

Experience vs **exploitation**

Internships can be valuable for employer and student alike. Beware, though, the legal pitfalls.

BY JOHN WILSON AND KIERAN PENDER, BRADLEY ALLEN LOVE

Internship and work experience programs are commonplace in many industries. They can provide essential practical training for students and recent graduates, while giving employers a “trial period” in which to assess potential future employees. For less scrupulous companies, interns also represent a limitless pool of free labour. It is not surprising then that responses to an intern survey ranged from “valuable learning experience” to “slavery”.

Regardless of the exact name or shape, all internship programs face legal risks. This is because Australian law maintains a binary conception of employment: an individual is either an employee, and thereby entitled to the full range of employment protections, or not. The current scheme has little room for lesser shades of employment: paid interns, unpaid interns and the like.

It follows that where an employment relationship is objectively considered to exist between a company and an intern, the latter is entitled to pay and other benefits in accordance with the relevant award. Where proper remuneration has not been provided, the company risks legal action from aggrieved interns and prosecution by the Fair Work Ombudsman.

The cost of turning a blind eye

The ombudsman has been pursuing internship cases with vigour lately, successfully seeking a total of over \$300,000 in penalties against several companies over the past two years.

Penalties are usually imposed in addition to full payment of entitlements to the interns involved.

While some of the penalties paid in early cases – \$17,500 in one, \$24,000 in another – may not provoke immediate fear, Judge Riethmuller sounded an ominous word of caution in a 2015 case involving media company Crocmedia.

“There can also be little doubt,” the federal circuit court judge observed, “that the penalties are likely to increase significantly over time as public exposure of the issues in the press will result in respondents not being in the position of being able to claim that a genuine error of categorisation was made.”

In other words, turning a blind eye to the risks posed by internships will no longer suffice.

Where’s the dividing line?

Unfortunately, determining as a matter of law how an intern should be classified is fraught with difficulty, as neither case law nor statute offers a clear dividing line between employee and non-employee in this context. An individual’s attendance at a workplace for a matter of weeks in a predominantly observational capacity will not satisfy the criteria of an employment relationship.

Conversely, a three-month program where the intern works regular hours and undertakes productive work in a position indistinguishable from junior employees will almost certainly amount to employment. Where the middle ground falls is unclear.

Herein lies the dilemma: for an internship to be useful for both parties, interns need to be engaging in proper work and not simply sitting around ‘making coffee’. Yet that important characteristic is the very thing that exposes companies to risk. As the ombudsman explained: “Where the arrangement involves productive work rather than just meaningful learning,

training and skill development, it is likely to be an employment relationship.”

The obvious solution is to employ interns on a fully award-compliant basis – that is, to engage the individuals as short-term employees. However, in many cases this defeats the purpose and leaves little incentive for prospective employers to run such programs.

Vocational placements

A more comprehensive way to avoid these legal risks is to take advantage of the vocational placement exception in the Fair Work Act. This excludes from the Act’s coverage individuals undertaking unpaid work as a requirement of an authorised educational or training course.

Aligning an internship program with a local school, university or training college would therefore be a prudent risk mitigation strategy. While such an approach may limit flexibility, this seems a small price to pay to ensure a legally compliant scheme.

If the current oversupply of graduates in many professions continues, internships may become even more commonplace. In this context, companies need to tread carefully in devising and operating their own internship programs. When the various pitfalls are minimised, internships can be a valuable experience for both parties. Offered without due regard to the legal risks, an attempt to attract free labour can become very expensive.●●●

“Where the arrangement involves productive work rather than just meaningful learning, training and skill development, it is likely to be an employment relationship.”



AHRI:ASSIST

Gain free access to our online AHRI:ASSIST resources for HR guidelines, checklists and policy templates. Exclusive for AHRI members.

bit.ly/ahri_assist