

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:

- ▶ the importance of correctly classifying different working relationships
- ▶ the basic legal differences between employees, independent contractors and volunteers



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** – 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 a legal right to, payment or reward.

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



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 an employee, independent contractor, or volunteer, different legal entitlements and obligations apply.



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 to them
- 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

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

When a worker's relationship with an organisation is being assessed, the Fair Work Ombudsman, court or tribunal will look at 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:

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 the 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. (see below for more information on internships and unpaid work experience).

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.



Note

In addition to these factors, a court or tribunal may also consider the actual nature of the arrangement (not just 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.



Protecting intellectual property and confidential information

There may be situations where an organisation wants to create legally binding obligations on a volunteer. For example, this may be done to protect the organisation's confidential information or intellectual property (as explained in our [National Volunteering guide](#)). Provided such legally binding obligations go no further than this (that is, do not 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 our [National Volunteering 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 the person is volunteering for a not-for-profit organisation or gaining 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)* (**Fair Work Act**).

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



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

- the [different types of legitimate unpaid work](#), and
- the [difference between paid work and unpaid work](#)



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 the 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 – 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'. After the law firm informed Barbour that it was no longer able to offer him work, Barbour claimed that he was an employee of the law firm and that he had been dismissed from employment. The law firm objected on the basis that Barbour was not an employee and therefore could not be dismissed.

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 Mementaz Derbas T/A Derbas Lawyers [2021] FWC 1718



Case example – 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 and 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 were relatively onerous (including cleaning, light maintenance work, inspecting the condition of the building and facilitating building inspections for prospective groups of visitors).

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 of visitors 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 six-month provisional period and the requirement to provide three months' notice of termination, which would be unusual in a volunteering context, because a true volunteer (or the organisation) is able to end a volunteering arrangement at any time

As a result, Mr and Mrs Morris were entitled to receive back pay for their unpaid entitlements under the relevant modern award that applied to their employment (including wages, annual leave, public holidays and superannuation), plus interest.

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 by the ranch – 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 our [National Volunteering guide](#).



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 further 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 act as a referee coach after participating in a meeting. 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



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

Depending on whether the worker is an employee, an independent contractor or a volunteer, different legal entitlements and obligations apply to your organisation.



Example

If your organisation incorrectly classifies a worker as a contractor, you may fail to:

- provide them with their legal entitlements, or
- meet your obligations under tax, insurance and superannuation law

This could result in legal claims being made against your organisation, and your organisation may be found liable to pay penalties.

The purpose of this guide is to help not-for-profit community organisations understand how the law treats different kinds of working relationships.

When is a worker an 'employee'?

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 has largely been based on principles that have been established through case law over time (judge-made law).

For some time, the courts and tribunals considered whether a worker was 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 previous approach by focussing on the terms of the contract between the parties (instead of their conduct).

Under the High Court approach, in certain circumstances, consideration of the parties' conduct would still be relevant and considered. These circumstances include:

- where the contract (or agreement) was not in writing, or was partly written and partly oral
- where the terms of the written contract were being challenged as invalid (as a sham) or varied (changed), or
- where a party to the contract was 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](#) now applies.

Under the new definition, whether a relationship is one of employer and employee, will be determined by:

- assessing the real substance, practical reality and true nature of the relationship between the parties (this assessment involves consideration of the totality of the relationship, including the terms of any contract and how the contract is performed in practice – **whole of relationship test**), and
- the terms of the agreement (which may be verbal, written or a mix of both) at the start of the relationship (this is relevant for constitutionally covered businesses determining the classification of workers before 26 August 2024 or if a worker opts out of the 'whole of relationship test')



Note

The new definition of employee under the [Fair Work Act](#) applies from 26 August 2024.

In essence, this legislative change generally 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 conduct of the parties, or
- both the contract and the conduct of the parties

Evidence of the attributes listed below in a working relationship suggest the worker is likely to be an employee. These attributes may be evident from the contract between the parties and the conduct of the parties in practice.

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 an employment relationship is distinguished from a volunteer relationship (or a contractor relationship)

Employee attributes

Type of work	Payments and benefits
<ul style="list-style-type: none"> • performs ongoing work under the control, direction and supervision of the employer 	<ul style="list-style-type: none"> • is paid for time worked
<ul style="list-style-type: none"> • employment may be terminated for a number of reasons, including, but not limited to, serious misconduct, performance issues, or if the individual fails to comply with the employer's reasonable and lawful directions 	<ul style="list-style-type: none"> • eligible employees are entitled to notice of termination of employment or payment in lieu of notice of termination
<ul style="list-style-type: none"> • must perform the duties of their position 	<ul style="list-style-type: none"> • is paid regularly (such as, weekly, fortnightly or monthly) and has income tax withheld from their salary by their employer
<ul style="list-style-type: none"> • provides their personal services and can't delegate their work to 'outsiders' (ie. employees can't arrange for their work to be done by someone else who is not another employee) 	<ul style="list-style-type: none"> • is entitled to have superannuation contributions paid into a nominated superannuation fund by their employer
<ul style="list-style-type: none"> • work hours are set by the employer, an enterprise agreement or modern award (see part 2 of this guide for further information) 	<ul style="list-style-type: none"> • is entitled to paid and unpaid leave (such as personal/carer's leave, annual leave, community service leave, compassionate leave,



	family and domestic violence leave, parental leave and long service leave)
<ul style="list-style-type: none"> 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 business cards) 	<ul style="list-style-type: none"> is covered by professional indemnity, public liability and workers compensation insurance premiums paid by the employer
<ul style="list-style-type: none"> doesn't bear commercial risks and can't make a 'profit' or 'loss' from the work performed 	<ul style="list-style-type: none"> generally, has all 'tools of the trade' provided by the employer to carry out the work (for example, desk, computer, stationery)
<ul style="list-style-type: none"> the contracting party is an individual, rather than an incorporated entity or partnership 	<ul style="list-style-type: none"> does not submit invoices for payment
	<ul style="list-style-type: none"> payment is generally not based on results or completion of projects or deliverables (noting, however, that some employees may be paid based on commission or piece rates)



Note

Other factors may also be relevant and of importance in particular cases. While it's often straightforward 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 their employees with certain benefits.

As listed above, examples of these benefits include paid leave, 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. Casual employees do not generally require a notice period or payment before termination of their contract of employment unless the casual employee is covered by a modern award and has started but not yet finished a shift when their employment is terminated. In that case, the casual employee is entitled to be paid for the minimum number of hours for that shift at the appropriate rate under the award.



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 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.



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), together with the conduct of the parties, will be considered when determining whether the worker is an employee or independent contractor.

Can legislation make someone (including a volunteer) an 'employee' for particular purposes?

Yes. Some legislation provides that a worker that is not an 'employee' at common 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 common law tests established by the courts

In such instances, 'employee' has an extended or 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.



Caution

A range of legal entitlements apply differently to different types of workers.

Although it's generally true that employees are owed more entitlements than volunteers or independent contractors, some workplace entitlements aren't so clearly confined.

For example, many protections under Workplace (or Occupational) Health and Safety laws apply to broader categories of workers, including volunteers and independent contractors.

There are also circumstances in which independent contractors are treated as employees for specific purposes, like superannuation entitlements or workers' compensation.

When is a worker an 'independent contractor'?

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 an employment or volunteer relationship

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 contracts for service (independent contractor engagements) rather than contracts of service (employment contracts).

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



Independent contractor attributes

Type of work	Payments and benefits
<ul style="list-style-type: none"> has control over how to carry out their work and has the expertise to do so (bears responsibility and liability for poor work) 	<ul style="list-style-type: none"> is paid for results achieved (for example, submits an invoice for work completed or is paid at the end of a project)
<ul style="list-style-type: none"> may also provide services to the general public and other businesses 	<ul style="list-style-type: none"> pays their own superannuation and GST and holds their own insurance policies – however, sole traders cannot take out workers' compensation insurance and therefore must be covered by the principal's insurance policy
<ul style="list-style-type: none"> is contracted to work for a set period of time or do a set task and can decide what hours are required to complete that work 	<ul style="list-style-type: none"> may have their own registered business and Australian Business Number (ABN) (however, a person with an ABN could still be a common law employee, depending on the circumstances)
<ul style="list-style-type: none"> is free to accept or refuse work beyond the requirements of any current contract with the organisation 	<ul style="list-style-type: none"> 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)
<ul style="list-style-type: none"> is free to delegate work to others (for example, to engage a subcontractor) 	<ul style="list-style-type: none"> is in a position to make a profit or loss from work (and bears the risk of this)
<ul style="list-style-type: none"> may be contracted through an incorporated entity or partnership 	<ul style="list-style-type: none"> is not provided with paid or unpaid leave entitlements (such as annual leave, personal/carer's leave, long service leave etc.)

Other factors may also be relevant in particular cases.



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 (who then manages the payment to Geoff).

Steve is likely 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.

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 they apply differently.



A summary of the basic legal entitlements and obligations that apply to independent contractors is set out in **part 2** of this guide.

When is a worker a 'volunteer'?

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.



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

The more formalised that volunteer engagements become, the greater the possibility that an employment relationship could be found to exist. For example, rostering workers on for shifts that they are required to attend may suggest that they are employees, rather than volunteers. However, it's less likely that an employment relationship will be found if the worker undertakes the work for selfless purposes and in the not-for-profit or community sector.



Community organisations need to be very careful that they don't inadvertently create an employment relationship with volunteers. While the courts look partly to the written agreement to determine the status of a worker, it will not be enough for the agreement to be titled a 'volunteer agreement' if the terms in the contract describe an employee relationship, or if the practical reality and true nature of the relationship is an employee relationship.

If it's found that a volunteer is in fact an employee, they will be entitled to:

- be paid the legal minimum rate of pay for the type of work they're doing
- the National Employment Standards
- other entitlements and protections provided in the Fair Work Act, and
- the terms of any applicable awards or enterprise agreements (for example, annual leave loading, overtime pay, penalty rates)



Awards and enterprise agreements are discussed in **part 2** of this guide.

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

Volunteer attributes

Type of work	Payments and benefits
<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • generally, has no legally enforceable right to receive payments or benefits
<ul style="list-style-type: none"> • 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, or • there is no verbal or written contract of employment or contract for services between the parties 	<ul style="list-style-type: none"> • may receive payments like 'honoraria' or allowances, or non-cash benefits such as free use of facilities or free or reduced-price entry into an event (although as above, no legally enforceable right) • however, such payments or benefits may attract taxation obligations, and if regularly received and/or of considerable value, may add weight to an argument that the 'volunteer' is an employee or contractor • where voluntary ex gratia payments are made, the organisation would generally not deduct income tax, superannuation, or other deductions, as voluntary payments would not be regarded as wages, salary or ordinary time earnings
<ul style="list-style-type: none"> • the volunteer arrangement can end at any time, either by the volunteer or the organisation 	<ul style="list-style-type: none"> • may be reimbursed for out-of-pocket expenses

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, 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
- FFV determined how coaching services were to be provided and what work could be delegated to others
- Grinholz was required to wear a uniform
- FFV provided the necessary equipment for the team and its coaching, and
- 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
- Grinholz did not receive paid leave entitlements
- GST was not deducted from (or applied to) the honorarium, and
- Grinholz performed other coaching work for other organisations

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



Note

In circumstances where it appears that a volunteer is in receipt of some benefit for the services they provide, distinguishing between an employee and a volunteer can be difficult. This may also pose problems in determining an organisation's tax liabilities.



Caution

Where a volunteer receives some benefit for the services they provide, ensure 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 withholdings to the Australian Taxation Office).



Tip

The best way to be clear about the relationship between your community organisation and a volunteer is to write it down, for example, in the form of a volunteer agreement. This agreement should ideally include an express acknowledgement from the volunteer that they:

- are a volunteer and not an employee
- don't have a contract with the organisation, and
- don't have any intention to create a legal relationship with the organisation

The volunteer may also acknowledge that they have a social, cultural, religious or other community motivation for performing the work (but this is not essential).

Generally, volunteer agreements must not be legally binding. This is because in a volunteer relationship there must be no intention to impose a legally binding obligation on the volunteer to attend work and perform work.

However, there may be some instances where you do need to create a legally binding relationship between your organisation and the volunteer (for example, clauses relating to confidentiality or intellectual property). See our [National Volunteering Guide](#) for more information on how to make this work with your 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.

Spontaneous volunteers differ from formal volunteers and may create certain challenges for organisations. For more information, see our [National Volunteering Guide](#).



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.

Unincorporated associations registered as charities with the Australian Charities and Not-for-profits Commission (**ACNC**) must comply with certain duties and the [ACNC Governance Standards](#). These duties include:

- acting with reasonable care and diligence
- acting honestly and fairly in the best interests of the charity and for its charitable purpose
- not misusing their position or information
- disclosing conflicts of interest
- ensuring the financial affairs of the charity are managed responsibly, and
- not to allowing the charity to operate while it is insolvent



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 employees 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.

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

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



A summary of the basic legal entitlements and obligations that apply to volunteers is set out in **part 2** of this guide.



Caution

It's important to understand the difference between volunteer and unpaid worker arrangements.

Certain obligations may arise under legislation and contract when work performed falls outside the scope of traditional volunteer arrangements.

Examples of unpaid work arrangements include:

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



Checklist – analysing your existing volunteer relationships

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



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 for any reason and without notice?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> No



Part 2

**Legal obligations community
organisations owe to different kinds
of workers**



Legal obligations community organisations owe to different kinds of workers

This part of the guide sets out a brief overview of some of the different legal obligations that a community organisation owes to its employees, independent contractors, and volunteers.

It also considers the risks of describing a worker's status inaccurately.

Minimum employment standards

Obligations to employees

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

These minimum standards are known as the National Employment Standards (**NES**) and include minimum entitlements for leave, public holidays, notice of termination and redundancy pay. 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
- superannuation contributions
- notice of termination and redundancy pay, and
- the provision of a Fair Work Information Statement and Casual Employment Information Statement

Employees are entitled to 'general protections' set out in the Fair Work Act, including protection from unlawful discrimination and other adverse action.

Obligations to 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 engage them (however, employees may also negotiate their own terms)

Independent contractors are entitled to 'general protections' set out in the Fair Work Act including protection from unlawful discrimination.



Independent contractors engaged under a 'services contract' and organisations may also have rights under the *Independent Contractors Act 2006 (Cth)* (**Independent Contractors Act**) if either party is a 'constitutional corporation' (see note below), the Commonwealth or a Commonwealth authority, or there is a specified type of connection to a Territory.

Under the Independent Contractors Act, either party can apply to a court to have the contract (or a part of it) revoked or varied on the grounds that it is 'harsh' or 'unfair'. This could happen, for example, 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.

In reviewing a services contract for unfairness or harshness under the Independent Contractors Act, the court may have regard to:

- the terms of the contract and other matters as existing at the time the contract was made
- the relative strengths of the bargaining positions of the parties to the contract and any persons acting on their behalf
- whether any undue influence or pressure was exerted on, or any unfair tactics used against, a party to the contract
- whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work, and
- any other matter the court thinks is relevant



Constitutional corporation

A 'constitutional corporation' is a body that:

- is incorporated under a Federal or State Act (for example, a company limited by guarantee or incorporated association), and
- conducts trading or financial activities

A key question for most not-for-profit organisations in determining whether they are a constitutional corporation is whether they are 'trading'.

'Trading' in this context means the provision of goods or services for payment as well as the provision of services carried on for the purpose of earning revenue. Satisfying this definition does not depend on whether trading is attached to the organisation's 'dominant' activities or whether they are merely an 'incidental' activity. Further, it doesn't matter that the income from trading activities is used for charitable purposes.

Activities that have been classified as trading activities include:

- providing services in return for a fee or charge
- selling goods from a shop or stall
- international student fees
- patient charges
- fundraising activities
- charging car parking fees
- ticket sales and sales of publications
- advertising and broadcasting, and
- charging for admission

The receipt of government grants and subsidies to not-for-profit organisations is generally not regarded by the courts as trading activities.

If you are unsure whether your organisation fits the description of a 'constitutional corporation', seek legal advice.



Obligations to volunteers

The Fair Work Act and the Independent Contractors Act 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.

While volunteers may not have any enforceable rights to hours of work or payment, it's important to be aware that other obligations may apply under laws such as work, health and safety legislation.



Your organisation may refer to [Volunteer Australia's National Standards for Volunteer Involvement](#) for guidance on best practice for management of volunteers (note this does not cover legal issues in managing volunteers).

Application of industrial instruments (modern awards and collective agreements)

Employees

Employees and employers in certain industries and occupations may be covered by an industrial instrument.

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

Industrial instruments include:

- **modern awards**, which are industry or occupation based and cover employers and employees in that sector (most industries have a modern award), and
- **collective agreements** (also known as **enterprise agreements**), which set out conditions of employment for a group of employees at one or more workplaces, and which apply instead of a modern award. Employees covered by a collective agreement must be 'better off overall' than if the relevant modern award applied.

In addition, employers and employees are bound by determinations of the Fair Work Commission, an independent body which operates as a tribunal and hears workplace disputes. For example, the Fair Work Commission may 'determine' that an employee was dismissed unfairly and should be reinstated.

Independent contractors

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

An independent contractor's entitlements are set out in the contract between the contractor and the organisation, and in legislation such as the [Independent Contractors Act 2006 \(Cth\)](#), certain provisions of the [Fair Work Act](#) and various other deeming legislation (including the [Superannuation Guarantee \(Administration\) Act 1992 \(Cth\)](#)).

Volunteers

Volunteers are not covered by the terms of industrial instruments or determinations of the Fair Work Commission.

Other laws still apply to volunteers in relation to work health and safety, as well as discrimination.



Long service leave

Employees

Employees are generally entitled to long service leave after a long period of working for the one employer. Generally, employees' long service leave entitlements are set out in the laws in the State or Territory where they are working. These laws set out the rate at which long service leave accrues and when it is taken by an employee (or paid to them on termination of employment).

For example, the *Long Service Leave Act 1955* (NSW) provides full-time, part-time and casual employees in New South Wales with two months' (8.6667 weeks) paid long service leave when they have completed a continuous period of ten years' service, and further paid leave after each additional period of five years of service with the same employer.



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's website](#).

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

Employers must make superannuation guarantee contributions regardless of an employee's earnings (there is no minimum earnings threshold).

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

Independent contractors

Under the *Superannuation Guarantee (Administration) Act 1992* (Cth), a contractor is entitled to superannuation contributions if they work under a contract that is 'wholly or principally for the labour of the person'.

A contractor may be considered 'wholly or principally for labour' if:

- they are paid wholly or principally for their personal labour and skills
- they perform the contract work personally, and
- they are paid for hours worked, rather than to achieve a result

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 you understand whether you need to make superannuation contributions for individual workers (including any contractors who are treated as employees for superannuation purposes).

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

Volunteers

Volunteers have no legal entitlement to superannuation.

Work health and safety

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

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 employees, independent contractors or volunteers there may be legal repercussions.

Employees

Your organisation has a legal duty under common law to take reasonable care to avoid exposing employees to likely risks of injury.

There is also legislation in every state and territory regarding workplace health and safety (**WHS**). All states and territories except Victoria have adopted the Model Commonwealth WHS legislation and implemented it in each jurisdiction (referred to here as **WHS Laws**).



Note

Although there are some differences across states and territories, a common element is a duty is to provide, so far as is reasonably practicable, a safe working environment and safe practices and systems of work.

If your organisation operates in any state or territory apart from Victoria:

- It will have to comply with the WHS Laws if it's considered to be a 'person conducting a business or undertaking' (**PCBU**). Subject to the below exception in relation to volunteer associations, this is a broad category that encompasses not-for-profit organisations that run an operation or enterprise of an ongoing, organised nature.
- There is an exception for 'volunteer associations', which are organisations that don't employ anyone and consist solely of volunteers. If your organisation is entirely volunteer run, it will not be subject to the WHS Laws. However, if it employs anybody (even just one person on a casual or part-time basis), it must comply with the WHS Laws.
- Once an organisation falls within the WHS Laws it will owe WHS duties to **all** workers, that is – any person who carries out work in any capacity for the organisation, whether they are paid or not.



Caution

Even if your organisation doesn't fall within the WHS Laws, there are common law duties to provide employees and other workers with a safe workplace.

All PCBUs have a duty to take reasonable care to avoid exposing employees (and others who might be exposed to risks from the organisation) to reasonably foreseeable risks of injury.

The duties of PCBUs include:

- an overarching duty to ensure as far as reasonably practicable the health and safety of workers while they are at work and others who may be affected by the carrying out of work such as visitors, clients, or customers. This duty is very broad
- duties regarding workplace safety if the organisation 'manages or controls a workplace'. A 'workplace' in this context means any place where work is carried out
- various other duties such as a duty to report any incidents, provide adequate training and supervision, and to consult with workers

If your organisation operates in Victoria:

- It will have to comply with the Victorian occupational health and safety laws (**OHS Laws**) if it is an 'employer', that is – if it employs one or more other persons under contracts of employment or contracts of training.
- Even if the organisation is completely volunteer based, if it manages or controls a workplace (that is, anywhere where employees or self-employed persons work), even if those persons are not engaged by your organisation, duties regarding workplace safety may apply (see 'Volunteers' below).
- The OHS Laws include duties to provide a safe working environment, monitor the conditions of the workplace and the health of employees, and protect other people from risks arising from the organisation's activities. There are various other duties too.

Independent contractors

If your organisation is bound by the WHS Laws, as above, it will owe WHS duties to all workers. The definition of 'workers' is broad and includes independent contractors.

If your organisation falls within Victoria's OHS Laws, its duties will generally extend to independent contractors too.

Volunteers

If an organisation falls within the WHS Laws, it will owe WHS duties to all workers – which includes volunteers. Although the 'volunteer association' exception means that organisations which are fully run by volunteers are exempt from the WHS Laws, if an organisation has **at least one employee**, it will owe WHS duties to all workers including volunteers.

For organisations covered by the Victorian OHS Laws, most of their duties will apply to volunteers. Even if your organisation is completely volunteer-based, it will be bound by OHS laws if it controls or manages a 'workplace'. This duty applies in relation to matters over which the organisation has management or control.



Caution

It's important to note that even if your organisation is not covered by the relevant legislation, or if a particular duty does not apply to volunteers under the legislation, your organisation owes a general duty of care to its volunteers and should adopt effective practices to ensure the safety of volunteers while working for the organisation.

In particular, be aware of volunteers with special needs, who may require a higher standard of care and a more intensive level of supervision in their work for the organisation.



This part of the guide is only intended to provide an overview of the WHS legal framework.

Officers must exercise 'due diligence' to ensure their organisation fulfills its WHS duties and obligations. There are significant penalties associated with non-compliance.

For more information about the WHS laws in Australia, see [our WHS webpage](#) and for more information about negligence laws in Australia, see [our negligence webpage](#).

Insurance

Employees

Employers are required by all state and territory health and safety laws to take out workers' compensation insurance to cover their employees and the organisation. Workers' compensation insurance provides benefits to employees, usually including lost wages and medical expenses, if an employee is injured at work or becomes sick due to their work. The specific requirements vary between the states and territories.

Depending on its activities and functions, your organisation may also need to take out 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. In some cases, both the organisation engaging a contractor and the contractor itself may have insurance and compensation obligations.

When you engage a contractor, you should check whether they have the necessary insurance because your organisation's insurance policies may not cover them. It's important to understand what your insurance policies do and don't cover. Workers' compensation insurance does not usually cover contractors. These situations can be complex, and you should seek legal advice in cases of doubt.

Volunteers

Generally, volunteers are not covered by workers' compensation insurance. Therefore, it is 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 on behalf of your organisation. You should also ensure that your public liability policy covers your organisation for loss caused by negligent acts or omissions of your volunteers.

If you are a volunteer, it's important to check that the organisation you volunteer for has insurance that covers you and the activities you are engaging in.



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 community organisation is an employer, it's required to withhold income tax from wage payments to employees (**PAYG withholding**) each pay period. The organisation must then provide this tax 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, 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 it in 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's income tax liability. It doesn't mean 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. As a



general rule, the community organisation usually doesn't have to withhold income tax in respect of payments made to independent contractors.

However, there is also scope under taxation laws for independent contractors to enter into voluntary agreements authorising the organisation 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 ensure that the necessary requirements for an arrangement of this type are met.

If your organisation is registered or required to be registered for GST purposes, it 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.

Volunteers

In certain circumstances volunteers may be provided with payments or other benefits in the course of undertaking work for an 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 don't 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.



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

Termination

Employees

In relation to the 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 unless their contract of employment provides for one.

If your organisation dismisses an employee for a reason that contravenes the general protection provisions of the Fair Work Act or for a reason that is discriminatory, or if the termination is 'harsh, unjust or unreasonable', the employee may be able to make a claim against your organisation.

Always seek legal advice before proceeding with the termination of any 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

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 the 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 cannot be completed for reasons outside the control of either party).

You need to check the terms of your contract to see whether:

- your organisation can terminate by giving notice, and
- you are 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.

It's also worth noting that if a person who your organisation regards as an 'independent contractor' can establish in court that they are properly classified as an employee (see above for attributes of an employee), then they may be able to make claims that are available to an employee, including an unfair dismissal application.



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 part 1 of this guide for attributes of an employee), they may be able to make claims that are available to an employee, including an unfair dismissal claim.

Volunteers

There's no notice period or other requirements to terminate a volunteer relationship – the voluntary nature of the relationship means that it can be ended by either party at any time.

Volunteers can't make unfair or unlawful dismissal claims. However, it's worth noting that if a person who your organisation said was a 'volunteer' is able to establish in court that they had the attributes of an employee (see above for the attributes of an employee) and the court accepts that they were an employee, then they may be entitled to lodge an action for unfair dismissal or make a claim for other employment benefits.



Summary – the different legal entitlements that apply to different categories of workers

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

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

The risks of describing a worker's status inaccurately

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, as well as how those rights and obligations are performed in practice, 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’ at law and is entitled to the legal benefits of being an employee.

Where an employer intentionally tries to disguise an employment relationship as an independent contracting arrangement (usually for the purpose of avoiding having to provide the worker with minimum rates of pay and leave or superannuation entitlements), they may face serious penalties under the Fair Work Act.

The Fair Work Act prohibits these kinds of ‘sham contracting arrangements’ by making it an offence for organisations to:

- intentionally disguise a worker's employment or an offer of employment as an independent contracting arrangement
- dismiss or threaten to dismiss a worker in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services, or
- make a knowingly false statement for the purpose of persuading or influencing a worker to become an independent contractor to perform the same, or substantially the same, work for the organisation



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.



Tip

Be careful not to falsely or incorrectly label an employee as an independent contractor (for example, in a written contract or letter of engagement).

If the true legal nature of the relationship between the parties is that of employer and employee, the parties can't alter the truth of that relationship by calling it something else. If you are unsure of the true nature of the relationship between your organisation and a worker, you should seek legal advice.

