

Unpaid work trials: a business guide

A guide created by Say No To Unpaid Trial Shifts

Contents

Introduction	2
Legal reasons.....	2
Ethical reasons.....	4
Business reasons	5
Be clear about the job.....	5
Advertise the job in a fair way.....	5
Screening applicants	6
Interviewing and testing applicants.....	6
Feedback.....	6

Introduction

In recent years, reports have emerged of businesses using unpaid work trials as a form of free labour. The practice is widespread in many industries, but is particularly prevalent in the hospitality, retail, and creative industries.

This guide looks at why unpaid trial shifts constitute poor business practice. It considers:

- legal reasons and how the [government's recent guidelines](#) impact on their use
- ethical reasons
- business reasons

Legal reasons

There is no direct reference to unpaid trial shifts in statutory law and very little case law. However, the National Minimum Wage Act 1998 states that any person who performs work for a business or organisation of any sort is entitled to at least the minimum wage. It also allows for exceptions when it comes to an individual who is involved in a scheme for the 'seeking or obtaining of work' or that is 'designed to provide training, work experience or temporary work.'

The National Minimum Wage Act 1998 does not adequately define these exceptions or the term "work". These ambiguities have allowed some employers and their advisers to argue that those engaged in trial work are not working as defined under the act.

Following lobbying activity from this campaign and other bodies, including attempts to introduce private members bills, the [government has recently clarified the situation and issued guidance](#). This guidance should be seen as part of the raft of changes introduced in response to the [Taylor Report](#).

In itself, the guidance is not legally binding. In fact, it states:

"The views of the government set out in this guidance are not binding determinative in any case but are intended to assist employers and individuals in identifying circumstances in which at least the minimum wage must be paid. It is for HMRC [Her Majesty's Revenue and Customs] enforcement officers, and ultimately for tribunals and courts, to decide whether the minimum wage should be paid in any particular case. Employers who do not pay at least the minimum wage for work trials should consider

seeking professional advice on whether this would breach NMW [national minimum wage] or other employment law.”

The guidance continues:

“NMW legislation provides that an individual who is ‘working’ for minimum wage purposes must be paid at least the National Minimum Wage or National Living Wage. Most workers in the UK who are over compulsory school age and who ordinarily work in the UK are entitled to be paid at least the minimum wage. An individual will generally be a ‘worker’ if they have a contract of employment or a contract to provide work or services. There may be a contract even though there is nothing in writing. Where an employer asks an individual to carry out a ‘trial’, ‘test’ or ‘recruitment exercise’, the individual may nevertheless be a ‘worker’ and entitled to minimum wage.”

The guidance lists a number of factors which a court or tribunal is likely to consider. These are:

- whether a ‘work trial’ is genuinely for recruitment purposes (if it is not, it will generally be considered to be work and the individual will be eligible to be paid the minimum wage)
- whether the trial length exceeds the time that the employer would reasonably need to test the individual’s ability to carry out the job offered (in the government’s view an individual conducting work in a trial lasting longer than 1 day is likely to be entitled to the minimum wage in all but very exceptional circumstances)
- the extent to which the individual is observed while carrying out the tasks
- the nature of the tasks carried out by the individual and how closely these relate to the job offered (where the tasks are different from those which the job would involve, this may indicate that the employer is not genuinely looking to test the individual’s ability, but rather to get the tasks carried out)
- whether the tasks carried out have a value to the employer beyond testing the individual (where the tasks are carried out in a simulated rather than real environment, this will normally indicate that they do not have such a value and that the individual is not ‘working’)
- whether trial periods are important (aside from recruiting) to the way the employer runs its business (for example, where trial periods are being used by the employer as a means to reduce labour costs, this is likely to indicate that the individual is ‘working’)

At [Say No To Unpaid Trial Shifts](#), we believe that the situation is clearer cut, and that ultimately if an individual is asked by an organisation to carry out tasks that will provide “benefit” to the organisation then this constitutes work and a contract between the organisation and the worker is established. By “benefits” this is most easily demonstrated in a commercial setting for example:

- selling a meal or a drink for which a customer pays;
- making or contributing to the making of a product that is sold to a customer.

But it could also include writing information such as programming code or even copy that are used on a website or information leaflet that is made available to those outside the organisation.

Not mentioned in the government guidance, but an additional consideration is your [health and safety responsibilities](#). Employers' safety obligations extend to other workers on site (such as contractors, temps, casual workers, members of the public, visitors and clients). These provisions will apply to all trialists, whether you pay them or not. Breaches of health and safety regulations can result in criminal as well as civil sanctions.

Ethical reasons

Ultimately, we believe that good business practice is that you should treat all those who want to work for your organisation with the same level of dignity and respect you would treat your own workers and that which you would expect yourself.

You should also consider the ethical implications of not following the same practice as your competitors. It could be argued that by not paying for trial shifts you are gaining an unfair competitive advantage over competitors who are paying their trialists.

Business reasons

Treating all your workers and employees with dignity and respect makes good business sense.

Employers can easily get a reputation as bad places to work. Review websites can be used to highlight your organisation as a poor place to work. Websites such as Glassdoor are increasingly used by job hunters. Your time is probably better spent getting your employment practices correct, rather than managing your social media and review sites to promote your employer brand.

There is strong evidence that ethical people management practice improves productivity and reduces employee turnover. If you are known as a good employer, then more staff are likely to want to work with you. You will become an employer of choice.

Some of the tips below will help you introduce good practice into how you hire workers and employees.

Be clear about the job

- Outline the main responsibilities
- Outline what skills, knowledge, behaviours and values you need from the applicant and how you will measure them
- Be clear about the benefits of working for you. For example, include hours of work, rates of pay and training opportunities
- Combine these in a job description. This doesn't need to be a complicated document but can be a couple of paragraphs summarising your requirements

Organisations can complain about the attitude of the workers they hire. If that is a major issue for you, then include reference to your expected values and behaviours in your requirements.

Advertise the job in a fair way

- Make information about the job available to all applicants in a consistent way, such as in a poster or social media post
- Use a closing date for applications

Screening applicants

- You don't have to interview all applicants. Consider screening candidates
- Be objective, such as removing references to age and gender. Concentrate on your key requirements. For example, if you want previous experience then you can reject candidates without the experience

Interviewing and testing applicants

- Set aside time for the interview
- Consider using tests or workshops. Tests can be simple. For example, if you need barista skills get them to make a coffee. Similarly a workshop could be used to observe how candidates work together on a team task where they can be assessed against your values
- Think about your decision - avoid making snap decisions

Feedback

- Always give feedback to the applicant whether they were successful or not. Be honest and explain your decision, relating it to the objective criteria
- Let all your applicants know if they have got the job or not and why. Even unsuccessful applicants are then more likely to talk positively about your organisation
- Remember, if you have used objective criteria then this feedback should be easy
- Think about how you would feel if you were to apply for a job and didn't hear anything back or just receive a text message