

UNPAID WORK – WORK EXPERIENCE AND TRIAL WORK

This fact sheet provides general guidance on the principles associated with unpaid work.

There are various forms of employment regulation under State, Territory and Commonwealth laws as well as the common law, so any proposed unpaid work arrangements (such as work experience or trial work) must be considered against all relevant laws applying in the State or Territory in which the employer is located.

Accordingly, it is the responsibility of each employer to ensure that any arrangements they have in place, or propose to put in place, meet relevant laws, including occupational health and safety, workplace relations and workers' compensation laws.

General principles

If a person is merely observing, and not undertaking productive work, he or she is generally not entitled to payment under an industrial instrument, eg an award.

However, undertaking productive work will generally create an employment relationship, and payment of wages will be required.

Ultimately, whether an employment relationship exists is a matter of law determined on an assessment of facts on a case by- case basis. In deciding the nature of a relationship, courts have considered the terms of the arrangement as well as what happens in practice; including:

- the industrial context and whether the work performed is in a trade or an industry accustomed to contractual arrangements
- whether the work could be covered by an industrial instrument
- whether the parties intended to create an employment relationship
- whether there are other people engaged in the same or similar work, and
- the extent and nature of control exerted over the work done under the arrangements; for example, whether or not the worker is told not only what to do but how to do it.

Limited provision for unpaid 'work experience' or 'trial work'

Employers placing people on a 'work experience' or 'trial work' basis need to be aware of the State and/or Commonwealth laws that will apply in their case and seek advice on whether payment is required. Even approved work experience programs may require participants to be paid.

For workers potentially covered by federal awards or agreements, the applicable Commonwealth law is the Workplace Relations Act 1996 (the Act). If a person is considered an 'employee' for the purposes of this Act, they should be paid for their work. An 'employee' for the purposes of the Act does not include a person undertaking a vocational placement.

A 'vocational placement' must comply with all of the following. It must be:

- (a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
- (b) undertaken as a requirement of an education or training course; and
- (c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

NOTE: It is not possible to characterise a relationship as something other than an employment relationship simply by asserting that it is some other relationship, eg "internship", "vocational placement" or "unpaid work experience". As outlined above, the true nature of the relationship is determined by examining the nature and extent of the work performed and the circumstances surrounding the performance of that work

Enforcement of entitlements

Employees who believe they have worked without being paid can seek to recover payments dating back up to six years.

The Department of Employment and Workplace Relations can also seek to enforce awards and other federal industrial instruments dating back six years. Interest and penalties of up to \$33,000 per breach can also be sought.

Employers should get specific legal advice on any 'unpaid work' arrangements they enter into, thus minimising the likelihood of having to defend non-payment or underpayment claims in the future.

This information is based on a Fact Sheet provided by the former Department of Employment and Workplace Relations. It is offered by BIA as general guidance and should not be treated as advice on the circumstance of any particular case. You should seek your own legal advice relevant to your particular situation.