Fact sheet – First Nations startups

#6 Employees, contractors & volunteers

To avoid litigation or unexpected liabilities in relation to workers, it is important that the engagement status of each worker is clear and well-documented. If a worker is misclassified, the business might become liable for payment of unpaid wages entitlements and civil penalties if prosecuted. Employers also have obligations under State and Federal employment-related laws when engaging an employee. Failure to comply may result in fines, penalties and even criminal liability.

What is an employee?

An employee has rights and obligations as defined under their employment contract (written, verbal and/or implied) and under various pieces of legislation, most notably the *Fair Work Act 2009* (Cth) **(FW Act)**. Employees are entitled to various types of leave, payments and superannuation, and have obligations to their employer to follow reasonable and lawful directions as well as act in the best interests of the employer. Employees can be permanent full-time or part-time, casual, or employed for a fixed or outer limit term.

What is a volunteer?

There is no legal definition of a 'volunteer' in Australia, however, the main distinction between a volunteer and an employee or an independent contractor is that the parties do not, in a volunteer arrangement, intend to create a legally enforceable contract. The Fair Work Ombudsman has identified some key characteristics of a genuine volunteering arrangement including that a volunteer is someone who does work for the main purpose of benefiting someone else; is under no obligation to attend the workplace or perform work; and does not expect to be paid for their work. The more formalised or employee-like a volunteer work arrangement becomes, the greater the possibility that an employment relationship will be found.

What is an independent contractor?

The main distinction between an employee and an independent contractor is that an employee is engaged to 'serve' the employer, while a contractor is engaged to perform 'services'. This distinction is important because employees have certain rights under the FW Act which do not apply to independent contractors – for example, entitlements to payment of minimum wages and other monetary entitlements, as well as to various kind of paid and unpaid leave. The essence of the distinction is that an employee works in and as part of the employer's business, in conditions largely determined by the employer. A contractor is conducting their own business, with an emphasis upon the delivery of agreed outcomes as opposed to payment for labour. A written agreement between the parties is essential to ensure the parties agree on nature of the relationship, however, the practical reality and totality of the relationship will determine whether it is an employment or a contractor arrangement.

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Documenting the relationship

Considering the complexities and ramifications involved in determining whether workers are volunteers, independent contractors or employees, it is essential for businesses to have a written document with each worker that specifies the relationship between the parties and the key terms of the engagement. Whilst this may be a simple email or letter with a volunteer, it is important that a more detailed written agreement is signed by the parties to an employment agreement or an independent contractor agreement. As there is no standard form for an employment agreement you should get legal advice to ensure it is appropriate.

Is the employee permanent or casual?

The FW Act differentiates between permanent and casual employment, with different rights and obligations for each. An employee is a casual employee of an employer only if the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment. Generally speaking, casual employees are engaged to work in piecemeal engagements paid by the hour, enjoy lesser job security than permanent employees and are paid a 'loading' to compensate them for these flexibilities for employers and for not receiving certain paid leave entitlements. In certain circumstances, where a casual employee believes that they no longer meet the definition of 'casual employee' the employee may seek to change to permanent employment. The term 'permanent employment' covers both full-time and part-time employees.

Permanent employees are typically employed to work regular hours on a recurring pattern of days and on an ongoing basis until their employment is terminated one way or another (e.g., via resignation, redundancy, dismissal or at the end of a specified fixed term or project). Permanent employees have various statutory entitlements including entitlements to paid annual and personal/carer's leave, long service leave (regulated state by state), notice of termination and redundancy pay. These entitlements generally apply pro-rata for part time employees.

While casual employees enjoy some legal protections they do not, generally, have entitlements to paid leave of any kind or to notice of termination of employment.

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What are the minimum terms and conditions for employees?

The FW Act prescribes a basic safety net of terms and conditions of employment for private sector workers, found in a series of standards called the National Employment Standards **(NES)**. The NES provides for a series of twelve minimum employment entitlements, including maximum hours of work, annual leave, redundancy entitlements, superannuation and parental leave. Further information on the NES is available here. While the NES operate largely independently of the employment contract, it is common for various features of them to be referred to or incorporated into employment contracts (e.g., dealing with an employee's leave entitlements). There is also a mandated National Minimum Wage, revised at the commencement of each financial year on 1 July.

Other rights and entitlements can be found in 'awards' or 'modern awards' and 'enterprise agreements'. These operate in conjunction with the NES and prescribe rights and entitlements for some employees working in particular occupations or industries (or in particular occupations in particular industries).

You can find a list of modern awards here with further links through to the text of each award. Awards, where applicable, provide for a range of matters including minimum wages, allowances and penalty rates, types of employment (including hours of work), termination of employment, redundancy, dispute resolution, and superannuation.

Employers have to keep time and wages records for 7 years. More information about what records must be kept can be found here, but it is important to note that a failure to keep accurate records can result in significant fines and penalties.

Other relevant laws for employees and workers

Other relevant laws include laws relating to income tax and superannuation which are generally federally regulated and administered by the Australian Taxation Office (ATO); worker's compensation insurance; work health and safety laws and payroll tax.

Both state and federal law includes regulation of human rights matters applicable to employment and working arrangements. Broadly speaking, these operate to prohibit sexual harassment and bullying and unlawful discrimination in the areas of sex, family responsibilities, disability, age, race etc. There are also protections extending to dismissals of employees which are harsh, unjust or unreasonable ('unfair dismissal'), and 'adverse action' taken against workers (including dismissals) due to the exercise of a wide range of 'workplace rights' (including, in some situations, the right to complain). It is good practice for a business to develop policies that deal with these protections.

Please see our other Fact Sheets for First Nations startups here.

For more information, please contact: probonoteam@hopgoodganim.com.au

Disclaimer

The content of this fact sheet is current at September 2026 and is intended to provide a general guide to the subject matter only. The fact sheet does not constitute legal advice. Obtaining specialist advice about your specific circumstances is recommended.