characteristics of Paid Work

The key characteristic of paid work is that an employment relationship exists between the employee and the employer, bringing with it a range of mutual obligations and rights backed by law. This includes the right of the employee to be paid the legal minimum rate of pay for the type of work they are doing and minimum entitlements, for example, for various types of leave.

Determining whether or not an employment relationship exists is assisted by analysis based on asking several questions, as recommended by the Fair Work Ombudsman. These are:

- **What is the nature and purpose of the arrangement?** Does it involve productive work assisting with the operations of the business or organisation?
- **How long is the arrangement for?** The longer the period of the arrangement, the more likely the person is an employee.
- **How significant is the arrangement to the business?** Is the work normally performed by paid employees? Does the business or organisation need this work to be done? The more integral to the function of the business, the more likely it is that an employment relationship exists.
- **What are the person's obligations?** For example, how formal is the arrangement for the number of hours worked and when? Is there a roster? The more formal the arrangement the more likely it is that an employment relationship will be found.
- **Who benefits from the arrangement?** The main benefit from a genuine unpaid work arrangement should flow to the person undertaking the role. If the business or organisation is gaining a significant benefit from the person's work, an employment relationship is more likely to exist.

See Attachment One for further information.

Characteristics of Lawful Unpaid Work

Unpaid work covers people undertaking vocational placements, unpaid internships or work experience, participating in unpaid trials or Work for the Dole schemes, and volunteers.

Determining whether a not a person is lawfully engaged in unpaid work is assisted by asking the same questions as for determining whether an employment relationship exists. For example, in some cases a person might do some productive work to aid their learning which might appear to warrant them being paid. However an employment relationship is unlikely to be found to exist if the role is primarily observational, and the expectation or requirement to perform such activities is incidental to that learning experience, and is not primarily for the operational benefit of the business or organisation.

With respect to the benefits flowing from an arrangement, the main benefit from a genuine unpaid work arrangement should flow to the person undertaking the role.

See Attachment One for further information.

Characteristics of Volunteering

While a form of unpaid work, volunteering's unique characteristics are the subject of separate description by the Fair Work Ombudsman (see Attachment One) as follows:

A volunteer is someone who does work for the main purpose of benefitting someone else, such as a church, sporting club, government school, charity or community organisation. Volunteers are not employees and don't have to be paid.

As with work experience and internship arrangements, all relevant factors must be considered to determine whether a person is a genuine volunteer or whether, in fact, an employment relationship exists even though the worker is called a 'volunteer'.

Key characteristics of a genuine volunteering arrangement include:

- The parties did not intend to create a legally binding employment relationship
- The volunteer is under no obligation to attend the workplace or perform work
- The volunteer doesn't expect to be paid for their work.

The more formalised that volunteer work arrangements become (for instance if the volunteer is expected to work according to a regular roster) the greater the possibility that an employment relationship will be found.

It is less likely that an employment relationship will be found to exist where the volunteer work is undertaken for selfless purposes or for furthering a particular belief in the not-for-profit sector.

Volunteering Australia's Definitions and Principles of Volunteering also clarify the characteristics of volunteering as follows:

Definition of Formal Volunteering

Formal volunteering is an activity which takes place through not for profit organisations or projects and is undertaken:

- to be of benefit to the community and the volunteer;
- of the volunteer's own free will and without coercion;
- for no financial payment; and
- in designated volunteer positions only.

Principles of Volunteering

- Volunteering benefits the community and the volunteer;
- Volunteering work is unpaid;
- Volunteering is always a matter of choice;
- Volunteering is not compulsorily undertaken to receive pensions or government allowances;
- Volunteering is a legitimate way in which citizens can
- participate in the activities of their community;
- Volunteering is a vehicle for individuals or groups to address human, environmental and social needs;
- Volunteering is an activity performed in the not for profit sector only;
- Volunteering is not a substitute for paid work;
- Volunteers do not replace paid workers nor constitute a threat to the job security of paid workers;
- Volunteering respects the rights, dignity and culture of others; and
- Volunteering promotes human rights and equality.

It is important to note the dynamic nature of thinking in our community about what constitutes a lawful employment relationship versus lawful unpaid work and that the definition and principles of volunteering are the subject of ongoing examination and possible modification.

What is an Appropriate Volunteer Role?

Bearing in mind the characteristics of paid and unpaid work and of volunteering, volunteer involving organisations need to be mindful of why, when and how volunteers are recruited for, and remain in, various roles.

Organisations must ensure their commitment to engaging volunteers is not based on a desire to spend less on wages and employee-related costs. Rather - as covered in Step Two of this Guide – it is to enhance the capability and capacity to deliver services to the community and benefit to volunteers. Why pay for it when you can get it for nothing? should never be part

of the rationale for designing a volunteer role. Basically, if funds are available to engage a paid employee, then the position should be paid.

The following worksheets will assist in the process of assessing whether or not a role is suitable for a volunteer.

Worksheet One – What You Need to Consider

If your answers are mostly **Yes** in Worksheet One, then the role is almost certainly one for a paid worker.

What You Need to Consider		Yes	No
1	Is this role critical to the overall successful functioning of the organisation?		
2	Is the role closely aligned to an industrial award?		
3	Is it likely that an employment relationship could exist?		
4	Is the role more than 16 hours per week and ideally filled by one person?		
5	Is this a role that must be filled by a paid worker for regulatory, legal or industrial relation reasons?		
6	Does the non-effective performance of the role have any legal ramifications for the organisation?		
7	Does the non-effective performance of the role have any financial ramifications for the organisation?		
8	Does the non-effective performance of the role have any negative implications on the work of paid staff?		
9	<p>Is this a position for which funding has been obtained, sought or is available?</p> <ul style="list-style-type: none"> If it is a position for which funding has been sought and/or obtained then it would be appropriate to employ a paid worker. Where funding has been sought but not obtained or external funding has not been sought, it may be necessary to review budgets to determine if funding could be allocated. 		
10	Has this role ever been filled by a paid worker?		
11	Are similar roles filled by paid workers? Simply saying that an organisation cannot afford to pay a worker may not be lawful especially if an employment relationship is likely to exist		
11	Is this role normally a paid position in other not-for-profits?		
12	Would a person reasonably expect remuneration for this work?		

Source: Adapted from the Volunteering Australia publication: *Toolkit: Designing Volunteer Roles and Position Descriptions*

Worksheet Two – Is This a Suitable Role for a Volunteer?

If you answer **No** to any question in Worksheet Two, you may need to consider whether this is a suitable role for a volunteer.

Is this role suitable for a volunteer?		Yes	No
1	Does the role have intrinsic value to the volunteer and the organisation, taking into account motivation, perceived benefits and skill level needed to perform the job?		
2	Are there adequate and effective management supports for this role?		
3	Do the paid staff, board and clients of the organisation accept this as volunteer role?		
4	Did the paid staff, board and clients of the organisation have a role in determining the status of the position?		
5	Does the role add value to and not replace the work of paid staff in the organisation?		
	(NOTE: Worksheet One (see p.8) has been created to help you determine what will add value to your organisation, and can be found in the section How to Design a Role That Will Value Add.)		
6	<p>Can this role, in its entirety, be performed in less than 16 hours per week?</p> <p>When answering this question consider the following:</p> <ul style="list-style-type: none"> • How long is the arrangement for? How many weeks/months is this role likely to be required? The longer the period, the more likely that an employment relationship may exist. • How many working hours per week does this role require to be adequately resourced? i.e. are there any periods where the worker may be required for more or less than 16 hours per week? • The organisation should calculate the total hours required for the role over the expected term of engagement. If the average hours is greater than 16 hours per week over the term of the role, then an employment relationship may exist. Splitting the role between 2 or more workers may not absolve the organisation from an employment relationship. 		
7	Is this role significantly different to the role of paid workers?		
8	Will the client, organisation, and volunteer benefit from the role?		

Source: Adapted from the Volunteering Australia publication: *Toolkit: Designing Volunteer Roles and Position Descriptions*

Step Two – Designing Viable Volunteer Roles

A viable volunteer role achieves work outcomes that add value and are meaningful both for the volunteer and for the organisation.

Designing viable volunteer roles requires:

- Understanding of the motivations and expectations of volunteers,
- Understanding of the potential for and/or limits of volunteer involvement
- Knowledge of the evolving trends in volunteering service.

Volunteering ACT's research report *Selfless Service: The State of Volunteering in the ACT 2013* identified that volunteering *brought purpose and meaning to one's life, provided something enriching for oneself and that one main reason for volunteering is to make a difference.*

The report also found that *time pressures arising from work, family or study commitments* are the most significant barriers to volunteer engagement.

Reflecting both the need for meaning and to take account of time pressures, volunteers are selecting roles that take account of their skills and interests and that offer the flexibility to fit with busy schedules. They are also informed about their rights and responsibilities and are taking advantage of websites and social media to inform themselves about organisations' general culture and approach to volunteers.

Volunteering Trends

Corporate and team volunteering is a growing trend amongst Australian businesses. This has created a demand for team projects, activities that can be 'done in a day' and roles that take advantage of and enhance the skills of corporate volunteers. So:

- Volunteer Position Descriptions with corporate volunteers in mind should contain a section outlining the benefits an employer may receive when their employees volunteer, such as the enhancement of skills relevant to their paid roles, team-building and increased community awareness.

Virtual volunteering is another positive trend, offering a solution to people whose employers allow them to volunteer at their desk or for those with limited mobility or with travel time issues or for people who want to volunteer with an organisation that is not based locally. So:

- Make sure your Volunteer Position Descriptions identify whether these options are available to prospective volunteers. Doing so could greatly increase your volunteering pool.

A further trend is towards person-centred creation of volunteer roles to enable the inclusion of people who experience social isolation whether because of issues related to disability, culture or language. So:

- Consider whether a position can be broken down into two or more roles to take advantage of the diversity of volunteers.

Also as time pressures are the biggest barriers to volunteer engagement, people may seek a volunteering role they can undertake with their family or friends. So:

- If a volunteering role is one suitable for a family or a group of friends, make sure that is highlighted e.g. *This opportunity would be suitable for two friends to undertake together.*

Volunteer Roles to Add Value to Your Organisation

Volunteers add value to your organisation by bringing skills, knowledge and a willingness to make a positive contribution that open up new possibilities for your organisation. They take on responsibilities and contribute in a way that assists your organisation to carry out its objectives, and they also provide your organisation with resources that it wouldn't otherwise have.

Worksheet Three – What Will Add Value to Your Organisation?

This worksheet has been designed to help you determine where volunteers can add value in your organisation. Consider the questions on the left and fill in your answers on the right.

What sort of activities, skills and knowledge would 'add value' to the organisation and its services?	Your answers
What needs does your organisation have that are currently not being met?	
What else would you do if you had the time or resources?	
What else would you do if you had the right skills available to you?	
How could the core functions of your organisation be improved?	
What other organisational competencies does your organisation need to build?	
Which skills or new approaches would your staff and organisation benefit from learning most?	
How could you improve the quality of your internal activities and processes?	
How could you improve the quality of your services?	
What additional services would your clients value most?	

Source: Adapted from the Volunteering Australia publication: *Toolkit: Designing Volunteer Roles and Position Descriptions*

Step Three – The Value of a Volunteer Position Description

A written Volunteer Position Description is an organisation's most valuable tool for sourcing and recruiting suitable volunteers.

The effort an organisation puts in to the development of clear and up to date Volunteer Position Descriptions is rewarded through the volunteer service of people with the right qualifications, skills and aptitude for their roles.

A well written Volunteer Position Description will attract volunteers to your organisation because it demonstrates a thoughtful approach towards, and respect for, their contribution.

Your organisation will benefit from the process of writing Volunteer Positions Descriptions because:

- It makes everyone think about the work to be done. Is there really enough for a volunteer to do? Or is it too much for one person? Who will provide the supervision, training and support?
- Listing the prospective volunteer's responsibilities and tasks helps identify the best person for the role.

When written, the Volunteer Position Description:

- Enables the organisation to discuss the role completely and consistently with prospective volunteers, encouraging people to 'self-screen' and take into account their abilities and willingness to undertake the role, and
- Becomes the basis for supervision and assessment of the contribution of the volunteer. Are they doing the tasks outlined in their Volunteer Position Description and to the expected standard? Have the outcomes and goals been achieved and are they worthy of particular recognition?

Volunteer Position Description Template

A well-considered, current position description is a concise, informative summary of a volunteer role. Worksheet Four is an example of a useful position description template. Completion of the template with the following suggestions in mind will provide your organisation with practical, fit for purpose documentation.

Position Title

Give each volunteer role a title that reflects the content of the project/ assignment.

- Examples are: Tutor, Picnic Coordinator, Traffic Marshall.

If the volunteer is going to be in charge of something, the title should reflect that.

- Examples are: Area Coordinator, Project Officer, Team Leader

Position Supervisor

Provide details of the person the volunteer will report to and be supervised by - provide the name of the supervisor and their title.

- Examples are: Jill Citizen, Event Manager; Bill Jones, Volunteer Coordinator.

Location

Where will the volunteer work?

- Be specific, especially if the position is located away from the organisation's principal office.

Time Commitment

Ensure the volunteer has a clear understanding of the hours of work required for the position and how they may be scheduled.

- Will they be required to work to a roster and how fixed/flexible is it?
- Are there minimum hours per week or month to be worked?
- If the role is ongoing, what is the minimum acceptable commitment?
- Confirm any known leave plans with the prospective volunteer.

Description of Position

Provide details of the project or purpose of the assignment. Fully state the organisation's need for, and expectations of, the volunteer role. Be clear on the role's demands so that a prospective volunteer knows what they are committing to and can be confident of doing the job well.

If the role involves additional or varying duties from time to time (e.g. to take advantage of a skills development opportunity or in case of another's absence) consider including an enabling clause in the Volunteer Position Description such as *other duties, as may be required*.

Outline of Volunteer's Responsibilities or List of Tasks

State clearly what the volunteer will be doing, so that both the potential and the limitations of the role are clear.

- Ensure the list of tasks is up to date to accurately reflect the role's current contribution to your organisation.
- Aim to outline as many activities as possible e.g. specific tasks, participation in meetings, other staff the volunteer may need to liaise with.

Qualifications and Experience

Describe any essential or desirable qualifications and any relevant skills or experience required for the position. Be clear about any particular personality or character traits that would prove useful in the position. Outline any physical demands that the role may require e.g. lifting, pushing a wheelchair.

Outcomes and Goals

Identify how the organisation and the volunteer will know that their project or assignment is achieving the desired purpose. How can the volunteer provide or be provided with feedback on their work? Will the organisation offer the volunteer opportunities to evaluate their work or have it evaluated?

Training and Support Plan

Identify any pre-requisite training required for the position and how and when that will be arranged.

- Identify the induction process and when that will be undertaken and by whom.
- Identify how on-the-job training will be provided and by whom.
- Outline the supports in place and who the volunteer should go to for assistance if required.

Reporting

Explain the type of reporting (if any) that is expected in the position.

- Are there expectations of reporting on arrival and departure from the workplace?
- Are verbal and/or written reports required and if so, when and to whom?

For some assignments, particularly for volunteers who will be doing most of their work off-site, clarity in reporting mechanisms and timeframes is critical.

Benefits

Explain the benefits the volunteer may gain in undertaking this volunteering assignment. These benefits may be tangible, such as transportation expense reimbursement or less tangible, such as the opportunity to explore a career option or enjoy engagement with the community.

Maintain the Value

Keep your Volunteer Position Descriptions updated so that they accurately reflect the work volunteers do for your organisation. This will help when you need to replace a volunteer because you already have the position requirements available.

Of course, roles may change or evolve over time - involving the use of new or different skills - and volunteers may undertake varied and/or additional activities from time to time, for example by filling in for those who are absent.

Other changes, such as in information and communications technology and in organisational structures may impact on the patterns of volunteering in your organisation.

Reflecting changes in your documentation as they happen will ensure the effective and efficient management of your volunteer program and enable your volunteers to give of their best in furthering your organisation's service delivery objectives for our community.

Worksheet Four: Volunteer Position Description Template

Volunteer Position Description

Your Logo

Position Title

Position Supervisor

Location

Time Commitment: (Indicate minimum hours per week/month? For what duration of time?)

Description of Position (Details of the project or purpose of the assignment)

Outline of Volunteer's Responsibilities or List of Tasks: (Give potential and limits)

Qualifications and Experience Needed:

(Indicate the skills and experience that are essential and/or desirable)

Outcomes/Goals:

(How will you and the volunteer know that the job is being done well or that the project is successful?)

Training and Support Plan:

(How will the volunteer be prepared for the work and oriented to the organisation? What support is offered to volunteers by the organisation?)

Reporting: (What reports will be expected? In what form and how often?)

Benefits: (What benefits will the volunteer gain in this role - tangibles and intangibles?)

Date Developed		Signed	
Date Developed		Signed	

Attachment One – Unpaid work fact sheet



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Unpaid work fact sheet

Unpaid work can take on different forms – including vocational placements, unpaid internships, unpaid work experience and unpaid trials. Unpaid work arrangements can be entered into for a number of reasons. These include:

- to give a person experience in a job or industry
- to test a person's job skills
- to volunteer time and effort to a not-for-profit organisation.

These arrangements can be initiated by employers, the person wanting the work or experience, or education/ training institutions.

Is unpaid work lawful?

Some unpaid work arrangements are lawful and others are not. Depending on the nature of the arrangement, the person doing the work may be an employee and be entitled to be paid the legal minimum rate of pay for the type of work they're doing, along with other minimum employment entitlements.

Whether an unpaid work arrangement is lawful under the *Fair Work Act 2009* (FW Act) depends on:

- whether an employment relationship exists, or
- whether the arrangement involves a vocational placement.

Vocational placements

A vocational placement is a formal work experience arrangement that is part of an education or training course.

Vocational placements can give students important skills to help them transition successfully from study to work, while giving industry and business the opportunity to enrich student learning experiences and increase the number of work-ready graduates.

Vocational placements that meet the definition under the FW Act are lawfully unpaid, regardless of whether an employment relationship exists or not.

For more information, including the criteria that an arrangement must meet to be a vocational placement under the FW Act, see our Vocational Placements Fact Sheet.

Is there an employment relationship?

Where an unpaid work arrangement is not a vocational placement, the arrangement can only be lawful if no employment relationship exists. If there is an employment relationship, the person is actually an employee and entitled to conditions under the FW Act including:

- a minimum wage
- the National Employment Standards
- the terms of any applicable award or enterprise agreement.

To work out whether or not a person is an employee each case must be considered on its own facts. There is no definition of employment under the FW Act. Instead, it is a matter of working out whether the arrangement to work involves an employment contract. That contract does not have to be in writing; it can be a purely verbal agreement. For an employment contract to exist it must be clear that:

- the parties intend to create a legally binding arrangement
- there is a commitment to perform work for the benefit of the business or organisation
- the person performing the work is to get something in return (which might be just experience or training)
- the person must not be performing the work as part of a business of their own.

When looking at whether an employment relationship exists, the nature of an arrangement should be considered, not just how the parties have chosen to describe it. The following factors should be considered:

- **What is the nature and purpose of the arrangement?** Was it to provide a learning experience or was it to get the person to do work to assist with the ordinary operation of the business or organisation? Where the arrangement involves productive work rather than just meaningful learning, training and skill development, it is likely to be an employment relationship.

- **How long is the arrangement for?** The longer the period of the arrangement, the more likely the person is an employee. Although even relatively short engagements can still be an employment relationship.
- **How significant is the arrangement to the business?** Is the work normally performed by paid employees? Does the business or organisation need this work to be done? The more integral the work is to the function of the business, the more likely it is that an employment relationship could be found.
- **What are the person's obligations?** In some cases a person might do some productive work to aid their learning. An employment relationship is unlikely to be found in these circumstances if:
 - the role is primarily observational and,
 - the expectation or requirement to perform such activities is incidental to that learning experience and not primarily for the operational benefit of the business or organisation.
- **Who benefits from the arrangement?** The main benefit from a genuine unpaid work arrangement should flow to the person undertaking the role. If the business or organisation is gaining a significant benefit from the person's work, an employment relationship is more likely to exist.

While a person is not prevented from taking up employment with a business or organisation after completing an unpaid work arrangement, each situation should be carefully considered to determine if an employment relationship had been formed earlier.

Unpaid trials (skill demonstration)

Sometimes a person is asked or required to perform work or undertake a trial to be evaluated for a vacant position. This skill demonstration is used for the purposes of determining a prospective employee's suitability for a job. It is often referred to as a work trial.

A brief work trial can be legally unpaid if it is necessary to evaluate someone's suitability for the job, and:

- it involves no more than a demonstration of the person's skills, where they are relevant to a vacant position
- it is only for as long as needed to demonstrate the skills required for the job. This will be dependent on the nature and complexity of the work, but could range from an hour to one shift
- the person is under direct supervision of the potential employer (or other appropriate individual) for the entire trial.

Any period beyond what is reasonably required to demonstrate the skills required for the job must be paid at the appropriate minimum rate of pay. If an employer wants to further assess a candidate's suitability, they could employ the person as a casual employee and/or for a probationary period and pay them accordingly for all hours worked.

Example 1

Jack applies for a job as a trades assistant at a local panel beaters. As part of the applicant screening process, Jack is advised by the owner that on the day of the interview he'll need to show he knows his way around a car and a workshop, because it's a minimum requirement of the job. Jack agrees.

To do this, after the interview, Jack is asked to follow one of the tradesmen doing body repairs. The tradesman watches Jack to make sure he knows how to work safely and use the right tools. Jack shows he meets the minimum criteria for the role and the owner offers Jack the job.

Jack's brief trial was reasonable to demonstrate his skills and he does not need to be paid for the trial.

Example 2

Jessica sees an advertisement on her university notice board for a job as a barista at a campus café.

The position was advertised for Monday, Tuesday and Thursday mornings from 7 am to 12 pm. The successful candidate needs to have at least 3 years' experience and be able to make a wide range of coffees.

At her interview, Jessica is advised that she will need to work the first week unpaid to give the café manager time to see whether or not she is suitable for the job. She is also advised that if she isn't able to work any of the shifts in the first week, she needs to advise the manager the night before and arrange someone to cover her shift.

The duration of the 'trial' and the requirements placed on Jessica suggest that the arrangement is an employment relationship, meaning that she should be paid for all hours worked at the appropriate minimum rate of pay.

Example 3

Mina applies for a job as a receptionist at a medical centre. After the interview, the manager calls Mina to ask her to do a trial on the weekend so they can make sure that she can handle working over a busy period. Mina agrees, and performs a shift on a Saturday morning. On the day, the manager shows Mina how to answer the phone, transfer calls, book and cancel appointments, and take payments at the end of a consultation.

Mina spends the morning performing these duties. At the end of her shift, the manager advises that she has done a good job, but she is not able to offer her the position until she gets it approved at a meeting on Wednesday. The manager advises Mina that if she could cover the shifts on Monday and Tuesday, it would show her commitment to the position and give her a better chance of getting the job. The manager advises Mina she would not be paid for these shifts.

Even though the manager called the period a work trial, in reality the time worked on the Saturday involved Mina being trained in skills she needed to be able to do the job. It is likely to represent actual hours of work, rather than a legitimate work trial. Further, the additional time worked on Monday and Tuesday is likely to represent an unreasonable time for demonstration of skills and abilities. Mina should be paid for all the hours that she worked.

Unpaid work experience and unpaid internships

A work experience arrangement or internship is when a person works for a business to gain experience in a particular occupation or industry. These arrangements can be a valuable way for prospective employees to make the transition from study to work or explore a new career path. Sometimes these arrangements span several months and can lead to ongoing employment.

An unpaid work experience arrangement or unpaid internship can be lawful if it is a vocational placement (see section above) or if there is no employment relationship found to exist. In particular:

- the person must not be doing “productive” work
- the main benefit of the arrangement should be to the person doing the placement, and
- it must be clear that the person is receiving a meaningful learning experience, training or skill development.

Example 4

A local council has advertised an internship program for high school or university students interested in government processes. The internships have been advertised as unpaid positions and students are allowed to select the hours they spend at the council office over a two week period. The council is careful to ensure that the role is mainly observational and there is no expectation that the students will perform productive work during their internship. The student is gaining the main benefit from the arrangement. It is unlikely that an employment relationship has been created in this case, and the internships are lawfully unpaid.

Example 5

A publishing company has advertised an internship program for recent graduates of copywriting and journalism university courses. The advertisement calls for applicants who are passionate about their career and who are looking for experience as a gateway to future employment opportunities. The company advises that it will recruit for the positions based on academic transcripts, work experience and references. The positions are unpaid, but the advertisement notes that the successful candidates will receive perks and networking opportunities throughout their internship. The positions are advertised for three months full-time, with the possibility of ongoing employment based on the candidate’s performance during the internship. The duties listed include general administration, event planning, and proof reading, with some opportunities for writing depending on performance.

Despite the offer of non-monetary perks, work experience and networking opportunities, the company will receive the main benefit out of this relationship as it involves significant productive work to be performed by the interns for the company. It is likely that an employment relationship will be formed in this case, meaning that the internship should be paid.

Volunteering

A volunteer is someone who does work for the main purpose of benefitting someone else, such as a church, sporting club, government school, charity or community organisation. Volunteers are not employees and don't have to be paid.

As with work experience and internship arrangements, all relevant factors must be considered to determine whether a person is a genuine volunteer or whether, in fact, an employment relationship exists even though the worker is called a 'volunteer'.

Key characteristics of a genuine volunteering arrangement include:

- the parties did not intend to create a legally binding employment relationship
- the volunteer is under no obligation to attend the workplace or perform work
- the volunteer doesn't expect to be paid for their work.

The more formalised that volunteer work arrangements become (for instance if the volunteer is expected to work according to a regular roster) the greater the possibility that an employment relationship will be found.

It is less likely that an employment relationship will be found to exist where the volunteer work is undertaken for selfless purposes or for furthering a particular belief in the not-for-profit sector.

Example 6

Franko approaches a soup kitchen run by his local charity to ask about volunteering. He fills in an application form and meets with the volunteer coordinator who explains the roles and responsibilities of volunteers. Franko will be helping in the kitchen, serving and cleaning. The coordinator confirms that he will not be paid and that he only needs to attend when he is available.

Franko agrees to volunteer once a week when he can and understands he will not receive payment. Franko is not an employee and the charity does not have to pay him for his time.

Other laws

Even if an unpaid work arrangement is lawful under the FW Act, it is important to be aware that other laws may still apply in relation to matters such as work health and safety or discrimination.

Further information

For information and resources to help you understand your rights and obligations on the topic of unpaid work, visit www.fairwork.gov.au/unpaidwork or contact the Fair Work Infoline on 13 13 94.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

- 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

Fair Work Infoline: 13 13 94 www.fairwork.gov.au

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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Attachment Two – Independent contractors and employees



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Independent contractors and employees

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, help to resolve workplace complaints, conduct investigations, and enforce relevant Commonwealth workplace laws.

The *Independent Contractors Act 2006* in conjunction with the *Fair Work Act 2009* protects the rights and entitlements of independent contractors.

Who is an employee? Who is an independent contractor?

There are a number of factors which may contribute to determining the difference between an employee and an independent contractor. However, it is important to

note that no single indicator can determine if a person is a contractor or an employee. Each determination is based on the individual merits of the work arrangement in place. Courts always look at the totality of the relationship between the parties when determining the status of a person's employment.

There are some common indicators that may contribute to determining whether a person is an employee or independent contractor:

Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	Has a high level of control in how the work is done.
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week).	Under agreement, decides what hours to work to complete the specific task.
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	Usually engaged for a specific task.
Risk	Bears no financial risk (this is the responsibility of their employer).	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.
Superannuation	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation contributions).
Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Uses their own tools and equipment (note: alternative arrangements may be made within a contract for services).
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Method of payment	Paid regularly (for example, weekly/fortnightly/monthly).	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.
Leave	Entitled to receive paid leave (for example, annual leave, personal/carers' leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees.	Does not receive paid leave.

How can the Fair Work Ombudsman help independent contractors and employees?

Fair Work Inspectors can investigate alleged sham contracting arrangements and prohibited conduct in relation to reform opt-in agreements.

Sham contracting arrangements

A sham contracting arrangement occurs where an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done for the purposes of avoiding responsibility for employee entitlements.

Under the sham contracting provisions of the *Fair Work Act 2009*, an employer cannot:

- misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor
- make a knowingly false statement to persuade or influence an employee to become an independent contractor.

The *Fair Work Act 2009* provides serious penalties for contraventions of these provisions. Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel their rights have been contravened.

Prohibited conduct in relation to reform opt-in agreements

The *Independent Contractors Act 2006* provides a four-year and six month transitional period (from 1 March 2007 and ending on 1 September 2011) where certain state or territory laws may continue to apply to an independent contractor and their principal.

Parties to an existing contract for services can choose to sign a reform opt-in agreement. A reform opt-in agreement is an agreement in writing, signed by the independent contractor and their principal, which states that they no longer want the state or territory laws to govern their contract for services.

The *Independent Contractors Act 2006* provides protections for parties in making the choice to sign a reform opt-in agreement.

These protections are that a person must not:

- take or threaten to take any action or
- prevent, or threaten to prevent, from taking any action

with the intent to coerce another person into signing or not signing a reform opt-in agreement.

Further, a person must not knowingly make a false statement in order to persuade or influence another person into signing or not signing a reform opt-in agreement.

The *Independent Contractors Act 2006* provides serious penalties for contraventions of these provisions. Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel there has been prohibited conduct.

Penalties

Fair Work Inspectors can seek the imposition of penalties for contraventions of sham contracting arrangements and reform opt-in provisions. The courts may impose a maximum penalty of \$51,000 per contravention.

Fair Work Inspectors may also apply to the courts to grant an injunction or an interim injunction if an employer seeks (or threatens) to dismiss an employee for the purpose of engaging them as an independent contractor. The purpose of the injunction would be to prevent the dismissal from occurring, or otherwise remedy the effects. Courts can also make other orders to have the employee reinstated or compensated.

General protections

Some general protections provided under the *Fair Work Act 2009* extend to independent contractors and their principals.

Independent contractors and principals are afforded limited workplace rights, and the right to engage in certain industrial activities. An independent contractor or principal is protected from adverse action by any person in relation to the decision to exercise or potentially exercise their rights under these provisions.

For more information on workplace rights, industrial activities, and what constitutes adverse action, please see the *Fair Work Ombudsman Fact Sheet – General Protections*.

Need further information?

For further information, contact the Fair Work Infoline on **13 13 94**.

If you require further information on contracting and the provisions of the *Independent Contractors Act 2006*, please contact business.gov.au on **13 28 46** or visit www.business.gov.au/contractors.

If you are in the building and construction industry, Fair Work Building & Construction (FWBC) may investigate and seek penalties for sham contracts. Contact FWBC on **1800 003 338** or visit the Fair Work Building & Construction website at www.fwbc.gov.au.

Sham contracting arrangements are prohibited by sections 357–359 of the *Fair Work Act 2009*.

The Fair Work Ombudsman has a collection of fact sheets, Best Practice Guides and other resources. For further information and assistance, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

- 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

Fair Work Infoline: 13 13 94

www.fairwork.gov.au

The Fair Work Ombudsman is committed to providing you with advice that you can rely on.

The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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