

## Unpaid work

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Download the fact sheet:

- [Unpaid work \(PDF 204.5KB\) \(www.fairwork.gov.au/ArticleDocuments/723/Unpaid-work.pdf.aspx\)](http://www.fairwork.gov.au/ArticleDocuments/723/Unpaid-work.pdf.aspx)

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.

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### 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](http://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/student-placements). ([www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/student-placements](http://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/student-placements))

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### 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.

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## **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.

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## 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.

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## **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 and 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.

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## **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.

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## 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](http://www.fairwork.gov.au/unpaidwork) ([www.fairwork.gov.au/pay/unpaid-work/default](http://www.fairwork.gov.au/pay/unpaid-work/default)) or contact the Fair Work Infoline on 13 13 94.

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