

# Alert

Employment, Workplace Relations & Safety

## Pay Up or Pay the Price: a reminder that Wage Theft has become a Criminal Offence

By Ben Duggan, Nicholas De Pasquale & Jasmine Zanatta

The start of 2025, an election year, marks the final suite of the Albanese Labor Government's workplace reforms during its busy first term.

An employer who deliberately fails to pay, or underpays their employees, now faces criminal sanctions under this final suite of reforms, which commenced to operate on 1 January 2025.

### Workplace Reforms

The Albanese Labor Government's desire to prioritise workplace reforms was apparent from its decision to hold its Jobs and Skills Summit shortly after coming to office, in September 2022.

Key objectives to come out of the Jobs and Skills Summit included the following:

- Keeping unemployment low, boosting productivity and incomes; and
- Delivering secure, well-paid jobs and strong, sustainable wages growth; and
- Broadly improving opportunities, rights and protections for workers, particularly those most disadvantaged and vulnerable workers.

Since the Jobs and Skills Summit, amendments have been made to the following workplace laws:

- Sex Discrimination laws (2022); and

- Secure Jobs and Better Pay reforms to the Fair Work laws (2022/2023); and
- Closing the Loopholes (Part 1 and Part 2) reforms to the Fair Work laws (2023-2025).

The amendments have included the introduction of a positive duty for employers to prevent sexual harassment, measures to support casual workers, and a right to disconnect from work.

### Wage Theft Workplace Reforms to the Fair Work laws

All employers will now have to pay up or pay the price as wage theft and intentional underpayments has been criminalised.

#### What Is Wage Theft?

Wage theft occurs when an employer knowingly, or intentionally, fails to pay wages or other entitlements to an employee in their business.

Historically, wage theft was treated primarily as a civil issue, with employees seeking compensation through disputes or claims lodged with the Fair Work Commission (FWC), Fair Work Ombudsman (FWO) or State Employment Courts.

More recently, State legislators have escalated the failure to pay wages or other entitlements, making wage theft a criminal offence in several States, including Victoria.



The Federal Government's workplace reforms elevate wage theft to the national stage.

Wage theft is defined as any of the following various actions by an employer:

- **Underpayment:** deliberately paying employees less than they should be paid; or
- **Withholding:** failing to pay wages, annual leave or other entitlements; or
- **Unlawful deductions:** making deductions from employees pay that are not legally permitted; or
- **Uncompensated Overtime:** requiring employees to work overtime without paying appropriate overtime rates of pay.

#### Difference Between Wage Theft and Wage Underpayments

There is an important distinction between wage theft and wage underpayment.

Whilst both categories involve an employer's failure to pay an employee's wages or other entitlements, the key difference is the employer's intention and the gravity of the offence.

Wage underpayment occurs when the employer is not intentionally underpaying their employees, but rather does so unknowingly that may arise from situations, such as:

- Administrative errors; or
- Incorrectly classifying employees under a modern award; or
- Misinterpreting pay rates; or
- Failing to keep on top of ongoing changes in employment law.

In contrast, the new offence of wage theft occurs when an employer deliberately underpays an employee and as a result fails to comply with the relevant industrial instrument (Modern Award or Enterprise Agreement) and the Fair Work laws.

An employer will be found guilty of the offence of intentional wage theft if:

- they are required to pay an amount to an employee (such as wages), or on behalf of or for the benefit of an employee (such as superannuation) under the Fair Work laws, or an industrial instrument; and
- they intentionally engage in conduct that results in their failure to pay those amounts to or for the employee on or before the day they're due to be paid.

#### Penalties for Employers if Found Guilty of Wage Theft

Criminal penalties will be imposed on employers if they are found guilty of wage theft or intentional underpayment.

##### Individual penalties

An individual can face a maximum of 10 years imprisonment.

Additionally, if the Court determines the underpayment amount, an individual may be punished by paying up to 3 times the amount of the underpayment and a maximum of \$1,565,000.

However, if the underpayment cannot be quantified, an individual may be fined up to \$1,565,000.

##### Company penalties

The new laws impose a harsher penalty for companies.

If the court can determine the monetary amount of the underpayment, companies can pay up to 3 times the amount of the underpayment and up to \$7,825,000 in fines.

However, if the court cannot determine the underpayment, then companies may be fined up to \$7,825,000.

#### Tips To Make You Compliant

Employers can take proactive steps to identify and avoid wage theft and intentional underpayments by ensuring compliance with legal obligations and encouraging a workplace culture of transparency and fairness.

The following steps can be taken by employers to ensure compliance with the new legislative provisions:

- Regularly review employment contracts and awards; and
- Implement robust payroll systems; and

- Educate management and staff; and
- Monitor legislative changes; and
- Ensure proper classification; and
- Maintain transparent record keeping by documenting everything; and
- Promptly addressing employee complaints and rectify mistakes; and
- Correctly compensate overtime, shift work and other work performed outside of regular hours; and
- Avoid making illegal deductions unless expressly permitted by law or contractual agreements; and
- Consult a legal professional if you are unsure.

These workplace changes carry severe penalties for employers found guilty of this new offence.

Employers must ensure that legal obligations are met by accurately paying wages, benefits and entitlements whilst avoiding unlawful deductions or failing to compensate employees for work performed.

With the criminalisation of wage theft, Courts will play an increasingly central role in determining the scope of employer liability.

Criminal cases will likely be pursued by Federal Government agencies or Unions, particularly where there is evidence of systemic underpayment or intentional wage theft.

In these cases, the Court must decide whether the employer's conduct meets the criteria for criminal action, considering whether there was knowledge of or recklessness regarding the underpayment.

Employers may defend themselves by showing that any underpayment was due to clerical errors or oversight, rather than intentional misconduct.

If you have any questions or require assistance or advice in ensuring compliance with these new workplace laws, please get in contact with one of our employment law experts.



[MORE INFO](#)

**Ben Duggan**

Director

p: +61 8 8124 1881

[ben.duggan@dwft.au](mailto:ben.duggan@dwft.au)



[MORE INFO](#)

**Nicholas De Pasquale**

Associate

p: +61 8 8124 1883

[nicholas.depasquale@dwft.au](mailto:nicholas.depasquale@dwft.au)

**DW Fox Tucker Lawyers**

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 8124 1811 e: [info@dwft.au](mailto:info@dwft.au) [dwfoxtucker.com.au](http://dwfoxtucker.com.au)

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