

# National Volunteering Guide Part 2

**Volunteer, employee or independent contractor?**

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# Contents

<b>Part 2</b>	<b>4</b>
Distinguishing between different kinds of workers .....	6
The difference between members of a community organisation and volunteers .....	8
Volunteers.....	10
Who is a volunteer?.....	10
Volunteer attributes.....	11
Assessing whether a worker is a volunteer .....	13
Can volunteers be paid for their work? .....	18
What does it mean for your organisation if a person is a 'volunteer'?.....	19
Employees .....	20
When is a worker an employee? .....	20
Employee attributes .....	22
What does it mean for your organisation if a worker is an 'employee'? .....	23
Can legislation make someone (including a volunteer) an 'employee' for particular purposes?.....	23
Independent contractors .....	24
When is a worker an 'independent contractor'? .....	24
Independent contractor attributes .....	24
What does it mean for your organisation if a worker is an 'independent contractor'? ..	25
Checklist – analysing your existing volunteer relationships.....	26
Legal obligations owed by community organisations .....	27
Minimum legal protections.....	27
Application of industrial instruments (awards, enterprise agreements and determinations).....	28
Long service leave.....	29
Superannuation .....	29
Safety .....	30



Insurance.....	30
Taxation.....	31
Termination .....	32
The risks of not describing a worker’s status accurately .....	34
Summary – the differences between a volunteer, employee and independent contractor .....	35



## Part 2

**Volunteer, employee or independent contractor?**

# Volunteer, employee or independent contractor?



## This part covers:

- ▶ the importance of correctly classifying different working relationships
- ▶ the basic legal differences between volunteers, employees and independent contractors, and
- ▶ some of the main legal obligations an organisation owes to its volunteers, employees and independent contractors

This part of the guide helps community organisations understand how the law treats different kinds of working relationships in your organisation – volunteers, employees and independent contractors.



## Why is it important to distinguish between different kinds of working relationships?

If your organisation incorrectly classifies a worker:

- you may fail to give the worker their legal entitlements or meet your obligations under law
- the worker may be confused about their own obligations and legal entitlements
- legal claims could be made against your organisation, and your organisation may be liable to pay penalties



## The National Strategy for Volunteering

**On the strategic objective to ensure volunteering is not exploitative:**

*Volunteers across Australia deliver essential services, which further complicates the distinction between paid and unpaid work.*

*Determination of how volunteer contributions are equivalent to, distinct from, or complement paid work is critical for better understanding the size, scale, and contribution of volunteer workforces. It will remain important to differentiate paid and unpaid work in different settings, so a more nuanced understanding of the intersection between paid and unpaid work is paramount.*

(page 47 of the strategy)



# Distinguishing between different kinds of workers

Whether a person is a volunteer, employee or independent contractor – requires consideration of different elements because each category of worker has different attributes.

The law recognises different categories of relationships where one party (a worker) performs work for another party in exchange for payment or reward.

These include the relationships of:

- employer and employee, and
- principal and independent contractor

The law also recognises a separate category of worker known as a 'volunteer'. This type of worker performs work for another without an expectation of, or legal requirement of, payment or reward.



## Note

It's important for your community organisation to know which category of 'worker' is doing work in your organisation because, depending on whether the worker is a volunteer, employee or an independent contractor, different legal entitlements and obligations apply.

In particular:

- your organisation can be legally responsible for both the safety of its volunteers and the consequences of their actions (so you need to know who they are and what they are doing)
- a volunteer should understand the basis on which they are engaged (so they are aware of their legal entitlements and insurance and safety risks)
- whether someone is covered by your organisation's insurance may depend on their status (category of worker), and
- some laws apply differently to volunteers and some laws don't apply at all



As a result, different legal entitlements apply to different categories of workers in your organisation. This is shown in the table below:

Indicators	Volunteer	Employee	Independent contractor
Is the worker paid?	✗ (note: honorarium discussed below)	✓	✓
National Employment Standards apply?	✗	✓	✗
Superannuation paid?	✗	✓	✗ (some exceptions)
Workers' Compensation applies?	✗	✓	✗ (some exceptions)
Occupational/Workplace Health and Safety laws applies?	✓ (some exceptions)	✓	✓
Paid sick and annual leave accrues?	✗	✓	✗
Paid long service leave?	✗	✓	✗
Unfair dismissal laws apply?	✗	✓	✗ (but some contractual termination rights may apply)
Redundancy rights apply?	✗	✓	✗ (but some contractual termination rights involving payment may apply)



### Case examples

In the case of Mr and Mrs Morris (see summary below), the court found that Mr and Mrs Morris were employees as caretakers of a property. The organisation had alleged they were volunteers. The Court found that, based on the care-taker award rate, the couple had been underpaid, and awarded them superannuation and annual leave to the value of approximately \$80,000.

In the case of Ms Guilbert (see summary below), the court found Ms Guilbert was a volunteer rather than an employee when she was injured after being thrown by a horse. This means that she was unable to make a claim for workers compensation, which is only available to employees.



# The difference between members of a community organisation and volunteers

The line between members and volunteers can be tricky to distinguish when you sit on a committee. In particular circumstances, an organisation's members may also be considered to be 'volunteers'.

A 'member' of a not-for-profit organisation has certain rights and obligations set out in the organisation's rules or constitution (for example, the right to vote at an AGM, attend meetings and access information) and in legislation.

As soon as an organisation asks a member to do something outside their role as a member, the person may be considered a volunteer (as well as a member). This has legal implications:

- certain laws apply to volunteers (that may not apply to members), and
- insurance may apply to volunteers and members in a different way

Consider your organisation's liability for negligence – volunteer board members can sometimes be personally liable.

Where the organisation is unincorporated, no specific duty of care arises merely because people share common membership of the unincorporated association. However, committee members may still be personally liable for injuries to a member or a volunteer.



## Case example – unincorporated association

Mr Hrybnyuk was a member of a Russian Club, an unincorporated association. The president of the club, Mazur, asked Hrybnyuk to help demolish a shed on the association's premises. While doing so, Hrybnyuk suffered extensive injuries when he fell through the roof of the shed that he was helping to demolish.

The judge held that the president (a volunteer) owed Hrybnyuk a duty of care. In particular, the judge stated the principle that 'a person who seeks the services of a volunteer may be liable in negligence'.

However, Hrybnyuk was unsuccessful in his negligence action because the judge found there was no evidence that Mazur's failure to require:

- a building inspection before permitting Hrybnyuk to demolish the shed, or
- a person with building experience to be on-site to supervise the demolition,

caused Hrybnyuk's injuries.

That is, an inspection may not have uncovered the fault that caused him to fall, and a suitably qualified supervisor would not necessarily have directed Hrybnyuk not to climb onto the roof.

*Hrybnyuk v Mazur [2004] NSWCA 374*



## Tip – insurance policies

Check your insurance policies to see whether they cover injuries to volunteers as well as members, and whether they also cover injuries or harm that volunteers might cause to others. If your policy doesn't explicitly cover volunteers and members, ask for this to be included in your policy (in writing).





### Example – insurance

Mr Ball is a member of his local cricket club. He regularly exercises his right to vote and attend meetings and enjoys the club's facilities on a weekly basis. The cricket club also engages staff to help with the upkeep of the grounds. The club has insurance covering employees, and people playing sport at the club. A call goes out to members to help in a working bee on the weekend and Mr Ball is eager to participate. He's asked to clean out the gutters.

Unfortunately, he slips while climbing the ladder and injures his back. The cricket club's public liability insurance policy doesn't cover injuries to volunteers. As he's not an employee, Mr Ball doesn't have access to workers compensation insurance. The cricket club doesn't have insurance that covers volunteers, and therefore Mr Ball has no access to insurance to cover the costs associated with his injuries sustained while volunteering.

# Volunteers

In Australia, there is no accepted legal definition of a volunteer.

Volunteering Australia and the Fair Work Ombudsman provide useful definitions for a volunteer, and case law (judge-made law) provides useful guidance on the 'attributes' of a volunteer.

## Who is a volunteer?



### Volunteering Australia

Volunteering Australia describes volunteering as:

'Time willingly given for the common good and without financial gain.'

Volunteering Australia has [published resources with more information about this definition](#).



### The Fair Work Ombudsman

The [Fair Work Ombudsman](#) has identified the following characteristics of a genuine volunteering arrangement:

- a volunteer is someone who does work for the main purpose of benefiting someone else
- the organisation and individual did not intend to create a legally binding employment relationship
- a volunteer is under no obligation to attend the workplace or perform work, and
- a volunteer does not expect to be paid for their work

It's important to:

- understand the attributes (characteristics) of a volunteer
- consider these attributes in relation to your existing or potential future volunteer relationships, and
- be clear about how the volunteer relationship is distinguished from the employment or independent contractor relationship



## Volunteer attributes

Generally, a worker will be found to be a volunteer when the following attributes exist (other factors may also be relevant):

Type of work	Payment and benefits
<ul style="list-style-type: none"> <li>works or provides services on an 'ex-gratia' basis, which means that they do so voluntarily, without a legally enforceable obligation to do so and with no expectation of payment for work performed</li> </ul>	<ul style="list-style-type: none"> <li>generally, has no legally enforceable right to receive payments such as a wage, honoraria, allowances or expenses</li> </ul>
<ul style="list-style-type: none"> <li>any agreement between the volunteer and the organisation (whether verbal or written) doesn't include any evidence that the parties intended to enter into a legally binding contract in relation to the work being carried out (see part 3 of this guide for more information about what should and shouldn't be included in a volunteer agreement)</li> </ul>	<ul style="list-style-type: none"> <li>may be reimbursed for out-of-pocket expenses</li> </ul>
<ul style="list-style-type: none"> <li>the volunteer arrangement can end at any time, either by the volunteer or the organisation</li> </ul>	<ul style="list-style-type: none"> <li>may receive payments like an 'honoraria', or allowances, or non-cash benefits such as free use of facilities or free or reduced-price entry into an event (but this is different from a 'legally enforceable right' to receive these things)</li> </ul>



### Caution

Where a volunteer receives some benefit for the services they provide, be careful that you are clear and careful in how you distinguish between volunteers and employees.

Payments or benefits to volunteers may attract taxation obligations, and if regularly received or of considerable value, may add weight to an argument that the 'volunteer' is an employee or contractor.

This may also pose problems in determining an organisation's tax liabilities (for example, for fringe benefits tax or the obligation to remit PAYG tax payments to the Australian Tax Office).



### Tip

The best way to be clear about the relationship between your community organisation and a volunteer is to write it down. Generally, if a person is described as a volunteer in a document governing the arrangement, it would usually be considered that there is no intention to create a contractual or legal relationship (provided that the relationship is, in reality, voluntary).

See part 3 of this guide for more information about what should and shouldn't be included in a volunteer agreement.



## Spontaneous volunteers

Sometimes community organisations attract ‘spontaneous volunteers’ – for example, spontaneous offers of assistance and volunteering following an emergency, crisis or issue resulting in significant media coverage.

As noted above, spontaneous volunteers differ from formal volunteers and may create certain challenges for organisations. For more information see part 4 of this guide (volunteer safety).

One of the strategic objectives of the National Strategy for Volunteering is to diversify the understanding of volunteering.



## The National Strategy for Volunteering

### **On the objective to diversify the understanding of volunteering:**

*Like First Nations people, volunteers in multicultural communities do not necessarily resonate with the term volunteering and more commonly use words such as ‘giving’, ‘helping’, and ‘sharing’ to describe their voluntary activities. Some cultures do not even have an equivalent word for volunteering and volunteer work undertaken by Australians born overseas often takes place within ethnic, cultural, or religious communities.*

(page 50 of the strategy)

*An expanded understanding of volunteering will reflect Australia’s diversity and ensure all forms of volunteering are recognised, supported, and celebrated.*

(page 49 of the strategy)



# Assessing whether a worker is a volunteer

When a worker's relationship with an organisation is being assessed, the Fair Work Ombudsman or court or tribunal will look at the four key factors (discussed below) to establish whether an agreement was intended to be legally binding. If these factors are in place, the relationship is less likely to be considered a volunteering relationship.

Generally, there are four key requirements that evidence a legally binding relationship:

## Four key requirements for a legally binding relationship

### 1. Intention to create legal relations

### 2. Consideration

### 3. Mutuality of obligation

### 4. Certainty and completeness

#### 1. Is there an intention to create legal relations regarding the obligation to carry out the work?

- Do the facts and circumstances point to an intention of both parties to have a legal relationship and that the arrangement could be enforced?
- Under the arrangement, can the organisation and individual be compelled to do something (as opposed to where either party can walk away at any time without challenge)?
- If the parties intend to create legal relations regarding the obligation to carry out the work, the relationship is not likely to be a volunteer relationship.

#### 2. Is there consideration?

- Does each party agree to provide a benefit or reward to the other party? For the worker, this will usually be their labour and for the employer (or principal), this will usually be monetary but may also be a commitment to offer training, experience or other non-monetary benefits. **[Note** – see below for more information on internships and unpaid work experience].
- Although the payment of consideration is generally an indicator of an employment or independent contracting relationship, this is not always the case, particularly where there is no correlation between the payment and the hours worked or completion of a specific task or job.

#### 3. Is there mutuality of obligation?

- Is the person's commitment to perform work provided in exchange for whatever benefits or experience the employer (or principal) is offering?
- Mutuality of obligation is more likely to indicate an employment or independent contracting relationship where the benefit (usually payment) is linked or correlates to hours worked or completion of a set task or tasks.

#### 4. Is there certainty and completeness?

- Is there an agreement on all the essential terms to make the contract workable and are those terms certain and clear in meaning?
- Whether certainty and completeness of terms is indicative of an employment or contracting relationship, or that of a volunteer, depends on the actual terms.
- Where the terms are clearly stated, for example, it's clearly stated that:
  - the relationship is a volunteer one
  - there is no intention to create legal relations between the parties in relation to the volunteering role, and
  - any payments aren't linked to the hours of work or completion of set tasks,
  - the arrangement is more likely to be a volunteer relationship.
- Of course, the agreement shouldn't include any terms which indicate an employment relationship.



### Note

In addition to these factors, a court or tribunal may also consider the actual nature of the arrangement as well as how the parties have chosen to describe it.



### What is a legally binding relationship?

Legal relations exist when the parties have a legally binding agreement between them.

Generally, this means they intend that the promises made by each party will be binding, so if one party breaches the terms of the agreement, the other party has a right to seek damages against the breaching party or, in some circumstances, force the breaching party to perform certain obligations under the agreement.

In a volunteer relationship, there must be no intention to create a legally binding agreement regarding the work to be carried out. This means that, for example, if the organisation doesn't provide the volunteer with work, the volunteer has no recourse against the organisation. Similarly, if the volunteer fails to report for duty as agreed, the organisation has no recourse against the volunteer.



### More information – protecting intellectual property and confidential information

There may be situations where a volunteer involving organisation wants to create legally binding obligations on the volunteer. For example, this is done to protect the organisation's confidential information or intellectual property (as explained in part 6 of this guide). Provided such legally binding obligations go no further than this (create obligations around other tasks or the work), having a legally binding agreement in relation to such matters will not affect the nature of the volunteer relationship.

See part 3 of this guide for more information on how to impose legally binding obligations on a volunteer to protect the organisation's confidential information and intellectual property.

## The nature of the relationship

In addition to how the parties have chosen to describe the relationship in a legal agreement, a court or tribunal may also consider the actual nature of the relationship and the work being done.

An arrangement is more likely to be considered an employment relationship rather than a volunteer relationship if it:

- involves productive work rather than just learning, training or skill development
- is for a lengthy period
- involves work that is integral to the functioning of the business or organisation, and
- primarily benefits the organisation



### Caution

Take care when negotiating with a worker. A legally binding agreement doesn't have to be in writing. It can be formed verbally through conversations, through communication such as a string of email correspondence or even inferred from the conduct of the people involved.

Work that is:

- primarily observational, or
- incidental to a learning experience rather than being for the primary benefit of the operation of the business or organisation,

is more likely to be considered voluntary in nature.

## Unpaid work experience and internships

In certain circumstances, it can be lawful to not pay a person for their labour (for example, when volunteering for a not-for-profit organisation or experience working in an organisation as part of a formal program to get employment). However, in cases where the person is actually an employee, they are entitled to pay and conditions under the [Fair Work Act 2009 \(Cth\)](#).

The Fair Work Ombudsman will consider certain factors to decide whether a person's position is an unpaid trial, a student placement, a work experience or internship.



### More information – guidelines on paid and unpaid work

See the Fair Work Ombudsman's website for more information about:

- the [different types of legitimate unpaid work](#), and
- [understanding different types of legitimate unpaid work and unpaid work where the person involved should be paid](#)



### Case example – work experience

Barbour worked as an unpaid assistant in a small law firm after graduating. The firm allowed him to observe practitioners and learn about the practice of law three days a week. He wasn't paid, but was promised a base salary of \$250 per week with 25% commission for referred matters later – once he had become 'competent'.

The Commission was **not** satisfied that:

- an agreement had been reached as to the terms of an employment contract (the role was an unpaid opportunity for him to demonstrate competence as a lawyer)
- consideration had passed between the parties (the work was not paid for and there was no evidence that the work was for the commercial gain of the firm)
- there was an intention to create a legally binding arrangement (it didn't matter that the parties may have contemplated a future legal employment relationship)

[Barbour v Memtaz Derbas T/A Derbas Lawyers \[2021\] FWC 1718](#)



### Case example – internship

A university student performed more than 180 hours of work for AIMG during an internship, before being offered paid employment.

The Court found that the internship did not have any affiliation or connection with the worker's university degree, and involved productive work for the benefit of AIMG. Accordingly, it was held that an employment relationship existed and AIMG was ordered to back-pay wages and penalties relating to underpayment of wages.

The Court stated that it would not tolerate attempts to disguise employment relationships as unpaid internships to avoid payment of entitlements.

*Fair Work Ombudsman v AIMG BQ Pty Ltd & Anor [2016] FCCA 1024*



### Case example – no intention to create legal relations

Anglican Community Services (**ACS**) rented a property to various groups for camps and retreats. Brandenburg (the camp manager) asked Mr and Mrs Morris to act as caretakers of the property. They acted as caretakers for three years; at the end of this period they claimed unpaid wages. ACS argued that Mr and Mrs Morris were volunteers and therefore not entitled to wages.

Brandenburg had sent Mr and Mrs Morris a letter outlining the nature of their role, which described Mr and Mrs Morris as being 'appointed' to the positions of caretakers of the property. The initial appointment was for six months, which would then be reviewed and could be extended. Their duties were clearly set out and relatively onerous (including cleaning, light maintenance work, inspecting the condition of the building and facilitating building inspections for prospective groups).

The judge found that Mr and Mrs Morris were employees and not volunteers, as the parties intended to create legal relations. This was demonstrated by several factors:

- they were under the instruction of Brandenburg who would inform them when groups were coming to stay and when the premises would need to be cleaned and inspected
- the nature of the agreement created mutual expectations between the parties (rent and amenities in exchange for labour), which could be legally enforced, and
- the regularity of their appointment was indicative of employment, as was the inclusion of the initial provisional period which would be unusual in a volunteering context, because a true volunteer (or the organisation) is able to end the arrangement at any time

As a result, Mr and Mrs Morris were awarded compensation for unpaid wages.

*Morris and Morris v Anglican Community Services [2000] SAIRC 6.*





### Case example – workers compensation

Guilbert was a volunteer at a horse-riding ranch in NSW for five years. She was asked to perform tasks such as saddling and preparing the horses for trail rides, feeding the horses, cleaning out bird cages, cleaning toilets, washing equipment and helping in the café. Guilbert was also allowed to participate in riding lessons and go on trail rides.

Guilbert was thrown from a horse while helping on a trail ride and injured her spine. The ranch's insurance company denied that Guilbert was a worker, and therefore denied her access to workers compensation.

Guilbert argued that there was an intention to create legal relations. She said that the horse rides she was allowed at the end of some of her shifts were 'consideration' or a 'reward' for performing duties which otherwise would have been performed by paid staff. She also provided evidence that indicated control – she was required to wear a uniform, work set hours, and was asked for reasons if she was late.

However, the Commissioner found there was no intention to create legal relations. The fact that she wouldn't have performed the tasks, if not for the 'horse rides or lessons in exchange' didn't matter. What matters is the objective intention conveyed by what was said or done – not the uncommunicated subjective motives or intentions of the parties. The tasks comprised part of the usual activities of a volunteer. They didn't represent some additional activity that was outside the activities performed by a volunteer, which could be regarded as consideration to form a binding contract of employment. The direction, organisation and supervision of volunteers was for reasons of safety and to ensure a full complement of volunteers.

*Glenworth Valley Horse Riding Pty Ltd [2020] NSWCCPD 10 (4 March 2020)*



This decision doesn't mean that volunteers are always excluded from coverage under workers' compensation schemes or that organisations using volunteer services are not liable for costs associated with injuries to volunteers. For more information, see part 4 of this guide (volunteer safety).



### Case example – workers compensation

Wieland held roles with Basketball SA, including referee coordinator, referee coach, and court supervisor. Wieland received \$500 per season for each role, as well as payments for her referee coach and court supervisor roles. Basketball SA made these payments in cash, and Wieland didn't declare them as income for tax purposes.

In 2017, Wieland fell over and injured herself as she entered a stadium to participate in a meeting and act as a referee coach. Wieland made a claim for compensation under the South Australian legislation for injured workers. To be entitled to compensation, Wieland needed to prove that she and Basketball SA mutually intended to create a legally enforceable contractual relationship between them.

Although Basketball SA had classified Wieland as a 'volunteer', the South Australian Employment Tribunal wasn't satisfied that she was a volunteer. The Tribunal noted that, even though Basketball SA was a not-for-profit organisation that would be expected to engage volunteers, it also had employees. The Tribunal said that for the roles of referee coach and court supervisor, there was a direct correlation between the hours worked and the amount Basketball SA paid Wieland, so the parties mutually intended to create a contractual relationship. Wieland was therefore entitled to compensation for her injuries.

*Wieland v Return to Work SA [2018] SAET 190*



## Can volunteers be paid for their work?

Some payments to volunteers are acceptable.

It's common, and appropriate, for volunteers to be reimbursed for authorised expenses they incur while performing their role. Sometimes organisations provide a monetary reward or other recognition to show gratitude for a volunteer's contribution.

Some organisations provide benefits to volunteers that they may call an honorarium, allowance or one-off payment. However, if these payments are comparable to wages or a salary in disguise, then this may point to an employment relationship, and such payments should not be made to volunteers.

Examples of where a payment or pattern of payments may be deemed to be a wage or payment for services include:

- if a payment is calculated with reference to time with the organisation or hours worked
- if an allowance far exceeds the expenses actually incurred or is paid on a regular basis, or
- a lump sum payment is in exchange for services provided



### Case example – honorarium

Bergman was a member of the Broken Hill Musicians Club and a regular bingo patron, who had acted as a bingo caller for the club for approximately five years until she claimed she was unfairly dismissed. To bring a claim for unfair dismissal, Bergman needed to prove she was an employee.

Bergman argued that she was paid \$50 regularly for calling five bingo sessions per week. She provided her tax file number to the club, was provided with a letter for Centrelink where the club referred to her as an employee, and argued that the club exercised control over the manner of her work performance, place and hours of work and that she required permission to take leave.

The club argued that there was no intention to create a legal relationship. She was not offered the role – rather Bergman was selected as the bingo caller by club patrons (who were all members). She was allowed to play the gambling machines during her 'breaks' unlike employees of the club. Her attendance and times of the bingo sessions were not monitored by the club. On occasion, when Bergman was absent, other people performed the bingo calling. Bergman didn't need to notify the club of her absence.

The club also argued that the \$50 per week was an honorarium not intended to affect the relationship.

The Fair Work Commission found that Bergman was not an employee, as there was no mutual intention between the parties to enter a legally enforceable arrangement or contract. The \$50 was a gift unrelated to her hours of work, which did not satisfy the element of 'consideration' or exchange that exists in an employment relationship where a person is hired to work in return for wages.

[Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club \[2011\] FWA 1143](#)



### Case example – honorarium, terms of the agreement

Grinholz was a coach for a soccer team for Football Federation Victoria (FFV). He was engaged under a 'voluntary services agreement' which stated he would receive an honorarium of \$6,000 to be paid in two equal instalments – one at the beginning of the season and the other at the end. In exchange, Grinholz was required to attend training sessions each week, and attend matches throughout the season and the youth championships. He was also required to liaise with full time coaches and FFV administrators.

FFV terminated Grinholz's engagement halfway through the season. He then made an unfair dismissal application to the Fair Work Commission. FFV objected on the basis that Grinholz was a volunteer and not an employee (and therefore not entitled to bring a claim for unfair dismissal).

In deciding the case, the Commission looked at the various indicators of a volunteer and employment relationship. In this case, indicators of an employment relationship were that:

- FFV was able to exercise a substantial degree of control over Grinholz's work
- Grinholz was required to wear a uniform
- Grinholz was required to act consistently with FFV's policies and to promote FFV in his coaching activities

However, there were also indicators of a volunteer relationship:

- the honorarium was not paid based on hours worked, but closely related to the expenses Grinholz would likely incur in carrying out his role
- provisions of the volunteer services agreement expressly stated that Grinholz was a volunteer and not an employee nor independent contractor, and that he was not entitled to any fees for services

The Commission determined that Grinholz was a volunteer and not entitled to make an unfair dismissal claim against FFV.

In making its decision, the Commission stated that, although certain terms of the agreement indicated the existence of an employment relationship, those terms were not inconsistent with requirements that would normally be expected to be placed on volunteers, particularly in the not-for profit sector. In other words, the factors that would normally suggest an employment relationship could be attributed to other legitimate purposes, such as the need to uphold standards and protect the interests of the organisation (in this case, young people).

*Grinholz v Football Federation Victoria Inc [2016] FWC 7976*

## What does it mean for your organisation if a person is a 'volunteer'?

Many laws which protect employees' rights and entitlements apply differently to volunteers or not at all.

More information about the basic legal entitlements and obligations that apply to volunteers is set out below under the heading 'Legal obligations owed by community organisations'.



# Employees

The legal distinction between a worker who is an employee, an independent contractor, or a volunteer is not always easy to make.

While much employment law is now set out in legislation, the issue of whether a worker is an employee, independent contractor or volunteer is based on principles that have been established through case law over time (judge-made law).

## When is a worker an employee?

For some time, the courts and other relevant tribunals considered whether a worker is an employee by making a **multi-factorial assessment** of the entire relationship between the worker and the organisation (including by considering the conduct of the parties).

In 2022, two High Court decisions (summarised below) changed the court's approach by focussing on the terms of the contract between the parties (instead of their conduct).

In certain circumstances, consideration of the parties' conduct would still be relevant and considered. These circumstances include:

- where the contract (or agreement) is not in writing, or is partly written and partly oral
- where the terms of the written contract are being challenged as invalid (as a sham) or varied (changed), or
- where a party to the contract may be asserting rectification, estoppel or any other legal, equitable or statutory rights or remedies

Parliament has now stepped in to address the High Court's changed approach. Under the [\*Fair Work Legislation Amendment \(Closing Loopholes No. 2\) Bill 2023\*](#), passed by Parliament on 12 February 2024, a new definition of employee under the [\*Fair Work Act 2009 \(Cth\)\*](#) will apply.

Under the new definition, whether a relationship is one of employer and employee, will be determined by assessing the totality and true nature of the relationship between the parties. This assessment will include consideration of the terms of any contract and how the contract is performed in practice.



### Note

The new definition of employee under the [\*Fair Work Act 2009 \(Cth\)\*](#) will apply six months from the day following royal assent to the [\*Fair Work Legislation Amendment \(Closing Loopholes No. 2\) Bill 2023\*](#).

In essence this legislative overrides the 'contract-centric' approach of the High Court in the two cases from 2022 and is a return to the previous multi-factorial test from case law.



### Summary

Depending on the circumstances, whether a person is an employee, an independent contractor, or a volunteer will be determined by examining:

- the terms of the contract between the parties
- the relationship between the parties, or
- both the contract and the relationship between the parties



### Case example – contractor label

McCourt signed an 'administrative services agreement' with Construct, a labour hire organisation. Under the agreement, Construct would offer McCourt an opportunity to provide labour to third-party building companies, who would oversee McCourt's day-to-day work and directly pay Construct, who in turn paid McCourt.

In finding that McCourt was an employee (and not an independent contractor), the High Court held:

- where it has not been argued that a contract is a sham, is ineffective, has been varied or otherwise displaced by the parties' conduct (for example, conduct giving rise to an estoppel or waiver), the rights and obligations under the contract are primary, and
- it is not required to look beyond the terms of the contract and review the parties' subsequent conduct to determine if an employment relationship exists

Parties should still be wary of relying on labels given to a relationship in a contract as determinative of its character. In this case, while McCourt's contract described him as a contractor, the nature of the rights and obligations between the parties under the contract rendered him an employee of Construct.

*Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA*



### Case example – contract terms

From 1977 to late 1985, Jamsek and Whitby were employed by a company as truck drivers. In 1986, the workers agreed to 'become contractors', by forming partnerships with their respective spouses and re-engaging under fresh contracts between the company and these partnerships, while also purchasing their own trucks.

After the working relationship was terminated in 2017, the nature of the relationship between the workers and the company was in dispute.

In the absence of a reason to doubt the contract's validity (such as being a sham or otherwise ineffective at law), the High Court of Australia focussed on the wording of the written contract to determine the relationship between the parties and find that the workers were independent contractors from 1986.

*ZG Operations Australia Pty Ltd v Jamsek [2022] HCA*

Evidence of the attributes listed below in a working relationship suggest the worker is an employee. These attributes may be evident from the contract between the parties, the relationship between the parties, or both.

It's important to:

- understand the attributes (characteristics) of an employee
- consider these attributes in relation to your existing or potential future employment relationships, and
- be clear about how the employment relationship is distinguished from the volunteer relationship



## Employee attributes

Type of work	Payments and benefits
<ul style="list-style-type: none"> <li>performs ongoing work under the control, direction and supervision of the employer, on an ongoing basis</li> </ul>	<ul style="list-style-type: none"> <li>is paid for time worked</li> </ul>
<ul style="list-style-type: none"> <li>must perform the duties of their position</li> </ul>	<ul style="list-style-type: none"> <li>is paid regularly (for example, weekly, fortnightly or monthly) and has income tax withheld from their salary by their employer</li> </ul>
<ul style="list-style-type: none"> <li>provides their personal services and can't delegate their work to 'outsiders' (can't arrange for their work to be done by someone else who is not another employee)</li> </ul>	<ul style="list-style-type: none"> <li>is entitled to have superannuation contributions paid into a nominated superannuation fund by their employer</li> </ul>
<ul style="list-style-type: none"> <li>work hours set by the employer, an enterprise agreement or modern award</li> </ul>	<ul style="list-style-type: none"> <li>is entitled to paid and unpaid leave (for example, sick leave, personal or carers' leave, annual or recreation leave, or long service leave)</li> </ul>
<ul style="list-style-type: none"> <li>is recognised as a part of the employer's business or holds themselves out to the public as being part of that business (for example, wearing a uniform, using a business card)</li> </ul>	<ul style="list-style-type: none"> <li>is covered by professional indemnity, public liability and workers compensation insurance premiums paid by the employer</li> </ul>
<ul style="list-style-type: none"> <li>doesn't take commercial risks and can't make a 'profit' or 'loss' from the work performed</li> </ul>	<ul style="list-style-type: none"> <li>generally, has all 'tools of the trade' provided by the employer to carry out the work (for example, desk, computer, stationary) unless otherwise agreed</li> </ul>



### Note

Other factors may also be relevant and of importance in particular cases. While it's often straight-forward to determine whether a worker is an employee, where there is doubt, the organisation should get legal advice.



### Example – employee

Barry is a retired clerk and is often called on by Jo, the office manager, at a local charity to do administrative duties, including project work. Jo gives Barry details of the work to be done and negotiates with Barry as to the days and times he works. The charity provides Barry with the equipment he needs to get the work done and pays him by the hour. When working, Barry is required to wear a uniform displaying the charity's logo and must report to Jo regularly about the status of the work. The charity deducts tax from Barry's wages and remits it to the ATO.

Even though Barry works irregular hours for the charity, Barry is employed by the charity, most likely on a casual basis.



## What does it mean for your organisation if a worker is an ‘employee’?

The law requires that employers provide certain benefits to their employees. Examples of these benefits include paid leave and superannuation, but there are many others.

The law also requires that employers treat their employees in a certain way. For example, an employer must provide an employee with a notice period (or payment instead of notice) before terminating their contract of employment. Note, however, casual employees do not require a notice period or payment before termination of their contract of employment.



### Note

Independent contractors and volunteers are not owed all the same entitlements as employees.

**This is why it's important for your community organisation to be clear about the terms on which a person becomes involved in your community organisation.**

More information about the basic legal entitlements and obligations that apply to employees is set out below under the heading ‘Legal obligations owed by community organisations’.



### Tip

Have a written agreement documenting the nature of the relationship between your community organisation and any person doing work for it. This way both parties will be clear about the nature of the relationship.

However – merely labelling a worker an employee, independent contractor or volunteer doesn't mean they are in fact an employee, independent contractor or volunteer. The nature of the rights and obligations between the parties as set out in a contract (if there is one) will largely determine whether the worker is an employee or independent contractor.

## Can legislation make someone (including a volunteer) an ‘employee’ for particular purposes?

Yes. Some legislation may provide that a worker that is not an ‘employee’ at law may still be entitled to particular protections as if they were an employee.

For example, the laws governing workplace health and safety, workers' compensation and superannuation:

- contain 'deeming' provisions which group employees, independent contractors and volunteers together as 'workers' in certain circumstances, or
- provide a definition of an employee that is broader than the standard legal tests established by the courts

In such instances, ‘employee’ has a broader meaning than the tests in the ‘employee attributes’ table above. The effect of this is that an organisation may owe duties to certain independent contractors and volunteers and be liable to provide them with certain entitlements, as if the independent contractor or volunteer was actually an employee.





# Independent contractors

There are many circumstances in which a community organisation may wish to engage an independent contractor or consultant to provide services to the organisation.



## Example

An organisation may wish to engage an independent contractor when it has a short-term project which requires a person with specialist skills to complete a task – such as an independent evaluation of the organisation's services or programs.

The organisation hiring a contractor is sometimes referred to as the 'principal'.

It's important to:

- understand the attributes (characteristics) of an independent contractor relationship
- consider these attributes in relation to your existing or potential future independent contractor relationships, and
- be clear about how this relationship is distinguished from the volunteer relationship

## When is a worker an 'independent contractor'?

Unlike employees who are seen to be subject to the control and direction of their employer, independent contractors are recognised as running their own business and providing services under commercial, rather than employment, contracts.

Evidence of the attributes listed below in a working relationship suggest the worker is an independent contractor. These attributes may be evident from the contract between the parties, the relationship between the parties, or both.

### Independent contractor attributes

Type of work	Payment and benefits
<ul style="list-style-type: none"> <li>• has control over how to carry out their work and has the expertise to do so (bears responsibility and liability for poor work)</li> </ul>	<ul style="list-style-type: none"> <li>• is paid for results achieved (for example, submits an invoice for work completed or is paid at the end of, or at stages of, a project)</li> </ul>
<ul style="list-style-type: none"> <li>• also provides services to the general public and other businesses</li> </ul>	<ul style="list-style-type: none"> <li>• pays their own superannuation, income tax and GST and holds own insurance policies</li> </ul>
<ul style="list-style-type: none"> <li>• is contracted to work for a set period of time or do a set task and can decide what hours of work are required to complete that work</li> </ul>	<ul style="list-style-type: none"> <li>• may have their own registered business and has an Australian Business Number (<b>ABN</b>)</li> </ul>
<ul style="list-style-type: none"> <li>• is free to accept or refuse work beyond the requirements of any current contract with the organisation</li> </ul>	<ul style="list-style-type: none"> <li>• provides all or most of the necessary materials and equipment to complete the work (for example, uses their own tools, but there may be exceptions to this)</li> </ul>
<ul style="list-style-type: none"> <li>• is usually free to delegate work to others (for example, to engage a subcontractor)</li> </ul>	<ul style="list-style-type: none"> <li>• is in a position to make a profit or loss from work (bears the risk of this)</li> </ul>





### Example – independent contractor

Steve is a handyman and is often called on by Abdul, the operations manager at a local charity, to do minor repairs. Abdul provides Steve with details of the work to be done and the time by which he needs it done. Abdul is not concerned about how Steve does the work only that it is done on time and on budget. Steve considers the request for the work to be done. He personally doesn't have time to do the work, but his colleague Geoff does. Steve agrees with Abdul as to the work to be done, the timeframe in which it is to be done in and the cost of the work to be carried out.

Steve arranges for Geoff to attend the charity's offices with his tools and equipment and complete the work. Steve invoices the charity for the work carried out by Geoff, and Abdul is responsible for payment to Steve and remitting tax on the invoiced amount.

Steve is an independent contractor.

## What does it mean for your organisation if a worker is an 'independent contractor'?

Many of the laws which protect employees' rights and provide for their entitlements don't apply to independent contractors or will apply differently.

More information about the basic legal entitlements and obligations that apply to independent contractors is set out below under the heading 'Legal obligations owed by community organisations'.



# Checklist – analysing your existing volunteer relationships

In analysing your existing volunteer relationships, it may be useful to complete the following check list.



## Note

This is not an exhaustive checklist and there may be other relevant factors to consider.

Factors indicating...	A volunteer relationship	An employer / employee relationship	An independent contractor relationship
Was there an intention to create a legally binding agreement?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes
Is the person motivated by selfless reasons consistent with a volunteering role?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> No
Is there an expectation or provision of remuneration or benefit in relation to the work performed?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes
Is the type of remuneration based on hourly rates or wages (and are overtime and penalties paid)?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does the person have absolute discretion and autonomy about how they perform their tasks or work (can they determine their start and finish times)?	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Is the person free to provide similar services to others within the same industry?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Can the arrangement end at any time?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> No



# Legal obligations owed by community organisations



## Why is it important for your community organisation to know which category of worker is doing work in your organisation?

It's important for your community organisation to know which category of worker is doing work in your organisation because, depending on whether the worker is a volunteer, employee or an independent contractor, different legal entitlements and obligations apply.

The main obligations owed by an organisation to its volunteers, employees and independent contractors are quite detailed and are only summarised very briefly below.

## Minimum legal protections

### Volunteers

The *Independent Contractors Act 2006 (Cth)* and most of the *Fair Work Act 2009 (Cth)* don't apply to volunteers.

A volunteer doesn't have any legally enforceable right to hours of work or payment.

Some organisations may have policies about paying out-of-pocket expenses and other payments for volunteers, but generally there is no legally enforceable obligation for the organisation to do so.



## National Standards for Volunteer Involvement

The Volunteering Australia's National Standards for Volunteer Involvement include Standards relevant to the matters discussed in this part of the guide.

**Standard 2: Volunteer participation is championed and modelled** – Commitment to volunteer participation is set out through vision, planning and resourcing, and supports the organisation's strategic direction.

**2.5** Resources (including time, funds, equipment and technology) are allocated for volunteer involvement.

Evidence of this includes having policies and procedures for reimbursement for volunteer out-of-pocket expenses.

**Standard 7: Volunteers are recognised** – Volunteer contribution, value and impact is understood, appreciated and acknowledged.

This standard sets out non-monetary ways that your organisation can recognise the valuable contribution of volunteers. This could help make sure you are not inadvertently providing a benefit that is comparable to wages.

**7.3** The organisation regularly engages with volunteers about the impact of their contribution.

Evidence of this includes:

- The organisation plans and schedules activities to acknowledge and celebrate the value, contribution and impact of volunteers at the individual and group level.
- References and statements of service are provided to volunteers.
- The governing body and leaders champion and lead volunteer acknowledgement.



## Employees

Under the [Fair Work Act 2009 \(Cth\)](#), all employees are entitled to minimum standards of employment.

These minimum standards are known as the National Employment Standards (**NES**). All employers must comply with the NES.

The NES provides a safety net for all Australian employees and relates to:

- maximum weekly work hours
- requests for flexible working arrangements
- offers and requests to convert from casual to permanent employment
- parental leave and related entitlements
- annual leave
- personal/carer's leave, compassionate leave and unpaid family and domestic violence leave
- community service leave
- long service leave
- public holidays
- notice of termination and redundancy pay, and
- the provision of a Fair Work Information Statement and Casual Employment Information Statement

## Independent contractors

Independent contractors:

- have no statutory entitlement to minimum wages or other benefits such as paid leave (the NES don't apply to them), and
- are free to negotiate the terms of their contracts with the organisations that hire them

However, independent contractors are entitled to some 'general protections' set out in the [Fair Work Act 2009 \(Cth\)](#), including protection from unlawful discrimination.

Independent contractors and organisations may also have rights under the [Independent Contractors Act 2006 \(Cth\)](#). Under that Act, if the provisions apply either party can apply to a court for an order to have the contract (or a part of it) revoked or varied on the grounds that it is 'harsh' or 'unfair'. This could happen if the independent contractor believes that they are being paid at a rate that is, or is likely to be, less than an employee would get for performing similar work.

If your organisation is concerned about whether a contract is unfair, you may need to seek legal advice.

# Application of industrial instruments (awards, enterprise agreements and determinations)

## Volunteers

Volunteers are not covered by the terms of industrial instruments.

## Employees

Employees and employers in certain industries and occupations may be bound by an industrial instrument such as a modern award, enterprise agreement or determination of Fair Work Australia.

These instruments contain additional minimum entitlements that supplement the NES (for example, penalty and overtime rates, loadings and allowances).

## Independent contractors

Independent contractors are not covered by the terms of modern awards, enterprise agreements or determinations of Fair Work Australia.



An independent contractor's entitlements are set out in the contract between the contractor and the organisation (although those rights may be impacted by the [Independent Contractors Act 2006 \(Cth\)](#), certain provisions of the [Fair Work Act 2009 \(Cth\)](#) and various other deeming legislation. See below for further information in relation to superannuation, taxation and workplace health and safety.

## Long service leave

### Volunteers

Volunteers have no legal entitlement to long service leave.

### Employees

Employees are generally entitled to long service leave after a long period of working for an employer. For most employees, their long service leave entitlements come from the laws in the state or territory where they are working. These laws set out how long an employee must work to get long service leave and details of how long service leave is calculated.

### Independent contractors

Independent contractors have no legal entitlement to long service leave.



Long service leave entitlements generally vary between the states and territories. To find out more about long service leave entitlements, contact the long service leave agency in your state or territory. For a list of these agencies, see the [Fair Work Ombudsman website](#).

## Superannuation

### Volunteers

Volunteers have no legal entitlement to superannuation.

### Employees

Under the [Superannuation Guarantee \(Administration\) Act 1992 \(Cth\)](#), your organisation is required to make minimum prescribed superannuation contributions for all eligible employees (whether full time, part time or casual):

- over 18 years, or
- under 18 years who work more than 30 hours a week



### Note

Before 1 July 2022, a \$450 superannuation guarantee applied (so employers were only required to make super guarantee contributions to an eligible employee's super fund if the employee was paid \$450 or more in a calendar month).

The [Australian Tax Office](#) has published a [note](#) on making a payment after 30 June 2022 for work done before 1 July 2022.

### Independent contractors

Under superannuation law, the definition of an employee is expanded to include a person who is engaged wholly or principally for their labour, who is paid under a contract for the hours they work (rather than to achieve a result) and who is not permitted to delegate their work.

The effect of this is that in certain circumstances your organisation may be required to make superannuation payments on behalf of workers you consider to be independent contractors.



The ATO has developed a [Superannuation Guarantee eligibility decision tool](#) to help you understand whether you need to make superannuation contributions for individual workers (including any contractors who are treated as employees). However, these situations can be difficult, and you should seek legal advice in cases of doubt.

## Safety

### Volunteers, employees and independent contractors

Not-for-profit organisations are required by law to make sure they provide a safe working environment for their volunteers, employees and independent contractors.

This legal obligation stems from two primary sources of law:

- the common law (judge made law) of negligence and the negligence provisions in state and territory legislation, and
- work health and safety (or occupational health and safety) laws in each state and territory

Generally, under both sets of laws, if your organisation fails to take steps to protect the safety of volunteers, employees or independent contractors there may be legal repercussions.



You can find more information about your organisation's obligations to volunteers under negligence law and work health and safety laws in part 4 of this guide.

For more information about the work health and occupational health and safety laws in Australia generally see [our WHS webpage](#) and for more information about negligence laws in Australia generally see [our negligence webpage](#).

## Insurance

### Volunteers

Generally, volunteers are not covered by workers' compensation insurance. Therefore, it's a good idea for your organisation to take out personal accident insurance to cover your volunteers for out-of-pocket medical expenses if they are injured while working for your organisation.

Make sure any existing public liability, product liability and professional indemnity insurances are sufficient to cover the activities (acts or omissions) and age range of your volunteers. If they don't, it may also be necessary for your organisation to take out product liability and professional indemnity insurance in respect of its volunteers.

### Employees

Employers are generally required by state and territory health and safety laws to take out workers' compensation insurance to cover the employees and the organisation.

Depending on its activities and functions, your organisation may also need to take out product liability, public liability and professional indemnity insurance to cover its own liability and that of its employees to other people.

### Independent contractors

Unlike employees, independent contractors are typically required to organise their own insurance cover, such as accident compensation, public liability and professional indemnity. However, in some cases, an organisation engaging a contractor may have an obligation to effect workers' compensation insurance in respect of the contractor. The contractor themselves may also have insurance and compensation obligations in respect of their workers.



When you engage a contractor, you should determine if your organisation is required to effect workers' compensation in respect of the contractor and, if so, ensure your policy covers them.

If your organisation is not required to cover the contractor, check whether they have the necessary insurance because your organisation's policies may not cover them (make sure you understand what your policies do and don't cover). These situations can be difficult – seek legal advice in cases of doubt.



For more information about insurance for your community organisation, see part 4 of this guide and [our guide to risk and insurance](#).

For more information about the workers' compensation scheme in your state or territory, contact the relevant regulator:

- Australian Capital Territory – [Worksafe ACT](#)
- New South Wales – [SafeWork NSW](#)
- Northern Territory – [NT WorkSafe](#)
- Queensland – [WorkSafe Queensland](#)
- South Australia – [SafeWork SA](#)
- Tasmania – [WorkSafe Tasmania](#)
- Victoria – [WorkSafe Victoria](#)
- Western Australia – [WorkSafe WA](#)

## Taxation

### Volunteers

In certain circumstances, an organisation may provide volunteers payments or other benefits while working for the organisation. This may include cash payments, non-cash benefits, or both. These payments are given various descriptions, including honoraria, reimbursements, and allowances. Honorary or ex-gratia payments by the organisation to a volunteer are generally not legally enforceable.

How an amount is described does not determine its treatment for tax purposes. Whether a payment is assessable income in the hands of a volunteer depends on the nature of the payment and the recipient's circumstances.

Generally, volunteers do not have to pay tax on payments or benefits they may receive in their capacity as a volunteer for a not-for-profit organisation. Community organisations are similarly not liable to withhold income tax or fringe benefits tax for payments or benefits they provide to volunteers. There are, however, exceptions to these general rules and the ATO has further information on this issue.

### Employees

If your community organisation is an employer, it is required to withhold income tax from wage payments to employees (PAYG withholding) each pay period. The organisation must then provide this tax to the ATO. The [ATO website has a tax withheld calculator](#) that you can use to work out how much tax you need to withhold from payments you make to your employees and other workers each pay period (week, fortnight, or month).

Other taxes, such as fringe benefits tax, may also apply to employees. In addition, depending on the size of your organisation and the total remuneration paid by its payroll, it may also be liable to pay payroll tax to the State Revenue Office.



### Caution

Some not-for-profit community organisations are eligible for an exemption from paying income tax. This means the organisation doesn't have to pay tax on any income that comes into the community organisation (for example, on money received as part of a grant).

However, this exemption only applies to the community organisation income tax liability. It doesn't mean that employees of the community organisation are exempt from paying income tax. All employers are required to comply with the ATO's income tax withholding obligations in relation to payments of income to employees.

## Independent contractors

Typically, independent contractors are paid after they provide a tax invoice to your organisation. The independent contractor is responsible for any income tax liability that may flow from that payment. Generally, the community organisation usually doesn't have to withhold income tax in respect of payments made to independent contractors. However, if a contractor fails to provide you with an ABN, you may have an obligation to withhold PAYG tax.

There is also scope under taxation laws for independent contractors to enter into voluntary agreements authorising their hirers to withhold taxation from payments. Before entering into such a voluntary agreement with an independent contractor, your organisation should contact the ATO or seek legal advice to make sure the necessary requirements for an arrangement of this type are met.

If your organisation is registered or required to be registered for GST purposes, your organisation may have GST obligations in relation to services provided by an independent contractor.

It's important to note that certain tax laws (such as payroll tax laws) apply an expanded definition of employee or deem an independent contractor to be an employee in some cases. The effect of this is that in certain circumstances your organisation may be liable to pay tax in relation to workers that would otherwise be considered independent contractors.

## Termination

### Volunteers

There is no notice period or other requirements to terminate a volunteer relationship – the voluntary nature of the relationship means that either party can end it at any time.

Volunteers can't make unfair or unlawful dismissal claims. However, if a person disputes they were a 'volunteer' and can establish that they had the attributes of an employee (see the table above for the attributes of an employee), and a court accepts that they were an employee, they may be entitled to lodge an action for unfair dismissal.

### Employees

In relation to termination of their employment, most full-time and part-time employees are entitled to a notice period (or pay in lieu of such a notice period) in accordance with the NES. If the employee is covered by a modern award or enterprise agreement or has a written contract of employment, that award, agreement, or contract may specify a greater period of notice. Casual employees are not entitled to notice of termination.

If your organisation dismisses an employee for a reason that contravenes the provisions of the *Fair Work Act 2009 (Cth)* or for a reason that is discriminatory, or the termination is 'harsh, unjust or unreasonable', the employee may be able to make a claim for 'unfair dismissal' or 'unlawful termination' against your organisation.

Always seek legal advice before terminating an employee's employment.





For more information about termination of the volunteer relationship, see part 3 of this guide and our [fact sheet on legal obligations when terminating an employee](#).

## Independent contractors

If your organisation has a contract with an independent contractor, that contract will ordinarily end when the independent contractor has completed the work and received payment from your organisation. However, if your organisation wants to terminate the agreement before completion of the work, it can only do so in accordance with the terms of the contract or if otherwise allowed by the law (for example, it may be possible to terminate the contract if it can't be completed for reasons outside the control of either party).

Check the terms of your contract to see whether your organisation:

- can terminate by giving notice, and
- is required to pay the contractor for costs they incurred up to the date of termination

These situations can be difficult, and you should seek legal advice, particularly if the contract does not have any express provision dealing with termination.

Depending on its terms, your organisation may also be able to terminate a contract if the contractor is in serious breach of the contract. Again, it's important to look carefully at the terms of the contract because sometimes they require you to give the independent contractor a 'notice to remedy a breach' and an opportunity to fix it before terminating the agreement.

Unlike employees, independent contractors can't make unfair or unlawful dismissal claims. However, if your organisation attempts to terminate its contract with an independent contractor, other than in accordance with the terms of that contract, the independent contractor may take legal action against your organisation for breach of contract or breach of applicable general protections provisions of the [Fair Work Act 2009 \(Cth\)](#).



### Caution

If a person who your organisation regards as an 'independent contractor' can establish in court that they are properly classified as an employee (see the table above for attributes of an employee), they will be able to make any claims available to an employee, including an unfair dismissal claim.



# The risks of not describing a worker's status accurately

Often the parties to a contract for the performance of work will try to describe the legal nature of the relationship between them.

For example, a contract may state:

- 'this agreement does not create a relationship of employment' or
- 'the parties agree that their relationship is one of principal and independent contractor'

While it is a good idea to write down the terms of the relationship in a contract so both parties are clear about the arrangement, the label you give your worker is not necessarily decisive.

The nature of the rights and obligations between the parties as set out in the contract will largely determine whether the worker is an employee, independent contractor, or volunteer.

So, if a person who is called an 'independent contractor' or 'volunteer' actually has all or many of the attributes of an employee (see above for employee attributes), a court may decide that the person is an 'employee' and entitled to the legal benefits of being an employee.



## Caution

Even if it is made clear in writing that the person is a 'volunteer', if the true nature of the relationship is that of an employer and employee, your organisation can't rely on the label of 'volunteer' or the existence of a volunteer agreement as proof of this arrangement.



## Remember

If your organisation is not sure about how to correctly classify the worker, or whether you have correctly labelled the worker – seek legal advice.

# Summary – the differences between a volunteer, employee and independent contractor

## The law recognises many different categories of ‘workers’ such as volunteers, employees and independent contractors

- The law treats each category of worker differently; it's important that you do as well
- The consequences for failing to understand these differences include exposing your organisation to claims for employee entitlements, unfair dismissal claims and penalties for failing to remit taxes or pay superannuation

## Different legal obligations are owed to volunteers, employees and independent contractors

- Your organisation needs to be across the different legal entitlements and obligations surrounding payment, safety, industrial instruments (such as awards), insurance, superannuation, taxation and termination



## Each category of worker has unique attributes

- Generally, volunteers are not paid for the work that they perform, they perform without a legally enforceable obligation to do so and the volunteer relationship can end at any time
- Generally, employees are paid for time worked, must perform the duties of their position, perform ongoing work under the supervision and control of an employer and are entitled to paid and unpaid leave
- Generally, independent contractors have control over how they carry out their work, are paid for results that they achieve, are contracted for a set period of time or a set task and are free to accept work from the general public and other businesses

## Consider using a volunteer agreement

- This is the best way to be clear about the relationship between your organisation and the volunteer. For a sample volunteer agreement, see part 3 of this guide
- When your organisation engages a worker, it should clarify from the outset the nature of the relationship and the expectations and obligations of the parties

## Distinguish between members and volunteers

- Be aware that your organisation's members may also be considered ‘volunteers’ in particular circumstances
- This has certain legal implications for your organisation - certain laws apply to volunteers that may not apply to members, and insurance may apply to volunteers and members in a different way

