



Criminalising Wage Theft: Changes Effective January 2025

From 1 January 2025, intentional underpayment of employees will be a criminal offence under the Fair Work Act 2009 (FW Act).

This change, introduced by the Fair Work Legislation Amendment (Closing Loopholes) Act 2023, imposes severe penalties on businesses and individuals who engage in wage theft at a Commonwealth level, reflecting Australia's strengthened commitment to workplace fairness.

What is wage theft?

Wage theft occurs when employers intentionally underpay employees or delay their specified lawful entitlements.

The Wage Theft provisions will include:

- Failing to pay wages
- In some cases, not paying superannuation
- Not paying personal or annual leave entitlements
- Misclassifying employees as independent contractors
- Not paying for trial or training periods.

The Wage Theft provisions will not include:

- Some superannuation contributions
- Payment for taking long service leave payments
- Payment for taking leave connected with being the victim of a crime
- Payment for taking jury duty leave or for emergency services duties.

Penalties

The amendments criminalise wage theft at a Commonwealth level, introducing penalties for employers who intentionally underpay employees.

Companies and individuals involved in decision-making leading to the wage theft instance (e.g., directors, managers or employees) can face:

Individuals	Companies
<ul style="list-style-type: none">• Up to 10 years imprisonment.• Fines of either:<ul style="list-style-type: none">◦ Greater of three times the underpayment amount or \$1.565 million, if underpayment is determinable. <p>\$1.565 million, if the underpayment cannot be quantified.</p>	<ul style="list-style-type: none">• Fines up to \$7.825 million or three times the underpayment amount, whichever is greater.

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Proving wage theft

To prove the intention of wage theft, the following must be proved beyond reasonable doubt:

1. The employer was required to make payments under the FW Act or related instruments.
2. The payments were not exempt under the legislation.
3. The employer knowingly withheld payments past the due date, deliberately choosing not to make the required payments despite being aware of the entitlements.

Unintentional underpayments, such as honest mistakes or miscalculations, will not result in criminal charges.

Expanded Corporate Accountability: *'Corporate Culture'*

Corporate Culture will be taken into consideration when determining intent of wage theft. As such, employer's may face liability if their corporate culture tolerates, enables, or fails to actively prevent wage theft. This liability can extend to situations where an employer suspects underpayment but chooses not to investigate or address the issue, thereby failing to take reasonable steps to ensure compliance.

A corporate culture that is indifferent to wage and hour obligations can be deemed complicit in underpayment practices, even if these practices are unintentional. Employers are therefore strongly encouraged to cultivate a workplace environment centred on compliance, accountability, and proactive measures.

This includes implementing clear policies and procedures, conducting regular payroll audits, providing training for managers and payroll staff, and creating channels for employees to raise concerns about potential underpayment without fear of repercussions. A company culture that's focused on compliance can help employers significantly reduce the risk of wage theft exposure by demonstrating their commitment to fair and lawful treatment of their workforce.



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Enforcement and Safe Harbour Provisions



Enforcement Agencies: The Fair Work Ombudsman (FWO) will investigate potential offences, referring serious cases to the Commonwealth Director of Public Prosecutions or the Australian Federal Police for prosecution.



Safe Haven for Small Businesses: Compliance with the forthcoming Voluntary Small Business Wage Compliance Code will shield small businesses (employing 15 or fewer people) from criminal prosecution for wage theft. The Code is currently being developed by the government in collaboration with employer and employee groups.



Cooperation Agreements: Employers may self-report underpayments and enter into agreements with the FWO to avoid criminal referral, though civil penalties may still apply.

Proactive Steps for Employers

To prepare for the new laws, employers should:

- Conduct thorough payroll audits to identify and rectify underpayments
- Train management and payroll staff on compliance obligations
- Maintain accurate employee records, including award classifications
- Implement robust payroll systems to ensure timely and accurate payments
- Foster a culture of compliance through clear policies and procedures

The Importance of Compliance

Criminalising wage theft demonstrates Australia's focus on ensuring fair treatment for workers. Businesses are encouraged to take proactive measures to avoid penalties, foster equity, and build trust with employees.

If you have any questions or need assistance with any of the above, especially the proactive steps employers should take in preparing for these laws, contact our team now.

Contact Us