



Unpaid Work

This document has been created to provide Clubs with an overview of the rules on unpaid work. Please note that this is not an exhaustive list of everything that may apply to unpaid work.

Lack of an Employment Relationship

In order for unpaid work to be valid in most instances there needs to be **no employment relationship**. The one exception to this is with work experience / vocational placements which can be unpaid even if an employment relationship exists provided it meets other certain specific criteria (detailed later).

When looking at whether an employment relationship exists or not the main consideration is whether the parties intended to create a legally binding arrangement. As such should an arrangement not intend to create an employment relationship then this needs to be clearly stated in writing.

Some of the other factors that will indicate an employment relationship exists are:

- They are given set working hours by the organisation
- There is a commitment to perform work for the benefit of the organisation
- The person is undertaking productive work rather than just learning and skill development
- The person is provided with ongoing work under the control, direction and supervision of the organisation on an ongoing basis
- They receive regular payments even if they are not labelled as “wages”

Volunteering

Whilst there isn't a universal definition of volunteering, Volunteering Australia defines volunteering as “time willingly given for the common good and without financial gain”. Essentially the benefit that the volunteer receives is non-monetary in nature and they don't expect to be paid.

Where a genuine volunteering agreement exists then the worker will have no entitlement to be paid. Some of the key characteristics of a genuine voluntary agreement includes:

- There was no intention to create a legally binding employment relationship (best to have in writing in a volunteer agreement)
- The arrangement can be ended at any time by either party
- The volunteer is under no obligation to attend the workplace and volunteer and can decide when they come in
- The volunteer has no expectation to be paid for the work they do

The more formalised any arrangement for work is then the more likely an employment relationship will exist. For example if the volunteer has a set regular roster and is not doing the work for the main purpose of giving benefit to the not-for-profit sector.

Unpaid Work Trials

When a club wants someone to undertake an unpaid trial, there are limited circumstances where this can be legally done. Where these specific circumstances aren't met then a club needs to pay them for their time and this should be at the relevant casual rate.

Work trials are not to have the person do the work of an employee but rather to act purely as a skills demonstration. It should only be considered where there is a valid reason to need for them to practically demonstrate their skills.

For a work trial to be legally unpaid it needs to:

1. Involve no more than a demonstration of their skills as relevant to the position that they are applying for, that is they should not be undertaking "productive work"
2. Be only for as long as reasonably needed to demonstrate the skills required for the job, which will depend on the complexity of the work. Trials generally however should be brief (e.g. not multiple shifts) and in most cases only an hour or two can be justified
3. Have the person doing the trial under direct supervision by an appropriate person, e.g. a manager or supervisor, for the entirety of the trial.

Where the trial forms part of the interview process e.g. they are asked to stay back an hour to demonstrate their skills and be shown around then this gives more weight to it being a legitimate unpaid trial.

An example of a legitimate trial would be where someone applies for a role as a food and beverage attendant within a club and as part of their role they need to be able to prepare coffees for patrons. After the interview they are asked to stay for a trial for an hour. During the trial and under constant supervision by the manager, they are shown where the machine is and what they will need to be able to serve. They are then asked to briefly demonstrate using the machine and asked to make a few different coffees purely as a demonstration and not serving them. The entire trial lasts only as long as needed to test the quality of the person's skills.

An example of an unlawful unpaid trial is where a club is looking for a new clerical employee and interviews a person for the role. After the interview they tell the person that they need to undertake a few shifts during an unpaid trial period so they can assess if they are suitable. The trial lasts a week and during this time, they are undertaking the same duties as paid employees, with little supervision and are doing "productive work".

Clubs should remember that there are already laws and means to properly assess a new employee's suitability without the need for a trial e.g. probation, minimum engagement periods etc.

Work Experience

Formal work experience will take the form of a “vocational placement” of a student by a school or other educational institute e.g. a university.

In order for it to be a valid form of unpaid work experience all the criteria specified in the *Fair Work Act 2009* (Cth) of a vocational placement need to be met:

1. There must be a placement – these are usually organised by an education or training institute or a student may initiate it but it must be a formal placement
2. There must be no entitlement to pay for the work the student is undertaking – giving the student remuneration will make this appear more like an employment relationship
3. The placement must be a requirement of an educational or training course – it can be a component of the course as a whole, an individual subject or module
4. The course must be government approved - university, TAFE, school and registered training organisations will all satisfy this requirement

As such, a club can't just seek to engage a younger employee and not pay them as they are labelling it “work experience”. In doing so they risk this being found to not be a proper vocational placement and therefore liable for an underpayment claim and additional penalties.