

Comparison table of relationship indicia

Different indicia typically considered in employer/employee relationships compared with what may be considered in au pair/placement agency/host family relationships.

This is not an exhaustive guide. Other indicia may also apply depending on the circumstances of a case. Independent legal advice should always be sought on wording used in agreement terms and to consider facts unique to arrangements in each case.

| Indicia | Employment | Au Pair | Issues in comparison |
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| Terms and terminology of contract | Intention, usually expressly stated, to form a binding relationship of employment. | Typically, an agreement for a cultural exchange, whereby some shared responsibility for household duties and child care is assumed by the au pair. | <p>A contract which expressly or impliedly demonstrates an intention to create an employment relationship would result in the formation of an employment relationship.</p> <p>Courts can still look behind the express words of a contract should the overall circumstances indicate a different legal relationship.</p> |
| Nature and manner of work performed | <p>Personal services contract, which is non-delegable and non-assignable.</p> <p>Ongoing expectation of work an indefinite relationship, or relationship specified for a maximum or fixed term.</p> <p>Hours not determinative of employment per se. Short hours irregularly performed may be casual employment. Regular predictable hours may indicate 'part time' or 'permanent full time' employment.</p> | <p>The au pair lives in the household of the family in a domestic arrangement, often limited to rights to remain in country on visa.</p> <p>There are often different cultural or family expectations of the au pair depending on the day and needs of the family (not the au pair placement agency), geographic location and other responsibilities of household.</p> <p>Au pair assumes shared responsibilities for care of children or household chores as member of family unit. Undertaking responsibilities is favour in kind for benefits of sharing family home, meals transport, entertainment or other family social or</p> | <p>Employment typically does not involve an employee living with their employer.</p> <p>The nature of au pair during arrangements is domestic and familial, not commercial, in nature, as au pair is often treated as member of family unit and welcome invited guest in home.</p> <p>Triangular relationship between au pair, placement agency and host family is not in the nature of work in an industry historically recognised as involving employment.</p> |

Nature of au pair relationship with placement agencies and host families - IP of CAPAA

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| <p>Capacity and control</p> | <p>Labour services performed under the direction and control of a legal person employer or national system employer, on an ongoing basis, usually at a fixed place of work, so that employer can conduct business.</p> <p>Usually within an organised, hierarchal labour force, with other employees exercising delegated supervisory and managerial functions.</p> <p>Employer has right to suspend or dismiss for misconduct.</p> | <p>recreational time.</p> <p>Based on the domestic nature of the relationship – there is often a high degree of control, but exercised by family comprising more than 1 individual (as a unit not legal person).</p> <p>Au pair will often sometimes assume sole responsibility for children, with care within family expectations of common sense and decency, but no supervision management or control.</p> <p>Control more familial in nature, deriving from the au pair being an invited guest in the private residence of the host family, with observance of 'house rules' or family expectations of courtesy, decency and ensuring safety, security and welfare of family.</p> <p>Au pair agency acts as intermediary if placement is to end at request of au pair or host family.</p> | <p>The familial and domestic nature of live-in arrangements is the reason for control to ensure the well-being, safety and security of children and home.</p> <p>It is not 'control' in the sense of maximising worker productivity or to manage a way of working to ensure commercial business interests or not for profit goals.</p> <p>Au pair is not controlled by other delegated supervisors or managers. Is however expected to act consistent with family and community expectations implicit in duty of care for children and parental wishes of family values and norms.</p> |
| <p>Work personally performed for others?</p> | <p>Usually exclusive personal services contract. Permission required for secondary or other employment or work.</p> <p>Wages for work bargain, without ability to substitute for another employee.</p> | <p>Au pair assumes some personal and some shared family responsibilities for household chores and child care. More akin to quid pro quo (or favour for a favour) for cultural experience and living in private home at no cost for lodging or meals.</p> | <p>Au pair agency can however facilitate replacement of au pair at wish of au pair or host family on short notice whilst maintaining placement contract on foot.</p> <p>Employment contract terminates with loss of service of employee.</p> |
| <p>Distinct profession or trade</p> | <p>Usually exercise of skills, experience and qualifications within recognised general categories of type of work.</p> <p>May involve professional work, but tends not to involve true independent exercise of profession, trade or calling as primary duty to serve interests of employer.</p> | <p>Typically, au pairs are young and not trained in childcare or do not hold qualifications in that field.</p> <p>Match made with host family not usually based on special skills or experience, but as compatible person and trusted guest in family home with personal experience of living in culturally compatible family environment only.</p> | <p>If the au pair has specific training, for example, training in caring for children with disabilities – this may indicate a relationship closer to that of an employee or contractor. However, it could more strongly indicate an independent contractor relationship. FW Act does not apply to vocational placements.</p> |
| <p>Separate place of work and presentation</p> | <p>Employee usually required to present to place of work during specified hours as</p> | <p>Au pair lives and works at same place as host family, and may remain there during own</p> | <p>Unusual for an employee to live and work at same place as employer. Employee earns wages primarily to pay for private cost of living</p> |

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| | <p>directed by employer.</p> | <p>free or personal time.</p> <p>Au pair may also travel with family on holidays or at different family residences.</p> <p>Members of host family may be working at another place of work, whether in their own business or in their own employment, and au pair fills in for other family members, or may share chores with some family members present at family home.</p> | <p>expenses.</p> <p>More usual for independent contractor to live and work in the same place or work. Contractor earns services income to pay for cost of carrying on a for profit an enterprise.</p> <p>Au pair motivated by cultural exchange reasons – not as a means of earning a living, but as a form of life experience, and host family provides at no expense to employee enjoyment of living in family home, with no cost for accommodation, meals, transport or sometimes other entertainment or other cost of living expenses.</p> |
| Vicarious liability and risk | <p>No assumption of business risk. NSW <i>Employees Liability Act (NSW) 1991</i> also deems employees not liable for conduct performed in ordinary course of duties, unless serious and wilful misconduct. Employer vicariously liable for actions of employees.</p> <p>Employer duties only to insure for workers' compensation and professional negligence.</p> | <p>Typically, liability is assumed, within agreed limits, by the host family, but not on the basis of an employment relationship. Host family will have household and perhaps public liability insurance.</p> <p>Au pair may have travel or other private health insurance.</p> <p>Host family typically indemnifies au pair placement agency.</p> | <p>Where au pair placement agency agreement specifies public liability insurance arrangements, different to deemed assumption of employer insurance obligations.</p> <p>If deemed workers' compensation insurance, only relevant for statutory workers compensation insurance purposes.</p> |
| Superannuation | <p>Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.</p> | <p>A person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work: section 12(11) of the <i>Superannuation Guarantee (Administration) Act 1992</i>.</p> | <p>Even if superannuation is paid, it does not provide weight to the argument that an au pair is an employee. It is relevant for the purposes of superannuation law compliance.</p> <p>Independent contractors similarly may have superannuation entitlements, without being deemed an employee in an employment relationship.</p> |
| Resources and expenses | <p>Resources and equipment usually provided by the employer, or reimbursement or allowance to cover the cost of obtaining such resources or equipment.</p> <p>Employee however usually has to pay for own meals at</p> | <p>Au pairs usually not required to provide their own resources, nor do they have many expenses.</p> <p>Living within the host family household, sharing common household appliance, transport and recreational equipment as</p> | <p>It would be unusual for an au pair to be required to wear a uniform or have any need for special equipment.</p> <p>Au pair may be asked to dress to observe family expectations of modesty, but otherwise free to wear what</p> |

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| | break times and for transport to and from place of work. | well as meals usually at no expense to au pair. | they wish to and when. |
| Tax | Income tax deducted from wage payments. | Host family or au pair agency would not be responsible or expected to deduct and remit tax from stipend or pocket money. | Au pair agency would render tax invoice (specifying ABN) for services and is responsible for remitting correct GST. |
| Payment | <p>Wages and other remuneration paid periodically, usually per week, fortnight or monthly.</p> <p>Bonus or commission payments usually documented and linked to performance of work or employer business results.</p> | <p>Payment terms can vary from family to family and within cultural custom and practice. However, placement agency may suggest as a guide a typical weekly allowance of pocket money akin to what an adult child may receive in a family unit.</p> <p>Au pairs are not paid wages for the responsibilities they assume while living at the host family's house.</p> | <p>If the au pair is paid a 'wage' or remunerated for work they are undertaking at the house (as opposed to 'pocket money' or reimbursement for personal expenses) this is more likely to infer an employment relationship.</p> <p>However, host families would be free to provide gifts or ex gratia payments to the au pair at their discretion and without any expectation from the au pair and not linked to performance of work or benefit derived to family or placement agency.</p> |
| Leave | <p>Entitlements to accrue and seek leave for absences from place of work. This includes annual leave, personal/carers' leave, long service leave.</p> <p>Leave required in context of employer needing to manage business or undertaking.</p> | <p>No entitlement to receive or be paid leave in a true au pair arrangement.</p> <p>However, may be common to have an understanding of reasonable free time so that au pair may enjoy cultural experience and to provide some privacy to both au pair and host family.</p> <p>There may be requests to take time off for recreation or relaxation purposes, but au pair may equally enjoy such time with family, including domestic or overseas holidays together.</p> | <p>Any arrangements referring to providing 'leave' could be indicative of an employment relationship.</p> <p>Equally, host family consent would be seen to be reasonable before an au pair could be relieved of assumed child care or household responsibilities or leaving family home unattended.</p> |
| Capital investment | Employment relationship usually does not involve any contribution to capital of employer's business. | Au pair often does pay for own arrangements to travel to Australia and to return home. Could also be engaging in study at own expense. | An au pair may be considered to have made an investment in their au pair experience, or vocational placement experience, different to employment, especially if au pair is using experience for future specialist training in areas such as care of children with special needs or aged care. |
| Goodwill and reputation | Responsible only to uphold goodwill and reputation of | Unlikely to be responsible for any goodwill, except for general expectations of | This concept looks at commercial interests and is not directly relevant to a |

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| | employer's business. | respecting the host family and family reputation and standing in community. | domestic arrangement or personal reputations. However, any obligation to uphold au pair placement agency good will and reputation could be relevant in an assessment of employment. |
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