Interns
Taking an intern to help your business expand
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So you have this great idea and there are not enough hours in the day to get it developed and launched. It’s a ruthless job market out there and there are lots of good people who have recently been made redundant. You could probably find someone willing to help you with your project for little, if any, salary. Indeed, you would be doing them a favour as no one wants an awkward gap on their CV, or maybe their helping you out in this way is the stepping stone they need for greater things. So you reach out through your social network, find someone you like and offer them work experience, an internship or just ask them to help (let's just call them an Intern for the purposes of this article).

Have you just employed someone without knowing it?
Recent developments suggest that the risk of falling foul of Employment laws when using interns are increasing drastically.

Why does employment status matter?

If employment status (i.e. they are really an employee) is triggered then there will be legal implications including:

**Tax:** You have to account to the Government for tax in relation to all employees. HM Revenue and Customs has the right to inspect your books if they think you are getting this wrong. As this can be disruptive, it is important not just to comply, but to be seen to be complying in order to avoid these investigations.

**Unfair Dismissal:** Once you no longer need an employee you can’t just dismiss them, you have to have a fair reason to dismiss and you must act reasonably in the circumstances in deciding to dismiss. Otherwise you can be sued for unfair dismissal. What this means in practical terms is that you must follow a legally defined set of procedures and evidence that those procedures have been followed in writing. Even if there is a potentially fair reason to end employment, if correct procedures aren’t followed, dismissal will be unfair. In the worst-case scenario compensation of over £70,000 can be awarded for unfair dismissal and if discrimination is involved statutory compensation limits are waived meaning that an employment dispute could lead to compensation in six figures. Do note however, that whilst unfair dismissal rights would normally only apply to employees with more than one year’s continuous service, there are exceptions and often "one year" means less than that in practice. The one year qualifying period is due to rise to two years from April 2012.

Are Interns employees?

Much of the time although they are intended not to be, Interns are in fact employees (or in any event have most of the rights associated with a contract of employment).

Traditionally work experience has involved students shadowing you or your colleagues for short periods of time but not working as such. Internships (a phrase imported from the United States) have been more formal and have involved "proper work", often being undertaken by university students looking to break-in to a particular area after finishing their studies or even as part of a course of study. There is no legal definition of an Intern in the UK. Traditionally Interns have been unpaid. However, although carefully drafted documentation might help avoid an Intern falling within the strict legal definition of an employee, much employment-related legislation is drafted in such a way that it will apply to "workers" working on any basis other than as a genuinely self employed individual.
The National Minimum Wage and The Working Time Regulations

If Interns do “proper work” then the law requires that they are paid the National Minimum Wage, being £6.08 per hour (for workers aged 22 or over, after 1 October 2011) and that they are offered a minimum paid holiday entitlement under the Working Time Regulations usually equating to 28 days per year (including public holidays). The only exceptions to such obligations are in relation to Interns working under certain Government-run schemes such as the “Entry to Employment” programme and the European Union's Leonardo da Vinci programme and (more often) as a required part of a higher education course that does not exceed one year.

The law looks past whether you call an individual an Intern and to the heart of what the individual is actually doing for you: if they are really working for you then they are as good as employed by you. You need to appreciate that Interns often qualify for employment-related rights in order to establish the nature of your legal duties to them and to manage risk accordingly.

It is a good idea to have a simple internship agreement to record accurately your respective duties to each other. The provisions of internship contracts often include the following terms:

- no conventional salary arrangements;
- payments on account of expenses;
- statement of the fixed duration of the internship;
- no fixed working hours;
- no commitment for work to be given or undertaken; and
- a statement that it is not a contract of employment.

For your own protection, such an agreement should also include the following:

- confidentiality obligations - to ensure that your information must be kept confidential;
- confirmation of your ownership of rights relating to inventions - to ensure that if an Intern creates or contributes to any intellectual property during the internship then it is owned by the organisation hosting the Intern;
- commitment to your health and safety arrangements – the Intern should accept any health and safety policies and otherwise be treated the same as any other individual spending time at your offices: you may also need to tell your insurers;
- commitment to your equal opportunities policies - otherwise you could be liable if for example the Intern upsets one of your staff; and
- confirmation of opt-out from the Working Time Regulations – these rules impose a maximum average of 48 hours worked per week; if there is any chance that the Intern might work for a longer time than this, the opt out should be included.

Penalties if you treat an employee as an Intern

There are stiff penalties and criminal sanctions for getting this wrong. If HM Revenue and Customs believes that individuals may be working for you without being paid then they can investigate this. If they conclude that your “Interns” have actually been working for you, are not lawfully excluded from the minimum wage (i.e. they should have been paid) HMRC has the power to order you to pay them the minimum wage with retrospective effect from the day the Intern joined. In addition, HMRC will require you to pay employer's National Insurance Contributions and tax usually with penalties and
interest for late payment. Non-payment of the minimum wage is also a criminal offence which is punishable by a hefty fine.

In addition, the “Intern” may apply to an Employment Tribunal to demand paid holiday. If the “Intern” then leaves or is dismissed on account of your failure to offer paid holiday, then you will have unfairly dismissed them, (even if the Intern has worked for you for less than a year) and you will be liable to pay significant compensation.

**Alarm Bells**

Since this Keynotes article was originally published in 2009, the alarm bells it was intended to ring have been sounding louder and louder.

The profile of paying Interns has been raised by Graduate Fog’s “Pay your Interns” campaign launched with the intention to “name and shame” employers in September 2011. Other pressure groups have emerged

In November 2011 the Guardian reported that Government lawyers have warned that many thousands of interns should be paid.

Employers have noted that HMRC has in recent years been looking more closely at the employment status of Interns, although to date only a handful of prosecutions have been brought by HMRC under Minimum Wage legislation.

Many Interns won't kick up a fuss realising that to do so may jeopardise the first steps onto a lucrative career ladder.

However, some Interns backed by Unions have had widely reported Employment Tribunal victories. Keri Hudson, supported by the National Union of Journalists was awarded the minimum wage and holiday pay after a two month editorial Internship.

Despite signing written contracts confirming he would be unpaid Nick Thomas-Webster (a film extra) secured the minimum wage from four production companies. Three paid up on demand and the fourth paid up after losing at the Employment Tribunal.

**How Do I "Play Safe"?**

If they are an Intern without question, then have an internship agreement with them including the terms listed above. Where there is any doubt (i.e. the Intern is not working in connection with a higher education course or official training programme), then it is best to assume they are really an employee. In which case, have a written contract of employment, ensure that you pay the minimum wage and observe the minimum paid holiday entitlements referred to above.

**Charities**

If your organisation is a charity special exclusions from the National Minimum Wage apply to volunteers.
**Self employed**

If you are looking for a practical solution to get more manpower without a cost, then using an Intern in the true sense is probably not it. However, there may be a way, although practically businesses normally only use this route for senior or key individuals. The solution is for the individual to be genuinely self employed and for their reward to be paid in shares or a share of profits from the business the individual helps create.

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**Disclaimer**

We have written these materials to help you, but no article can address all the issues. The benefit of using an experienced lawyer is that they ask the right questions and build the solution around you. Please therefore note that these materials only provide you with general information and should not be regarded as a substitute for taking legal advice.

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