

# need to know

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## Internships - how to navigate the pitfalls

In an increasingly competitive labour market, it is unsurprising that graduates and businesses alike are seeking to reap the benefits of internships. The promise of practical work experience and exposure to a professional workplace is a great draw for graduates seeking to expand their CVs and put them one step ahead of the competition. The attraction for businesses is the discovery of new skills and talent.

### What is in an intern?

The distinction between work experience and internships is that typically internships are understood to be positions that are associated with gaining experience for a professional career and consequently require a higher level of qualification than other forms of work experience.

### So you have decided to hire an intern - now what?

Organisations must be aware of the legal obligations owed to interns. The key to doing this is to first determine the intern's employment status, the reason being that an individual's employment status determines the statutory employment rights owed to them by the organisation they work for.

Employment status is not necessarily the easiest concept to grasp but essentially there are 3 categories of protected individuals for employment law purposes: employees, workers and the genuinely self-employed.

An intern is usually more likely to be considered a worker than an employee. A worker is someone who has a form of contract of employment or contract to provide services and receives financial remuneration or benefits in kind in return for doing their work.

### What would an intern be entitled to if they are a 'worker'?

A worker is entitled to:

- + the national minimum wage ("NMW"), which is £6.50 for individuals over the age of 21 and £5.13 for those between the ages of 18 and 20;
- + paid holiday and rest breaks in accordance with the Working Time Regulations 1998;
- + the same protection as employees for data protection purposes; and
- + protection from discrimination.

### Should interns be paid?

Failure to pay interns the NMW has caused much controversy in recent years, leading to the government recommending that organisations pay interns the NMW irrespective of whether they are entitled to any such payment.

HMRC guidance suggests that 'work shadowing', which does not involve any work being performed, would be unpaid. Work placements which are not part of a course (as these are exempt if for a period of less than one year) may qualify for NMW if the intern is over compulsory school age. Otherwise interns are entitled to be paid the NMW if they are workers and no exemption is applicable.

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## What are the risks if we get it wrong?

Following a new regime introduced by the Government last year, failure to pay the NMW to eligible workers may result in large financial penalties. Under the previous regime, employees could recover 50% of the total underpayment up to a maximum of £5,000. Now, workers are able to recover 100% of the total underpayment subject to a maximum of £20,000. The Government recently introduced further legislative amendments so that for pay reference periods starting on or after 26 May 2015, the £20,000 cap now applies to each underpaid worker (rather than each notice of underpayment).

Aside from the increased financial penalties, employers also face possible reputational damage given that the Government can now publicly name and shame organisations that are in breach. In May 2015, 48 employers were publicly named and shamed by the Government bringing the total number of employers who have been named and shamed to 210 employers, with total arrears of over £635,000 and total penalties of over £248,000.

## Best practice guidance for engaging interns

If an intern does join your team and is not paid the NMW then it is important to avoid a scenario where there appears to be an intention to create legal relations. Agreeing that an intern must attend work for a minimum amount of hours within a set time frame and obliging the intern to perform specific tasks may indicate such an intention.

If you decide to take on an unpaid intern, you should make sure that staff are aware that the intern is there to shadow people and learn more about the business. You should avoid:

- + allowing staff to delegate work to the intern in a way that makes the intern feel obliged to do the work;
- + making payments to the intern that could be construed as wages. Payments to cover actual expenses should be clearly identified as such and reimbursed against receipts;
- + giving them any perks that could be construed as remuneration; and
- + using any language and terminology that makes the arrangement sound contractual and consistent with an employment relationship.

## Beware

It is important to remember that a contract of employment does not have to be in writing. A contract of employment may be implied where there is offer, acceptance, an intention to create legal relations and consideration of some kind. The consideration does not necessarily have to mean paying the intern a regular wage. Paying the intern expenses which go above and beyond what they are actually incurring may be deemed as consideration. In fact, even the promise of being kept on full time may amount to a reward for work done.

If a contract of employment is implied then an intern will be able to claim NMW and they will also benefit from a wider range of employment rights including statutory sick pay and maternity leave.

## Internship Agreements

The nature of the internship will determine the appropriate form of agreement. There is no legal obligation to set out the internship arrangement in writing though we recommend organisations set out the remit of the arrangement as this will be helpful.

BIS recommends using an internship agreement where interns are paid at least the NMW whilst being required to carry out specific tasks. For unpaid work experience, we recommend that you prepare a short document setting out basic information such as suggested times and dates of the placement, the supervisor's name, details regarding expenses, health and safety and confidentiality terms.

As we have illustrated above, a number of employers (including those in the computer gaming sector) have come unstuck and been accused of exploiting young workers in the media so, to avoid financial risk and possible reputational damage, it is important to properly assess the risk at the point of hire.

## What should I do next?

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