

Wage theft: addressing employee underpayments in Australia

Over the past 18 months, there have been moves by some Australian states to criminalise ‘wage theft’. Several high-profile cases involving major Australian organisations have placed a spotlight on employee underpayments, which are investigated by the Fair Work Ombudsman.

Interpreting employment 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



The distinction between ‘casual vs permanent’ employees remains a potential area for dispute/error. However, a recent appeal decision has made it more difficult for unpaid entitlements to be awarded to casual employees unless there is a firm advance commitment in their contract to ongoing work



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 not only significant financial or reputational risks but also criminal. In this article, we provide some insight on 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 155 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?

Various states in Australia have moved to criminalise the underpayment of employee entitlements. All Australian employers need to be aware of their legal obligations. Financial penalties for contravening the *Fair Work Act* are significant, while an employee underpayment scandal can present significant reputational risks to a business. So far, three states in Australia have introduced the following measures:

- In late 2019, following an inquiry into wage theft, Western Australia indicated its intention to criminalise wage theft and strengthen state industrial legislation;
- In June 2020, Victoria was the first Australian state to pass a similar law, which came into force on 1 July 2021. Under that new law¹, employers, directors and officers may be criminally liable for underpayments of wages and other benefits and for failures to keep proper records of employee entitlements; and
- In September 2020, the Queensland Criminal Code was amended to include a criminal penalty of up to 10 years' imprisonment for Queensland employers who intentionally underpay their employees.

While other states have yet to announce an intention to introduce similar legislation, the issue will likely remain on the agenda at both a state and federal level.²

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. How often do I check for updates on my legal obligations under each award?
6. 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.

¹ The Wage Theft Act 2020 (Vic)

² Wage theft is already unlawful federally however penalties are imposed by way of financial penalties rather than custodial sentences.

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 businesses and organisations assess the corporate risks of employee underpayments. Where necessary, we investigate and quantify instances of underpayments, working with you to communicate outcomes and improve your processes to ensure the issue doesn't recur in the future.



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