



## CRIMINALISING WAGES THEFT

Classifying an employee under the wrong award or at the wrong level, not accounting for meal breaks correctly, omitting to pay a penalty rate or not providing the correct allowance are all regular errors that occur in Australian payrolls every week.

Whilst honest mistakes would likely result in a bit of backpay, this new legislation is targeting deliberate underpayment and declaring it a criminal offence

In this article we explore the basis of the Government criminalisation of wages theft and as a business what you can do to better protect yourself.

*I pay my staff well above any Award so my business isn't impacted by this law... don't be so sure*

As part of the Government's Fair Work Legislation Amendment – referred to as the Closing the Loopholes Bill – from 1 January 2025, intentional underpayment of wages and certain entitlements will become a criminal offence.

This criminal offence will attract a maximum of 10 years imprisonment and/or a maximum or the greater of:

- three(3) times the amount of the underpayment (where it can be identified) OR
- 5,000 penalty points (\$1,565,000) for an individual; or for a body corporate 25,000 penalty points (\$7,825,000)

Ouch – that's significant, and whilst the business itself might be penalised, those individually involved in the underpayment actions, notably your payroll and HR people, authorised signatures to the payroll and business owners, CEO's and Boards could also be personally charged.

These new laws should be front of mind heading into 2025.

Whilst there are some exceptions for underpayments that result from a genuine mistake the following list are some of the types of underpayments that could occur and in green outline some practical and positive steps you can take for better compliance.



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### Common errors include:

- **Award misclassification** – You can't just decide to opt out of the Award – if your business and your employees within that business are covered – you're covered. Not knowing what Awards cover your business and/or the positions you employ and just paying a good salary may not protect you.
- **Annualised Salaries** – you must regularly confirm that the annualised salary you pay does in fact cover the minimum salary rate plus any allowances and penalties required under the Award for each role.
- **Superannuation** – with Single Touch Payroll (STP) and soon to be real time superannuation payments you must check which of your pay categories require superannuation paid on them and which don't.
- **Award changes** – the Awards change regularly. Subscribing to the Fair Work Commissions Award updates is a quick and easy way for you or your payroll people to keep on top of the latest changes. [www.fwc.gov.au/subscriptions](http://www.fwc.gov.au/subscriptions).

*All your terms and conditions of employment should be documented, and documented well... it doesn't matter that everything was agreed when an employee started ... it effectively doesn't count if it is not in writing.*

### Underpayment of wages can include:

- **Not paying sufficient wages, including penalty rates, overtime rates and allowance** – if you have a salary structure in place that provides an over-Award payment or a bonus or commission structure or you pay a premium salary just to get staff – that won't be enough to protect you and your business. Documentation will be crucial. You will need to specifically state in your employment contracts or letters of offer that their salary for example is \$ABC and this includes a provision for X hours of overtime, that leave loading won't be paid as it is already provided for in the employment contract, that you are not paying for XYZ allowance, because it's already included etc. Don't assume that because everything was explained or agreed when they started that that will protect you.
- **Not paying an amount required by the applicable award or enterprise agreement** - Did you know that under some awards staff who are required to wear a uniform should be paid an allowance for laundering that uniform, OR that some awards require you to pay travel or tool allowances. The list of allowances and penalties across the various awards are many and if you have multiple awards covering the staff who work for you, those allowances and penalties might not all be the same for all roles. Again, if you have not specifically documented that a staff member will or won't be paid for that allowance – you may be in breach.



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- **Failure to correct a known error** – once you have identified an error, putting actions in place immediately is critical. Further to this, regular checks throughout the year are a proactive measure to ensure that you remain on top of your payroll compliance.
- **Not paying other entitlements like superannuation** – if your payroll system is not set up correctly you may be overpaying or underpaying superannuation. Some pay items may be classed as salary & wages but not ordinary time earnings (OTE). OTE pay categories attract superannuation. If your payroll system is not set up correctly, you may have allowances that are not attracting superannuation and they should be. Bunnings famously (or infamously) discovered an error in the superannuation setup of their part time staff resulting in 10 years of superannuation underpayments of over \$6.1 million.

*If the big guys are getting it wrong, small businesses need to be wary.*

The intention of the wage theft criminalisation is not really about big fines and sending people to jail (although I am sure Fair Work will be looking for a first test case)... in reality it's about building business owners, CEO's and payroll's knowledge about the Award system and pay and condition requirements for employees.

It aims to ensure employers are being fair, compliant and helps to build trust that workers are being paid correctly for the work that they do.

\*\*\* Special note for small businesses (less than 15 staff) – a **Voluntary Small Business Wage Compliance Code** has been created for use by those employers with less than 15 staff. Those who use this code and still get things wrong will generally not be prosecuted if they have taken steps to comply.

*There are 121 Modern Awards in the Federal system plus a number of State awards and even more Registered Agreements. Just paying your people a good salary and assuming it will be OK is no longer enough.*

Below is a quick checklist for you to apply to your payroll.

Armed with the right information and the right advice, Award and Fair Work compliance becomes easier. Whilst the Industrial Relations system in Australia is complex, help is available.

Reach out to us at GPHR for an initial Award check, payroll audit, employment contract review or even as a 'sounding board' as you go through your checks.



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### Payroll Checklist

- Review each of your staff and identify whether an award covers your industry as well as all the roles within your business (there are both industry and occupational Awards). Many companies have multiple awards covering the different roles in their business, you will need to check all roles against the list of Modern Awards.
  - Use a spreadsheet and add a column for notes, naming the Award if applicable and the classification level for each staff member and/or each role.
  - If you do not believe an employee is covered by an Award, document why you have come to this decision.
  - If you are still not sure the Fair Work Pay and Conditions Tool (P.A.C.T) is a handy resource. Alternatively, GPHR is here to assist.
- Check your employment contract/letter of offer documentation. If they haven't been updated in the past two(2) years they will likely be out of date.
- Verify your leave balances in your payroll system to ensure they are being calculated correctly. Remind your staff about leave applications, compliance and documenting absences.
- Run a quick "what staff are being paid v what they would have been paid under the Award" check. If your permanent staff are on an annualised salary but do regular overtime or have to work an occasional weekend shift, this check is a proactive way to show that you are actively looking for payroll irregularities..
- Check the setup of your payroll software. Selecting whether an allowance attracts superannuation or not, ensuring leave accrues on some wages categories but not others. Payroll software is great...until it's not. A quick review will give you some peace of mind.
- All staff should track their hours – even if they are not under an award. Ensuring your people are taking their breaks and not doing excessive overtime is about both the Award and Fair Work compliance, but also Workplace Health Safety obligations.
- Check before accepting to a condition change – even when both you and the employee agree. Some Award provisions and the National Employment Standards (NES) are not able to be negotiated out of. Eg. if a staff member is OK working through lunch so they can finish 30 min early and that works for you, it still can't happen. A 30 minute break after 5 hours of work is a NES requirement and can't be contracted out of.

*If in doubt - double check - don't risk not being sure. A quick check is sometimes all you need to either confirm or correct an issue.*