

Wage Theft

Addressing Employee Underpayments in Australia

From 2025 onwards, intentional wage underpayments by employers will become a criminal offence and civil penalties will also increase for non-small business employers. The risk is high, with potential legal action, a Fair Work Ombudsman investigation, negative media attention as possible exposure. With several high-profile cases involving major Australian organisations agreeing to Enforceable Undertakings, no one is immune to wage underpayments.

Interpreting employee entitlements across systems and regulations is complex. Errors can arise due to:



Various hourly rates and other entitlement structures



Varied interpretation of applicable award and enterprise agreement clauses across jurisdictions, labour groups and organisations



Failure to undertake required reconciliation to ensure annual wages and salaries are not less than minimum entitlements under relevant awards



Varied classification and pay rates depending on duties performed



Ill-equipped payroll and rostering systems



Disparate data sets housed across businesses

It is important that businesses employing Australian employees who are subject to the rules laid out in modern awards actively monitor their legal obligations and manage their risk exposure. If not managed appropriately, employers could potentially be exposed to significant financial or reputational risks as well as civil and criminal penalties. In this article, we outline how organisations can mitigate associated risks.

What Is the Risk? Why Does It Occur?

Modern awards are industry or occupation-based and provide a safety net of minimum employment related entitlements. There are currently more than 120 different modern awards, each setting out multiple clauses on various employee entitlements. In some instances, a business may be subject to multiple modern awards for different employees.

Enterprise agreements are tailored to individual businesses and are required to place an employee in a better overall position as compared to relevant award(s).

The combination of modern awards and enterprise agreements can result in a highly complex set of rules. Added to this are the challenges of adapting a payroll system to the complex rules and operational rostering challenges. If the rules are not interpreted correctly in the payroll system, employee entitlements could be misclassified, resulting in the payment of incorrect amounts (i.e. under or overpayments).

Are Employee Underpayments a Crime?

From 2025, new rules criminalising intentional wage underpayments start in Australia. Financial penalties, if found guilty, are significant and individuals may face prison.

Civil penalties for wage underpayments for a non-small business employer (for example sham contracting or failure to meet record-keeping obligations) will also increase once the new criminal rules come into play.

All Australian employers need to be aware of their legal obligations.

What Should You Consider?

Here are a few questions that businesses, their directors, and their advisors can ask:

1. Do I know which modern awards apply to my business?
2. Do I have a good understanding of my legal obligations under each award?
3. Am I confident that I have the correct framework, policies, and procedures to interpret and implement each award correctly?
4. Does our payroll system correctly match the relevant rules with our rostering procedures?
5. When was the last payroll audit done?
6. How often do I check for updates on my legal obligations under each award?
7. Have there been employee or union complaints raised regarding employee underpayments?

If any of the above questions raise potential concerns about employee underpayments, businesses should seek expert legal advice as soon as possible.

What Can Businesses Do To Mitigate Risk?

It is vital that businesses understand their legal obligations under each applicable award and/or agreement and have in place relevant systems and resources to ensure the accurate payment of employee entitlements.

Larger businesses with numerous and differing types of employees will also need to ensure that employee data are properly maintained. In our experience, the following actions can reduce the risk of employee underpayments:

1. Ensure that key management personnel is aware of the risk of employee underpayment to manage the risk effectively.
2. Seek legal advice on the interpretation of modern awards and enterprise agreements.
3. Use forensic accounting and data analytics expertise to review and calculate the correct payment(s) for each employee. Use data visualisation tools to provide insights to management and directors on key risk areas.
4. Conduct robust risk assessments, focussing on the business' overall payroll framework, including relevant policies and procedures to prevent, detect, and respond to any employee underpayments.

Tips For a Successful Outcome

Here are a few tips to a successful outcome if a business suspects employee underpayment:

1. **Consult with experts** who have the relevant expertise and experience, e.g. forensic accountants, data analysts, risk analysts, regulatory experts, and legal representatives.
2. **Implement a collaborative approach** between the internal Human Resources team, legal experts, and any consultants used.
3. **Actively manage reputational risk** by utilising strategic communications expertise to advise on stakeholder management across the communications landscape. This includes communication with unions, employees, boards, regulators, and media enquiries.
4. **Build efficiencies** into the work plan by using pre-built models and data analytic techniques to recalculate all employee entitlements rather than only a sample or manual file review. The work plan should also identify areas of business transformation required to ensure that the risk of employee underpayment is reduced in the future.

How FTI Consulting Can Help

FTI Consulting helps organisations assess the corporate risks of employee underpayments. We can investigate and quantify instances of underpayments, working with you to communicate outcomes and improve your processes to ensure the issue doesn't recur.

**DAWNA WRIGHT**

Senior Managing Director
Forensic & Litigation Consulting
dawna.wright@fticonsulting.com

**SHANNON WALKER**

Managing Director
Strategic Communications
shannon.walker@fticonsulting.com

**STACEY VOSS**

Managing Director
Forensic & Litigation Consulting
stacey.voss@fticonsulting.com

**KATE WARWICK**

Senior Managing Director
Head of Retail & Consumer Products, Australia
kate.warwick@fticonsulting.com

The views expressed herein are those of the author(s) and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals. FTI Consulting, Inc., including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm.

FTI Consulting is an independent global business advisory firm dedicated to helping organisations manage change, mitigate risk and resolve disputes: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities. © 2024 FTI Consulting, Inc. All rights reserved. fticonsulting.com