

# Working for free

It's important HR clearly understands the difference between an unpaid worker and an employee.

BY ANDREW JEWELL, MCDONALD MURHOLME

Companies that take on interns reap many benefits, such as the chance to find and shape new staff. However, leaders and HR managers must be aware of how to avoid exploiting young workers in the process. With the recent spate of cases of employers taking advantage of their interns, it's more important than ever for HR to understand the difference between an unpaid intern and an employee.

Muffin Break GM Natalie Brennan recently said there was "nobody walking in [her] door asking for an internship, work experience or unpaid work". This comment, which subsequently went viral, is indicative of a widespread consensus that young workers should be grateful for any opportunity afforded to them; even an unpaid one.

## Get it right

If an employer incorrectly characterises an employee as an unpaid intern, the results can be both financially and reputationally damaging. Startup company Fashion Box recently discovered this when it was involved in a significant underpayments case brought before the Federal Circuit Court. The court ruled that the company was in breach of the Fair Work Act and was subsequently fined \$330,000 for exploiting its interns.

This is not an isolated occurrence. There have been a multitude of cases where an intern has been expected to work – at times in a full-time capacity – with little to no remuneration. In June 2016, a decision by the Fair Work Commission found that media company AIMG BQ grossly underpaid a student who was performing productive work that was not a formal part of her studies. The AIMG BQ student worked 180

**“There have been a multitude of cases where an intern has been expected to work – at times in a full-time capacity – with little to no remuneration.”**

hours over four months and was paid only at the conclusion of her 'internship' – at a rate far below the legal award rate.

## Clarifying factors

To decipher whether an intern should be classified as an employee, employers should work out if a contract has been created between the company and the individual. Consider these five points to determine the employment relationship:

- An intention to enter into an arrangement whereby the 'intern' does work for the employer (as opposed to merely observing work done by other people).
- If the 'intern' is doing work for the benefit of the business this points to employment,

especially if the business is charging for, or making profit from, the work or otherwise saving costs due to the 'intern's' work.

- The more productive the work completed by the intern, the more likely it is that an employment relationship has been created.
- If the intern is helping complete work that is part of the ordinary operation of the business, this is likely to be an employment agreement.
- The longer the working arrangement is, the more likely it is that an employment relationship has been created.

Interns who are not remunerated should be limited to tasks that further their learning, such as observation, training/learning and tasks that further their practical experience. An unpaid intern is permitted to perform productive activities as long as such tasks are part of their learning experience. If an employee is being remunerated, they can effectively be delegated any task an equivalent employee could be given.

If an employer is concerned about the possibility of legal recourse when hiring an unpaid intern, it is advised that they seek prior legal advice. •••

## ASK AHRI:ASSIST

Have an HR question? Access our online AHRI:ASSIST resource for HR guidelines, checklists and policy templates on different HR topics, or ask your questions online. Exclusive to AHRI members.

[ahri.com.au/assist](http://ahri.com.au/assist)