

Voluntary Small Business Wage Compliance Code / Commencement of Criminal Offence for Wage Theft

Summary

A federal criminal offence of wage theft will apply to intentional underpayments made after 1 January 2025.

Small business employers will not be referred for criminal prosecution where they comply with the Voluntary Small Business Wage Compliance Code (**Code**).

The Fair Work Ombudsman (**FWO**) has now issued the Code, which identifies various actions small businesses can take to demonstrate that any failure to pay employees correctly was not intentional. If the FWO is satisfied the underpayment was not intentional, the employer will be taken to have complied with the Code (and therefore, not be liable to be referred for potential criminal prosecution).

The actions small business employers may take to comply with the Code centre on making reasonable efforts to ascertain correct rates of pay and to stay up to date with changes, employer actions to rectify underpayments, and cooperation with the FWO.

There is a particular emphasis on small businesses seeking reliable, expert advice on pay and other compliance obligations, such as that provided by Ai Group and our Workplace Advice Line.

Background

One of the Federal Government's key workplace relations priorities has been improving compliance with awards, agreements, and the *Fair Work Act 2009* (**FW Act**), particularly in regard to payment of wages. This has seen amendments to the FW Act in 2023 and 2024 that:

- Further increase civil penalties (fines) for underpayments, and for serious contraventions.
- Introduce a new criminal offence for wage theft / intentional underpayments.
- Provide safe-haven mechanisms under which employers will not be referred for prosecution. These include the [Small Business Wage Compliance Code](#).

New Criminal Offence

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* will, from 1 January 2025, introduce a criminal offence for wage theft into the FW Act for the first time. The offence will apply to employers who **intentionally** engage in conduct that results in underpayment of their employees.

Those found guilty of wage theft can be subject to up to 10 years' imprisonment, and/or substantial fines. The maximum potential fines are the greater of:

- For an individual: 5,000 penalty units (\$1,650,000); or for a body corporate: 25,000 penalty units (\$8,250,000).
- Three times the amount of the underpayment, if the court can determine that amount.

The new criminal offence will commence from 1 January 2025 and apply to intentional underpayments that occur after that date. Prosecutions will be brought by the Australian Federal Police or the Commonwealth Department of Public Prosecutions. The FWO, Australia's national wages inspectorate, will investigate and refer matters to these agencies for prosecution.

Safe Havens

The criminal offence operates subject to two 'safe havens' designed to encourage self-reporting and cooperation with the FWO. The two safe haven options / pathways are:

- The Voluntary Small Business Wage Compliance Code (the Code). The Code is only able to be relied on by **small business employers**, which in broad terms is **defined under the FW Act as an employer with fewer than 15 employees**. Evidence of compliance with the Code will ensure that the FWO will not refer conduct for criminal prosecution or request the employer to enter into a cooperation agreement.
- Cooperation agreements which will enable the FWO to agree not to refer conduct for potential criminal prosecution, after assessing an employer against a non-exhaustive list of factors.

In both cases, the FWO may still pursue fines against an employer, issue compliance notices, and require that underpaid employees be re-paid.

Voluntary Small Business Wage Compliance Code

The Minister for Workplace Relations has now declared the Code. A small business employer will have complied with the Code if the failure to pay a required amount was not intentional, having regard to matters set out in Section 6 of the Code, which include:

- The efforts of an employer to ascertain the correct obligations under awards, agreements and other instruments (Section 7).
- The efforts of an employer to stay up to date with changing obligations (Section 8).
- The extent to which an employer seeks advice from reliable sources such as Ai Group (Section 9).
- The steps an employer takes to rectify failures to correctly pay employees including whether employees have been re-paid, how rapidly they are repaid, and efforts to prevent the same issues re-occurring in future. (Section 10).

Other relevant considerations include (Section 11 of the Code):

- Whether a failure to pay arose from a mistake or error in payroll processes or by a financial institution.
- Whether a failure to pay arose from ambiguity or competing interpretations of obligations, and the employer applied a reasonable, but incorrect, interpretation.
- How an employer becomes aware of the failure to pay correctly, and where raised by a union or other employee representative, how the employer responds and how promptly the underpayment is rectified.
- Whether underpayment was minimised because an employer took prompt steps to rectify it.

Small business members approached by the FWO in relation to underpayments can seek advice from Ai Group on the extent to which they may be able to rely on the Code and not be able to be referred for criminal prosecution. Ai Group can also advise members in relation to non-criminal civil penalties (fines), and engagement with the FWO, including in relation to compliance notices and enforceable undertakings.

Further information

Ai Group's [summary](#) of the Closing Loopholes amendments regarding wage underpayments and wage theft includes more detailed information on:

- Cooperation Agreements, the second safe-haven option provided for under the FW Act.
- Related offences which can impose personal liability on managers, officers, or agents of an employer for assisting, aiding, abetting, counselling, or procuring the commission of a wage theft offence.
- Corporate criminal responsibility, in which a body corporate employer can be held liable for the conduct of its employees, agents or officers.
- Increases to non-criminal fines (civil penalties) for non-intentional underpayments.
- New tools available to the FWO in responding to suspected underpayments.

Implications

The new criminal offence, increased fines and the Code reinforce the importance of all employers ensuring they are meeting their compliance obligations under awards, enterprise agreements and any other applicable instruments, particularly regarding accurately paying employees.

AFRA members seeking advice on pay and compliance obligations should contact the Ai Group Workplace Advice Line on 1300 55 66 77. AFRA members can also contact Ai Group if approached by the FWO following a specific complaint, investigation or allegation of underpayment.



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