

Beyond COVID-19: The unresolved epidemic of wage theft and underpayments

2 April 2020

Employers are currently focused on crisis-management workplace issues, due to the COVID-19 pandemic.

Once this crisis has abated, attention will again be focused on the yet unresolved wage theft epidemic.

We set out below the key issues that employers need to consider regarding underpayments.

Wage theft – a criminal offence

Victoria's *Wage Theft Bill 2020* was given its second reading in the Victorian Legislative Assembly on 19 March 2020.

The Victorian bill provides three wage theft offences: theft of employee entitlements (ie, "dishonest" withholding); falsification of an employee's record; and the failure to keep employee entitlements records. Companies will be vicariously liable for actions taken by officers, directors, associates and agents within their scope of employment or engagement, and there will be "implied authority" if there is a corporate culture of "wage theft". Decision-makers will be liable if they fail to take reasonable precautions, which includes exercising due diligence. "Dishonesty" will need to be proven but only to the standards of a reasonable person, which negates the defence that it was a "mere mistake" when there is substantial evidence that the employer did or *should have known*.

Queensland, Western Australia and the Commonwealth governments are similarly considering a criminal wage theft offence.

In Queensland, the government has confirmed its intention to legislate for wage theft crime with maximum penalties of 10 years' jail for employers committing intentional wage theft and 14 years where there is evidence of fraud. The Western Australian government is considering introducing wage theft crime but will first consult with the Commonwealth government.

The Commonwealth is informing itself as to its approach through a Senate Economics Committee Inquiry and Attorney-General discussion papers but has flagged its commitment to criminalise wage underpayments aimed at capturing serious and culpable behaviour.

The potential expansion of accessory liability, extending sham contracting provisions, increasing penalties and enforcement

The Commonwealth government is also canvassing various changes to the civil liability provisions under the FW Act to expand accessory liability and increase penalty amounts, including:

- increasing the penalty amounts for breaches of civil penalty provisions: s 539, FW Act;
- amending the "reckless" defence to "reasonably be expected to know" for the sham contracting provisions: ss 357-359, FW Act;
- extending accessory liability to include "recklessness", which is broader than the current requirement of "indirect knowledge": s 550, FW Act.

These amendments will increase the risk of liability for employers and accessories regarding underpayments.

Employers must conduct due diligence regarding employee entitlements and take steps to resolve identified underpayment risks. Individuals should cease processing underpayments and raise their concerns with senior management or the board.

Taking advantage of the superannuation guarantee amnesty

The ATO has estimated that unpaid compulsory superannuation in the six months' period between 2011-2017 was approximately \$2.3 billion.

To address this, a six months' amnesty currently applies which provides employers with the opportunity to correct past unpaid superannuation guarantee amounts. This ends on 7 September 2020.

During the amnesty, superannuation guarantee shortfalls can be disclosed without penalty, payments made can be claimed as tax deductions and payment plans can be arranged. After this period, if an audit identifies unpaid superannuation, significant penalties between 100-200% of the shortfall may be imposed by the ATO on the employer.

Audits checking compliance with superannuation legislation must be conducted by employers to take advantage of this amnesty. Do not delay.

Whistleblower reports of underpayments under the *Corporations Act 2001* (Cth)

Complaints about systemic underpayments in the workplace or supply chain will likely be disclosable matters under whistleblower provisions in the *Corporations Act 2001* (Cth).

If so, a whistleblower's identity must be kept confidential and the whistleblower must not be treated detrimentally because of the disclosure, which includes protecting the whistleblower against dismissal, reputational damage and damage to the whistleblower's business or financial position.

There are significant civil and criminal penalties for failures to comply with obligations under whistleblower legislation. Orders for compensation may also be sought from the court.

A flagged issue for Modern Slavery laws

Under Commonwealth modern slavery legislation, large corporate entities must issue a modern slavery statement by certain dates. Similar legislation exists in NSW but is not yet in force.

The statement is based on the company's investigations of operations and supply chains regarding modern slavery risks and the steps the company has taken (or will take) to address those risks. As part of this, modern slavery statements will likely contain assertions of compliance with local HR laws. Boards should be mindful that these assertions may be relevant to a court's assessment of the extent of a director's knowledge about a contravention when determining accessorial liability for underpayments.

10 days personal/carer's leave and annualised salaries

Personal/carer's leave is currently calculated on "working days" not "ordinary hours" and is not pro-rateable for part-time employees: *Mondelez v AMWU* [2019] FCAFC 138.

Despite this, many organisations continue to pro-rate personal/carer's leave for part-time employees and provide for the accrual and taking of leave on an "ordinary hours" basis. If HR and payroll staff continue to process this entitlement incorrectly, they risk accessorial liability.

Annualised salaries are also an ongoing issue if the amount paid in any pay period is below minimum award requirements when accounting for all hours worked (eg, there may be provision for overtime and penalty rates in respect of these hours). When employees are working significantly longer hours, either due to COVID-19 requirements or otherwise, there will be an increased risk of award non-compliance. Employers must audit hours worked by employees to mitigate this risk and resolve identified underpayments by increasing the annual salary or reverting to payment under the industrial instrument.

Increased intervention by enforcement agencies

Within the compliance and enforcement regulatory space, there is an increased allocation of resources being directed towards underpayments, including:

- the Fair Work Ombudsman (FWO) establishing a dedicated sham contracting unit and recently announcing it will be creating an underpayments taskforce;

- as part of its Wage Theft legislation, Victoria establishing Wage Inspectorate Victoria which will perform a similar role to the FWO by supporting compliance as well as investigating and bringing criminal proceedings for alleged employee entitlement offences;
- the WA Department of Mines, Industry Regulation and Safety providing a dedicated wage theft website setting out information on how to resolve underpayments, report wage theft and to get help with unpaid superannuation: www.wagetheft.wa.gov.au.

These steps will increase the likelihood of underpayments being reported and employers being subjected to monitoring and enforcement activities by government agencies or regulators in these jurisdictions.

COVID-19 changes increasing award flexibility

The Fair Work Commission is currently in the process of determining applications by unions and employer associations to increase award flexibility during the COVID-19 outbreak on an expedited basis.

Variations have been determined for the Restaurant Award, Clerks Award and the Hospitality Award and will be in effect until 30 June 2020, unless extended for a further period.

These changes include tricky accrual issues as set out below.

- Clerks Award and Restaurants Award – unpaid leave taken during any close down *counts as service* for entitlements under the award and the National Employment Standards (NES).
- Hospitality Award, Clerks Award and Restaurant Award – during directed reduced hours periods, employees accumulate and take paid leave entitlements (and under the Clerks Award, termination of employment entitlements) *based on their pre-reduction ordinary hours of work*.

The Fair Work Commission has also recently stated its provision view that it will vary 130 modern awards by introducing 10 days' unpaid pandemic leave, which will not be pro-rateable and will be available for full-time, part-time and long-term casual employees. Unpaid pandemic leave is intended to count as service for the purposes of the applicable modern award and the NES.

Employers must ensure payroll is across the details of these accruals as unpaid leave does not normally count for service regarding entitlements under awards or the NES.

See [Fair Work Commission Statement – Variation of awards on the initiative of the Commission – 1 April 2020](#)

Where to from here?

Underpayments continue to be a very serious legal and reputational issue for business and should not be forgotten during COVID-19 crisis management.

Boards, senior management (particularly HR professionals) and external advisers should continue to carefully monitor changes in this area and conduct appropriate due diligence in their workplaces and, where relevant, their supply chains. Where issues are identified they should be resolved and, if it relates to unpaid superannuation, employers should consider reporting the extent of unpaid superannuation under the Super Guarantee Amnesty by 7 September 2020.

See also [Underpayments of entitlements](#), [Whistleblowers' protection](#), [Modern slavery](#), [Superannuation](#), [Work relationships](#), [Minimum wages](#), [Annual leave](#), [Long service leave](#), [Personal/carer's leave for more information](#)