

Employee, contractor or volunteer?

A guide for community organisations

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Part 1

**Different categories of working
relationships**

Different categories of working relationships



This part of the guide covers:

- ▶ why it is important to correctly classify workers
- ▶ the legal differences between employees, independent contractors and volunteers
- ▶ factors that help determine whether a worker is an employee, independent contractor or volunteer



Disclaimer

This guide provides information on different working relationships and the legal obligations an organisation owes to its employees, independent contractors and volunteers. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this guide.

Whether a person is an **employee**, **independent contractor** or **volunteer** depends on the nature of their relationship with the organisation. This distinction is important because different legal rights, protections and obligations apply to each category of worker.

The law recognises different categories of relationships under which a person performs work or services for another person or organisation. 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. A volunteer performs work for another person or organisation without an expectation of, or legal right to, payment or reward.

The legal distinction between the different types of workers is not always easy to make.



It's important for your organisation to correctly identify the status of each worker because different legal rights, protections and obligations apply to employees, independent contractors and volunteers.

If your organisation incorrectly classifies a worker:

- you may fail to provide the worker with their legal rights and entitlements
- your organisation may fail to comply with legal obligations that apply to that worker
- the worker may be unclear about their rights and responsibilities, and
- your organisation may face legal claims, financial liabilities or penalties



Assessing whether a worker is an employee, contractor, or volunteer

When assessing a worker's relationship with an organisation, the Fair Work Ombudsman, a court or a tribunal may consider **four key factors** to determine whether the parties intended to create a legally binding agreement.

If these factors are present, the relationship is less likely to be a volunteer relationship.

1. Intention to create legal relations

Consider whether the facts and circumstances show that both parties intended to create a legal relationship and that the arrangement could be legally enforced.

For example:

- can the organisation legally require the person to perform the work?
- can the person legally require the organisation to provide work or an agreed benefit?
- can either party end the arrangement at any time without legal consequences?

If the parties intended to create legally enforceable obligations relating to the work, the relationship is unlikely to be a volunteer relationship.

2. Consideration

Consider whether each party has agreed to provide something of value to the other.

The worker will usually provide their labour. An employer or principal will usually provide payment, but consideration may also take the form of training, experience or another monetary or non-monetary benefit.

See the information below about unpaid work experience and internships.

3. Mutuality of obligation

Consider whether the person's commitment to perform work is given in exchange for the benefit or experience offered by the employer or principal.

Mutuality of obligation is more likely to indicate an employment or independent contractor relationship where the benefit, usually payment, is linked to hours worked or the completion of a particular task.

4. Certainty and completeness

Consider whether the parties have agreed on the essential terms needed to make the arrangement workable and whether those terms are sufficiently clear.

Whether certainty and completeness indicate an employment, independent contractor or volunteer relationship will depend on the actual terms of the arrangement.

For example, an arrangement is more likely to be a volunteer relationship where its terms clearly state that:

- the person is engaged as a volunteer
- the parties do not intend to create legally enforceable obligations relating to the volunteer's attendance or performance of work, and
- any payments are not linked to hours worked or the completion of particular tasks

**Note**

A court or tribunal may consider the actual nature of an arrangement, not only how the parties describe it.

**What is a legally binding relationship?**

Legal relations exist where the parties intend that their arrangement will create legally enforceable rights and obligations.

Generally, this means that if one party does not meet their obligations, the other party may be able to seek a legal remedy, such as damages or, in some circumstances, an order requiring the party to meet those obligations.

In a genuine volunteer relationship, there is no intention to create legally enforceable obligations relating to attendance or the work to be performed. For example, if a volunteer decides not to attend, the organisation generally has no legal right to require them to do so. Similarly, a volunteer cannot generally require the organisation to provide them with volunteer work.

**Note – protecting intellectual property and confidential information**

An organisation may still require a volunteer to comply with legally binding obligations relating to confidential information or intellectual property. These obligations will not, by themselves, change the nature of the volunteer relationship, provided they do not create legally enforceable obligations relating to attendance or the performance of work.

See our [National Volunteering guide](#) for more information about protecting confidential information and intellectual property in a volunteer agreement.

**Case example – intention to create legal relations**

Anglican Community Services asked Mr and Mrs Morris to act as caretakers of a property used for camps and retreats. They performed the role for three years before claiming unpaid wages. The organisation argued that they were volunteers.

The judge found that the parties intended to create legal relations and that Mr and Mrs Morris were employees, not volunteers. Relevant factors included that their duties were clearly defined, they received rent and amenities in exchange for their labour, their appointment was ongoing and subject to review, and the arrangement required three months' notice of termination.

These features were inconsistent with a genuine volunteer arrangement, which either party can ordinarily end without legal consequences.

Mr and Mrs Morris were entitled to outstanding wages, annual leave, public holiday entitlements, superannuation and interest under the applicable modern award.

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

The nature of the relationship

In addition to considering how the parties describe their relationship in an agreement, a court or tribunal may consider the practical reality of the arrangement and the work being performed.

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

- involves productive work rather than learning, training or skill development
- continues for an extended period
- involves work that is integral to the organisation's operations, and
- primarily benefits the organisation



Caution

Take care when negotiating with a worker. A legally binding agreement does not have to be in writing. It may be formed through conversations, emails or other communications, or inferred from the parties' conduct.

Work is more likely to be considered voluntary in nature where it is primarily observational or forms part of a learning experience, rather than being undertaken primarily for the benefit of the organisation.



Case example – workers compensation and volunteer's status

Guilbert volunteered at a horse-riding ranch in New South Wales. Her tasks included caring for horses, assisting with trail rides, cleaning facilities and helping in the ranch café. She was also allowed to participate in riding lessons and trail rides.

After she was injured while assisting with a trail ride, Guilbert claimed she was a worker for workers' compensation purposes. She argued that the riding lessons and trail rides were consideration for the work she performed, and that the ranch exercised significant control over her activities.

The Commissioner found that the parties did not intend to create legal relations. The riding lessons and trail rides were not consideration given in exchange for work under an employment contract, and the organisation's supervision of volunteers could be explained by safety requirements and operational needs.

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



Note

This decision does not mean that volunteers are always excluded from workers' compensation schemes or that organisations are never responsible for costs associated with injuries to volunteers. Coverage depends on the applicable law and the circumstances.

For more information, see our [National Volunteering guide](#).



Case example – payment and workers' compensation

Wieland performed several roles for Basketball SA and received fixed payments for those roles. After suffering an injury while attending the stadium to perform one of them, she claimed compensation under South Australian workers' compensation legislation.

Although Basketball SA described Wieland as a volunteer, the Tribunal found that the parties intended to create a contractual relationship because there was a direct relationship between the work she performed and the payments she received. Wieland was therefore entitled to compensation for her injuries.

Wieland v Return to Work SA [2018] SAET 190

Unpaid work experience and internships

In some circumstances, it is lawful for a person to perform work without payment. This may occur, for example, where a person volunteers for a not-for-profit organisation or gains experience through a formal program connected with education or training.

However, if the person is actually an employee, they are entitled to the pay and conditions that apply under the *Fair Work Act 2009 (Cth)* (**Fair Work Act**).

The Fair Work Ombudsman considers a range of factors when determining whether an arrangement is a lawful unpaid trial, vocational placement, work experience arrangement or internship.



See the [Fair Work Ombudsman's website](#) for more information about [unpaid work](#).



Case example – internship

A university student completed more than 180 hours of work for AIMG as part of an unpaid internship. The internship was not connected to the student's university studies and involved productive work for AIMG's benefit.

The Court found that an employment relationship existed and ordered AIMG to pay outstanding wages and penalties. The Court stated that it would not tolerate attempts to disguise employment relationships as unpaid internships to avoid providing employee entitlements.

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



Case example – work experience

Barbour worked as an unpaid assistant in a small law firm after graduating. The arrangement allowed him to observe practitioners and learn about legal practice, with the possibility of paid work in the future.

After the firm stopped offering him work, Barbour claimed he was an employee. The Fair Work Commission found there was no employment contract, no exchange of work for payment, and no intention to create a legally binding arrangement. The opportunity was intended to provide experience and did not create an employment relationship.

Barbour v Memtaz Derbas T/A Derbas Lawyers [2021] FWC 1718

Employee relationships

The distinction between an employee, independent contractor and volunteer is not always straightforward.

While legislation governs many aspects of employment, whether a worker is an employee, independent contractor or volunteer has also been determined through legal principles developed by the courts.

For a period following two High Court decisions in 2022, the courts generally focused on the terms of the parties' contract when determining whether a worker was an employee or independent contractor.

The parties' conduct could still be relevant where:

- the agreement was not in writing or was partly written and partly oral
- the validity of the contract was challenged
- the parties had varied the contract, or
- a party relied on rectification, estoppel or another legal, equitable or statutory right or remedy

The Fair Work Act now contains a statutory test for determining the ordinary meaning of employee and employer. The test has applied since 26 August 2024.

Under that test, the relationship is determined by considering the real substance, practical reality and true nature of the relationship. This requires consideration of the whole relationship, including:

- the terms of any contract governing the relationship, and
- how the contract is performed in practice

Different rules may apply when determining the status of a worker for periods before 26 August 2024 or where a worker has validly opted out of the whole of relationship test.



Key point

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

- the terms of any agreement between the parties
- how the relationship operates in practice, or
- both the agreement and the practical reality of the relationship

Employee attributes

The presence of the attributes below may indicate that a worker is an employee. The attributes may arise from the parties' agreement and from how the relationship operates in practice.

No single attribute will necessarily determine the worker's status.

Type of work

An employee generally:

- performs ongoing work under the employer's control, direction and supervision
- must perform the duties of their position
- provides their personal services and generally cannot arrange for another person to perform their work
- works hours set by the employer, an enterprise agreement or a modern award
- is represented as part of the employer's organisation, for example by wearing a uniform or using the organisation's business cards
- does not bear the commercial risk associated with the work
- is not in a position to make a profit or loss from performing the work, and
- contracts personally with the employer rather than through a separate incorporated entity or partnership

An employer may end an employee's employment for a lawful reason, subject to the employee's contract, applicable legislation and any relevant modern award or enterprise agreement.

Payments and benefits

An employee generally:

- is paid for time worked
- is paid regularly, such as weekly, fortnightly or monthly
- has income tax withheld from their salary or wages
- receives superannuation contributions if eligible
- may be entitled to paid and unpaid leave
- may be entitled to notice of termination or payment instead of notice
- is covered by the employer's workers' compensation insurance
- uses tools or equipment provided by the employer
- does not submit invoices for payment, and
- is not generally paid only when a particular result, project or deliverable is completed, although some employees may receive commissions or piece rates



Note

Other factors may be relevant in a particular case. If your organisation is unsure whether a worker is an employee, it should seek legal advice.



Example – employee

Barry is a retired clerk who regularly performs administrative duties and project work for a local charity. The charity determines the work he performs and agrees with him on the days and times he will work.

Barry is paid by the hour, uses equipment provided by the charity, wears a charity uniform, reports to the office manager and has tax withheld from his payments.

Although Barry works irregular hours, he is likely to be an employee of the charity, probably on a casual basis.

Legal consequences of an employment relationship

Employers must provide employees with the rights and entitlements required by law.

These may include minimum rates of pay, leave, superannuation and other employment entitlements. Employers must also comply with legal requirements concerning how employees are treated.

For example, an employer may have to give an employee notice of termination or payment instead of notice. Different requirements may apply to casual employees and employees covered by a modern award or enterprise agreement.



A summary of the basic legal entitlements that employers owe to their employees is set out in [part 2 of this guide](#).

Also see [our fact sheet Employee entitlements and protections](#).



Note

Independent contractors and volunteers do not receive all the same rights and entitlements as employees. Your organisation should be clear about the basis on which each person performs work.



Tip

Use a written agreement to document the nature and terms of the relationship between your organisation and each worker.

However, describing a person as an employee, independent contractor or volunteer does not determine their legal status. The terms of the agreement and, where relevant, how the relationship operates in practice must support that description.

Extended statutory definitions of employee and worker

Some legislation may treat a person who is not an employee under the ordinary legal test as an employee or worker for a particular purpose.

For example, workplace health and safety, workers' compensation and superannuation legislation may:

- apply to employees, independent contractors and volunteers as members of a broader category of workers, or
- use an extended definition of employee

An organisation may therefore owe duties to some independent contractors or volunteers, or have obligations relating to them, even though they are not employees under the ordinary legal test.



Caution – some legal obligations apply beyond employees

Legal rights, protections and obligations apply differently to different categories of workers.

Although employees generally receive more employment entitlements than volunteers or independent contractors, some laws apply more broadly. For example:

- workplace health and safety or occupational health and safety laws may protect employees, independent contractors and volunteers
- some independent contractors may be treated as employees for superannuation purposes, and
- workers' compensation legislation may cover some people who are not employees under the ordinary legal test

Independent contractor relationships

Community organisations often engage independent contractors or consultants to provide specialist services or complete particular projects.



Example

An organisation may engage an independent contractor to complete a short-term project requiring specialist skills, such as an independent evaluation of the organisation's services or programs.

The organisation engaging an independent contractor is sometimes called the **principal**.

An independent contractor generally operates their own business and provides services under a contract for services. This differs from an employee, who works under a contract of service as part of the employer's business.

The presence of the attributes below may indicate that a worker is an independent contractor. The attributes may arise from the parties' agreement and from how the relationship operates in practice.

No single attribute will necessarily determine the worker's status.

Independent contractor attributes

Type of work

An independent contractor generally:

- controls how the work is performed and has the expertise needed to perform it
- accepts responsibility for the quality of the work
- may provide services to the public and to other organisations
- is engaged for a particular period or to complete a particular task
- determines the hours needed to complete the agreed work
- may accept or refuse work outside the requirements of an existing contract
- may arrange for another person or subcontractor to perform the work, subject to the contract, and
- may provide services through an incorporated entity or partnership

Payments and benefits

An independent contractor generally:

- is paid for achieving an agreed result or completing a project
- submits invoices for payment
- is responsible for their own taxation and GST obligations
- arranges their own superannuation, subject to any superannuation obligations that may apply to the principal
- holds appropriate insurance
- may have an Australian Business Number
- provides all or most of the equipment and materials required to perform the work
- may make a profit or loss from the work, and
- does not receive paid or unpaid employee leave entitlements

Having an Australian Business Number does not, by itself, establish that a person is an independent contractor.

Insurance and workers' compensation requirements differ between jurisdictions. An organisation should not assume that describing a worker as an independent contractor removes all insurance or workers' compensation obligations.



Note

Other factors may be relevant in a particular case. If your organisation is unsure whether a worker is an independent contractor, it should seek legal advice.



Example – independent contractor

Steve is a handyman who is often asked by Abdul, the operations manager at a local charity, to complete minor repairs.

Abdul identifies the work and the date by which it must be completed. He is concerned that the work is completed on time and within budget, but does not direct Steve about how to perform it.

Steve does not have time to complete a particular job, but his colleague Geoff does. Steve agrees with Abdul on the scope, timing and price of the work. He then arranges for Geoff to attend the charity's premises with the necessary tools and equipment.

Steve invoices the charity for the work and is responsible for paying Geoff.

Steve is likely to be an independent contractor.



The Australian Taxation Office (**ATO**) has [guidance](#) to help you understand whether individual workers in your organisation are employees or contractors so you can comply with tax and superannuation obligations.

Legal consequences of an independent contractor relationship

Many laws that provide rights and entitlements to employees do not apply to independent contractors or apply differently to them.

An independent contractor's principal rights and obligations are generally set out in the contract with the organisation, although legislation may also apply.



[Part 2 of this guide](#) summarises some of the legal rights and obligations that apply to independent contractors.

Volunteer relationships

Australian law does not contain a single legal definition of a volunteer. However, guidance from the Fair Work Ombudsman, Volunteering Australia and the courts can help organisations distinguish volunteers from employees and independent contractors.



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](#) identifies the following characteristics of a genuine volunteering arrangement:

- the person performs work mainly to benefit another person or organisation
- the organisation and the person did not intend to create a legally binding employment relationship
- the person is not legally required to attend the workplace or perform work, and
- the person does not expect to be paid for their work

The more formal an arrangement becomes, the greater the possibility that it may be an employment relationship. For example, requiring a person to attend compulsory rostered shifts may suggest that the person is an employee rather than a volunteer.

However, the context and purpose of the arrangement are also relevant. An employment relationship may be less likely where a person performs work for community or altruistic reasons in the not-for-profit sector.

Community organisations should take care not to inadvertently create an employment relationship with a volunteer. Whether a person is a volunteer depends on the substance of the arrangement, not simply the label applied to it.

Calling an agreement a volunteer agreement will not be sufficient if its terms, or the practical reality of the relationship, establish an employment relationship.

If a person described as a volunteer is legally an employee, they may be entitled to:

- the applicable minimum rate of pay
- the National Employment Standards
- other rights and protections under the Fair Work Act, and
- entitlements under an applicable modern award or enterprise agreement



Awards and enterprise agreements are discussed in [part 2 of this guide](#).

Also see [our fact sheet Modern awards and enterprise agreements](#).

Volunteer attributes

The following attributes may indicate that a person is a volunteer.

Type of work

A volunteer generally:

- provides services voluntarily, without a legally enforceable obligation to perform the work
- does not expect payment for work performed
- is not bound by a contract of employment or contract for services
- may have a written volunteer agreement, but the agreement does not create legally enforceable obligations to attend or perform the volunteer work, and
- can end the volunteer arrangement at any time

Payments and benefits

A volunteer generally:

- has no legally enforceable right to payment or benefits
- may receive an honorarium, allowance or modest non-cash benefit
- may be reimbursed for authorised out-of-pocket expenses, and
- does not receive payments calculated by reference to hours worked or particular tasks completed

Payments and benefits may have taxation consequences. Regular or substantial payments may also support a conclusion that the person is an employee or independent contractor.

Whether an organisation is required to withhold tax or pay superannuation depends on the legal nature of the payment and the relationship. The name given to a payment does not determine its legal or taxation treatment.

Payments to volunteers

Volunteers generally provide their services without expectation of payment.

It is common and appropriate for organisations to reimburse volunteers for authorised out-of-pocket expenses incurred while volunteering. Organisations may also provide modest recognition payments or non-cash benefits in some circumstances.

However, payments that resemble wages or payment for services may indicate that the person is an employee or independent contractor rather than a volunteer.

Concerns may arise where:

- a payment is calculated by reference to time spent with the organisation or hours worked
- an allowance substantially exceeds the expenses actually incurred
- payments are made regularly, or
- a lump sum is paid in exchange for services performed



Case example – honorarium

Bergman was a member and regular bingo patron of the Broken Hill Musicians Club. Bergman called bingo sessions for a community club for about five years and received \$50 for calling five sessions each week. After the arrangement ended, she claimed she had been unfairly dismissed and argued that she was an employee.

The Fair Work Commission found that Bergman was not an employee. The parties did not intend to create a legally enforceable arrangement, and the \$50 payment was a gift rather than payment in exchange for work under an employment contract.

Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club [2011] FWA 1143



Case example – honorarium, terms of the agreement

Grinholz coached a soccer team for Football Federation Victoria under a voluntary services agreement and received a \$6,000 honorarium.

After the arrangement ended, Grinholz argued he was an employee rather than a volunteer. He pointed to factors such as the degree of control Football Federation Victoria exercised over his work, its requirements about how coaching services were provided, limits on delegation, the requirement to wear a uniform and comply with organisational policies, and the provision of equipment.

Football Federation Victoria argued that the honorarium was not based on hours worked, was closely related to likely expenses, and that the agreement expressly stated that Grinholz was a volunteer rather than an employee or contractor. It also pointed to the fact that Grinholz was not entitled to paid leave and performed coaching work for other organisations.

The Fair Work Commission found that Grinholz was a volunteer and could not bring an unfair dismissal claim. The Commission accepted that some requirements that might ordinarily indicate employment could be explained by the legitimate need to maintain standards and protect the organisation's interests.

Grinholz v Football Federation Victoria Inc [2016] FWC 7976



Caution – payments can affect volunteer status

Payments or benefits provided to volunteers may affect whether the arrangement is characterised as a volunteer, employment or independent contractor relationship and may also have taxation consequences.

If your organisation provides a volunteer with a payment or benefit, clearly document its nature and purpose and consider any taxation, superannuation or employment law consequences.

Regular or substantial payments may indicate that the person is an employee or independent contractor rather than a volunteer.



Tip – volunteer agreements

Record the nature of the volunteer relationship in a written volunteer agreement.

The agreement should generally state that the person:

- is a volunteer, not an employee or contractor
- does not expect payment for their volunteer work, and
- does not intend to create legally enforceable obligations relating to attendance or the performance of work

A volunteer agreement should generally not impose legally enforceable obligations relating to attendance or performance of work. However, some provisions, such as confidentiality or intellectual property provisions, may need to be legally binding.

See our [National Volunteering guide](#) for more information about volunteer agreements.

Spontaneous volunteers

Community organisations sometimes receive spontaneous offers of help following an emergency, crisis or event attracting significant public attention.

Spontaneous volunteers differ from volunteers engaged through an organisation's usual recruitment and management processes. Their involvement may create practical and legal risks that require careful management.



For more information about spontaneous volunteers, see our [National Volunteering guide](#) and [our webpage Managing spontaneous volunteers](#).

When a member is also a volunteer

A member of a not-for-profit organisation has rights and obligations arising from the organisation's governing document and applicable legislation. These may include rights to vote at general meetings, attend meetings, and access certain information.

A member does not become a volunteer merely by exercising the rights or meeting the obligations connected with membership.

However, if the organisation asks a member to perform work outside their role as a member, the person may also be a volunteer.

This distinction can have legal consequences because:

- laws that apply to volunteers may not apply to members acting only in their capacity as members, and
- an insurance policy may cover members and volunteers differently

Volunteer board or committee members may also have personal legal duties and, in some circumstances, may be personally liable.

For an unincorporated association, a duty of care does not arise merely because people share membership of the association. However, committee members or other individuals may still owe duties in relation to activities they organise or control.

Unincorporated associations registered as charities with the Australian Charities and Not-for-profits Commission (**ACNC**) must comply with applicable ACNC requirements, including the [ACNC Governance Standards](#).

The duties of responsible people under the Governance Standards include duties to:

- act with reasonable care and diligence
- act honestly and fairly in the charity's best interests and to further its charitable purposes
- not misuse their position or information
- disclose conflicts of interest
- ensure the charity's financial affairs are managed responsibly, and
- not allow the charity to operate while insolvent



Case example – when a member is also a volunteer

Mr Hrybynyuk was a member of a Russian club who was asked by the club's president to help demolish a shed on the club's premises. He was seriously injured while performing that work. The Court found that a person who asks a member to perform work outside their role as a member may owe that person a duty of care in their capacity as a volunteer.

The case illustrates that a member who performs work outside their role as a member may also be acting as a volunteer and may be owed legal duties in that capacity.

Hrybynyuk v Mazur [2004] NSWCA 374



Tip – insurance

Check whether your organisation's insurance covers volunteers, members performing volunteer work, and loss, injury or damage caused by volunteers.

If you are unsure about the scope of cover, check with your insurer.



Example – insurance

Mr Ball was a member of his local cricket club. When the club asked members to help at a working bee, he volunteered to clean the gutters and injured his back after falling from a ladder.

The club's insurance covered employees and people playing sport, but not volunteers. Because Mr Ball was volunteering rather than acting as an employee, he may not have had insurance cover for the costs arising from his injury.

Legal consequences of a volunteer relationship

Many laws that provide employment rights and entitlements apply differently to volunteers or do not apply to them.

However, organisations may still owe volunteers legal duties, including duties under:

- workplace health and safety or occupational health and safety laws
- negligence law
- anti-discrimination law
- privacy law
- child safety laws, and
- other laws applying to the organisation's activities

Many laws that protect employees' rights and entitlements apply differently to volunteers or, in some instances, don't apply to them at all.



Part 2 of this [guide](#) summarises some of the legal rights and obligations that apply to volunteers.



Caution – not all unpaid work is volunteering

A volunteer arrangement is different from other forms of unpaid work.

Other legal requirements may apply to:

- court-ordered community work and fine repayment schemes
- mutual obligation activities
- vocational placements
- unpaid internships, and
- work experience arrangements

Summary: key characteristics of different categories of workers

The table below summarises the key characteristics of volunteers, employees and independent contractors.



Note

This summary is not exhaustive. Other factors may be relevant, and no single characteristic will necessarily determine the legal status of a worker. A worker's status will depend on the whole relationship and the circumstances of the arrangement.

Factors	Volunteer	Employee	Independent contractor
Intention to create a legal relations?	The parties do not intend to create legally enforceable obligations relating to attendance or performance of the work.	The parties intend to create legally enforceable obligations.	The parties intend to create legally enforceable obligations.
Motivation for performing the work?	The person performs the work for community, altruistic, social, cultural or similar reasons rather than in exchange for payment.	The person performs the work in exchange for remuneration and employment entitlements.	The person provides services as part of their own business or commercial activity in exchange for payment.
Expectation of payment or benefit?	The person does not expect payment for work performed, although they may receive reimbursement or a modest recognition payment or benefit.	The person has a legally enforceable right to payment.	The person has a legally enforceable right to payment under the services contract.
How is payment calculated?	Any payment is not calculated by reference to hours worked or tasks completed.	Payment is commonly based on time worked, although commission, piece rates and other arrangements may apply.	Payment is commonly linked to achieving an agreed result or completing a project or deliverable.
Control over the work?	The organisation may provide reasonable directions, supervision and safety requirements, but the volunteer is not legally required to attend or perform the work.	The employer generally controls or has the right to control the work, subject to the employment contract and applicable law.	The contractor generally controls how the agreed services are provided, subject to the terms of the contract.
Ability to work for others?	The person is generally free to volunteer or work elsewhere.	The person may be subject to lawful restrictions under their employment contract, although employees may work for more than one employer.	The person generally provides or may offer similar services to other clients.
Ability to delegate work?	The volunteer may be able to arrange for another volunteer to help or take their place,	The employee generally must perform the work personally.	The contractor may be able to delegate or subcontract the work, subject to the contract.



	subject to the organisation's policies, safety requirements and screening processes.		
Ending the arrangement	Either party can generally end the volunteer arrangement at any time without a contractual notice requirement.	The employment relationship is subject to legislative, award, enterprise agreement and contractual requirements governing termination.	The services contract ends according to its terms or applicable law.



Final caution

The legal status of a worker depends on the whole relationship. A written agreement is important, but the label used in the agreement will not determine the outcome if the terms or practical reality of the relationship point to a different legal status.



Part 2

**Legal obligations owed to
employees, contractors and
volunteers**

Legal obligations owed to employees, contractors and volunteers



This part of the guide covers:

- ▶ the legal obligations organisations owe to employees, independent contractors and volunteers
- ▶ how those obligations differ depending on the type of worker involved, and
- ▶ the risks of incorrectly classifying a worker

This part of the guide provides an overview of some of the different legal rights, protections and obligations that apply to employees, independent contractors and volunteers.

Because the law applies differently to different categories of workers, it is important for community organisations to understand the nature of each working relationship.

Employment entitlements and benefits

The employment entitlements and benefits that apply to employees, independent contractors and volunteers differ significantly.

National Employment Standards

Employees

Under the *Fair Work Act 2009 (Cth)* (**Fair Work Act**), all employees are entitled to minimum standards of employment known as the **National Employment Standards (NES)**.

The NES provide a minimum safety net for Australian employees and include minimum entitlements relating to:

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

Employees are also entitled to the general workplace protections contained in the Fair Work Act, including protections against unlawful discrimination and adverse action.

Independent contractors

Independent contractors:

- have no statutory entitlement to minimum wages or employee benefits such as paid leave, and
- are generally free to negotiate the terms of their engagement with the organisations that engage them

Independent contractors are entitled to certain general protections under the Fair Work Act, including protection from unlawful discrimination.

Some independent contractors and organisations may also have rights under the [*Independent Contractors Act 2006 \(Cth\)*](#) (**Independent Contractors Act**). In some circumstances, a court can review, vary or set aside a services contract if it is found to be harsh or unfair.

When considering whether a services contract is unfair or harsh, a court may have regard to matters such as:

- the terms of the contract
- the relative bargaining positions of the parties
- whether undue influence, pressure or unfair tactics were used
- whether the contractor receives less remuneration than an employee performing similar work, and
- any other relevant circumstances

Volunteers

The Fair Work Act and the Independent Contractors Act generally don't apply to volunteers.

Volunteers do not have a legally enforceable right to work, hours of work or payment. Organisations may choose to reimburse volunteers for authorised expenses or provide other forms of recognition, but volunteers are not generally entitled to employment benefits.

Importantly, other legal obligations may still apply in relation to volunteers, including obligations under workplace health and safety laws.



Organisations may wish to refer to [*Volunteering Australia's National Standards for Volunteer Involvement*](#) for guidance on volunteer management good practice. The Standards are not a statement of legal obligations.

Modern awards and enterprise agreements

Employees

Employees may be covered by industrial instruments that provide additional workplace rights and entitlements.

Industrial instruments include:

- **modern awards**, which apply to particular industries or occupations, and
- **enterprise agreements**, which apply to specific workplaces and replace any applicable modern award

These instruments commonly regulate matters such as:

- minimum rates of pay
- overtime
- penalty rates
- allowances
- rostering, and
- consultation obligations

Employees may also be affected by decisions and orders of the Fair Work Commission.

Independent contractors

Independent contractors are not covered by modern awards or enterprise agreements.

Their rights and obligations are generally determined by their services contract and applicable legislation.

Volunteers

Volunteers are not covered by modern awards, enterprise agreements or Fair Work Commission determinations.

However, other laws may still apply to volunteers, including workplace health and safety laws, anti-discrimination laws and negligence principles.

Long service leave

Employees

Employees are generally entitled to long service leave after a lengthy period of service with the same employer. Long service leave is governed by state and territory legislation, which differs across Australia.

The relevant legislation determines:

- when long service leave becomes available
- how leave accrues, and
- the circumstances in which leave may be taken or paid out



To find out more about long service leave in your jurisdiction, contact the relevant long service leave authority or see the [Fair Work Ombudsman's website](#).

Independent contractors

Independent contractors are not entitled to long service leave.

Volunteers

Volunteers are not entitled to long service leave.

Superannuation

Employees

Organisations must make superannuation guarantee contributions for eligible employees in accordance with the [Superannuation Guarantee \(Administration\) Act 1992 \(Cth\)](#).

Superannuation obligations may apply to full-time, part-time and casual employees.

There is no minimum earnings threshold before superannuation obligations arise.



The [Australian Taxation Office has published a note](#) on when employers are required to pay their workers superannuation guarantee.

Independent contractors

Some independent contractors are also entitled to superannuation contributions.

This may occur where a contractor works under a contract that is wholly or principally for their labour.

For superannuation requirements to apply, the contract must be directly between the contractor and the principal. It can't be through another person or through a company, trust or partnership.



The Australian Taxation Office has developed a [superannuation guarantee eligibility decision tool](#) to help organisations determine whether they must make superannuation contributions for individual workers, including contractors who may be treated as employees for superannuation purposes.

However, these situations can be complex, so seek legal advice if you are unsure.

Volunteers

Organisations are generally not required to make superannuation contributions for volunteers.

Work health and safety

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

These obligations arise from two main sources of law:

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

Generally, under both sets of laws, organisations that fail to take reasonable steps to protect the safety of employees, independent contractors or volunteers may face legal consequences.

Employees

Community organisations owe employees a duty of care to take reasonable steps to avoid exposing them to foreseeable risks of injury.

There is also workplace health and safety legislation in every state and territory. All jurisdictions except Victoria have adopted versions of the model WHS laws. Victoria has a separate OHS regime.



Note

Although the legislation differs across jurisdictions, a common requirement is that organisations take reasonably practicable steps to provide a safe working environment and safe systems of work.

If your organisation operates in a state or territory other than Victoria

Your organisation will generally need to comply with WHS laws if it is a person conducting a business or undertaking (**PCBU**). This is a broad concept that includes many not-for-profit organisations that carry out ongoing and organised activities.

An exception applies to some volunteer associations. A volunteer association that is run entirely by volunteers and does not employ any workers may not be subject to the WHS laws. However, if the organisation employs even one worker, including on a part-time or casual basis, it will generally become subject to the WHS laws.

Once an organisation is covered by the WHS laws, it owes WHS duties to all workers, including:

- employees
- independent contractors, and
- volunteers

If your organisation operates in Victoria

Victoria operates under separate OHS legislation.



An organisation will generally be required to comply with Victorian OHS laws if it employs one or more people under contracts of employment or training.

Even where an organisation is entirely volunteer-run, obligations may still arise if it manages or controls a workplace where employees or self-employed persons carry out work.

Victorian OHS laws include obligations to:

- provide a safe working environment
- monitor workplace conditions
- monitor the health of employees, and
- protect other people from risks arising from the organisation's activities

Independent contractors

If an organisation is subject to the WHS laws, its duties generally extend to all workers, including independent contractors.

Similarly, organisations covered by Victorian OHS legislation will generally owe safety obligations in relation to independent contractors.

Volunteers

Where an organisation is subject to the WHS laws, it generally owes WHS duties to volunteers because volunteers fall within the definition of workers.

Although volunteer associations may be exempt where they are entirely volunteer-run, that exemption generally ends once the organisation employs one or more workers. At that point, WHS duties will generally extend to volunteers as well as employees and contractors.

Under Victorian OHS legislation, many safety duties also extend to volunteers. In some circumstances, obligations may apply even where the organisation is volunteer-run if it manages or controls a workplace.



Caution – volunteers must still be protected

Even where a particular WHS or OHS obligation does not apply, organisations still owe volunteers a duty of care and should take reasonable steps to protect them from foreseeable risks of harm.

Common obligations

Depending on the legislation that applies, organisations may have obligations to:

- provide a safe working environment
- provide safe systems of work
- provide training and supervision
- consult with workers
- monitor workplace risks, and
- report certain incidents

Officers' duties

Officers of an organisation may also have obligations under WHS laws.

In many jurisdictions, officers must exercise due diligence to ensure the organisation complies with its WHS obligations. Significant penalties can apply where WHS duties are breached.



For more information about workplace health and safety, see [our workplace health and safety resources](#) and [negligence resources](#).

Insurance

Employees

Employers are generally required to maintain workers' compensation insurance for their employees. Workers' compensation schemes differ across jurisdictions, but commonly provide benefits such as income support, medical expenses and rehabilitation assistance where a worker is injured or becomes ill because of their work.

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

Independent contractors

Unlike employees, independent contractors are generally responsible for arranging their own insurance cover, such as accident compensation, public liability and professional indemnity insurance. In some circumstances, both the organisation engaging the contractor and the contractor may have insurance or compensation obligations.

Before engaging a contractor, your organisation should confirm that the contractor has appropriate insurance cover. It is important to understand what your organisation's insurance policies do and do not cover. Workers' compensation insurance will not always extend to contractors. These arrangements can be complex and legal advice should be obtained if there is any uncertainty.

Volunteers

Volunteers are not always covered by workers' compensation schemes. Coverage depends on the applicable scheme and the circumstances. Organisations should consider whether additional insurance, such as volunteer personal accident insurance, is appropriate.

Your organisation should also ensure that its public liability insurance covers loss caused by the negligent acts or omissions of volunteers acting on its behalf.

Organisations should ensure that volunteers are aware of any relevant insurance arrangements and limitations in coverage.



For more information about insurance for your community organisation, see our [guide to managing insurance and risk for community organisations](#).

For more information about the workers' compensation scheme in your state or territory, contact the relevant workplace health and safety 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

Employees

If your organisation employs staff, it is generally required to withhold income tax from payments made to employees under the PAYG withholding system and remit those amounts to the Australian Taxation Office (ATO).



The ATO website contains 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, in some cases, other workers) each pay period (week, fortnight or month).

Other taxes may also apply, including fringe benefits tax and, depending on the size of your payroll and the jurisdiction in which you operate, payroll tax.



Caution

Some not-for-profit organisations are exempt from income tax. However, this exemption applies to the organisation's income tax liability only. It does not exempt employees from paying income tax or remove an employer's obligation to comply with PAYG withholding requirements. For more information, see [our webpage on income tax exemption](#).

Independent contractors

Independent contractors are usually paid after issuing a tax invoice to the organisation. They are generally responsible for their own income tax obligations. In most circumstances, an organisation is not required to withhold PAYG amounts from payments made to contractors.

Contractors and organisations can, in some circumstances, enter into voluntary withholding arrangements. Organisations should seek advice before entering into these arrangements to ensure that the legal requirements are satisfied.

Where an organisation is registered, or required to be registered, for GST, GST obligations may arise in relation to services supplied by a contractor.

It is also important to remember that some taxation laws apply broader definitions of employee. As a result, a contractor may sometimes be treated as an employee for particular taxation purposes, including payroll tax and superannuation obligations.

Volunteers

Volunteers may sometimes receive payments or benefits, including reimbursements, allowances, honoraria or non-cash benefits. Honorary or ex gratia payments are generally not legally enforceable.

The taxation treatment of a payment depends on its nature and the circumstances in which it is provided. Simply calling a payment an honorarium, allowance or reimbursement does not determine its taxation treatment.

In many cases, payments or benefits provided to volunteers will not give rise to PAYG withholding, fringe benefits tax or income tax obligations. However, organisations should not assume that a payment is exempt from tax merely because it is described as an honorarium or reimbursement.

Where there is uncertainty, organisations should consult Australian Taxation Office guidance or obtain professional advice.



For more information about the tax obligations of community organisations, see [our webpage on tax](#).

Termination

Employees

Most full-time and part-time employees are entitled to a period of notice, or payment in lieu of notice, under the National Employment Standards. Modern awards, enterprise agreements or employment contracts may require longer notice periods. Casual employees generally do not have notice entitlements unless these arise under their contract or other applicable industrial instruments.

Employees may have legal remedies where a dismissal is:

- harsh, unjust or unreasonable
- discriminatory, or
- contrary to the general protections provisions of the Fair Work Act

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



For more information, see [our fact sheet on your legal obligations if you want to terminate an employee's employment](#).

Independent contractors

A contractor arrangement will usually end when the agreed work has been completed and payment has been made. If an organisation wishes to end the arrangement earlier, it must generally do so in accordance with the contract or another legal right.

Before terminating a contractor arrangement, review the contract carefully to determine:

- whether notice is required
- whether costs incurred to the date of termination must be paid, and
- whether any dispute resolution procedures apply

Independent contractors cannot bring unfair dismissal claims. However, they may have contractual remedies if an agreement is ended improperly. In addition, a worker described as a contractor may be able to bring employment-related claims if a court later determines that they were actually an employee.



Caution

If a person described as an independent contractor is later found to be an employee, they may become entitled to employment-related remedies, including unfair dismissal protections.

Volunteers

Volunteer arrangements can generally be ended by either party at any time. Volunteers are not entitled to notice of termination and cannot bring unfair dismissal claims.

However, a person described as a volunteer may seek employment-related remedies if they successfully establish that they were, in substance, an employee.

Summary: legal entitlements for different categories of workers

The different legal entitlements that apply to different categories of workers in your organisation are summarised in the table below.

	Volunteer	Employee	Independent contractor
Paid for work	Usually no	Yes	Yes
National Employment Standards	No	Yes	No
Modern awards or enterprise agreements	No	May apply	No
Superannuation	Generally no	Generally yes	Sometimes
Workplace health and safety protections	Usually yes	Yes	Usually yes
Long service leave	No	Yes	No
Workers' Compensation	Depends on the jurisdiction and circumstances	Generally yes	Sometimes
Paid leave	No	Yes	No
Unfair dismissal protections	No	May apply	No
Notice of termination	No	Usually applies	Depends on the contract



Note

This table is a general guide only. The legal rights, protections and obligations that apply to a worker depend on the applicable legislation and the circumstances.

The risks of describing a worker's status inaccurately

Organisations often describe workers as employees, independent contractors or volunteers in written agreements. While documenting a working relationship is important, the label given to a worker does not determine their legal status.

A court or tribunal will consider the substance of the relationship, including the terms of any agreement and how the relationship operates in practice, when deciding whether a worker is an employee, independent contractor or volunteer.

For example, an agreement may state that:

- the arrangement does not create an employment relationship, or
- the relationship is one of principal and independent contractor

However, if the rights, obligations and practical reality of the relationship are consistent with employment, a worker described as an independent contractor or volunteer may still be found to be an employee. In that case, the worker may become entitled to the legal rights, protections and benefits that apply to employees.

Where an organisation intentionally disguises an employment relationship as an independent contracting arrangement, it may face significant penalties under the Fair Work Act. These arrangements are commonly known as **sham contracting arrangements**.

The Fair Work Act prohibits organisations from:

- intentionally disguising an employment relationship as an independent contracting arrangement
- dismissing, or threatening to dismiss, a worker to engage them instead as an independent contractor to perform the same or substantially the same work, or
- making a knowingly false statement to persuade or influence a worker to become an independent contractor and perform the same or substantially the same work



Caution – labels do not determine legal status

Even if an agreement describes a person as a volunteer, independent contractor or employee, a court or tribunal may reach a different conclusion if the substance of the relationship indicates otherwise.



Tip

If you are unsure about a worker's status, seek legal advice before entering into, changing or ending the arrangement.

