



Salaried Arrangements - Wage Theft

After admitting that it has underpaid 2,200 workers for the past six years, Star Entertainment Group could be liable for \$13 million dollars in employee back payments.

The Star Entertainment Group's underpayment is one of many recent highly-publicised cases that demonstrates that the Fair Work Ombudsman will continue to take a tough stance on wage theft from salaried employees.

Background

Back in 2020 the Fair Work Ombudsman (FWO) commenced an investigation into casino giant, Crown, after Crown self-reported underpayments to over 200 salaried staff, equating to approximately \$2 million of underpayments in wages and superannuation.

Woolworths has not been as fortunate as Crown, and is now not only dealing with a previous underpayment claim in 2019 for approximately 5,700 salaried managers, but also a class action brought by Adero Law on behalf of salaried managers. The FWO has now commenced proceedings against the retail conglomerate in the Federal Court.

Woolworths isn't alone, with the FWO having commenced proceedings against Coles, alleging the supermarket giant short-changed thousands of salaried employees by more than \$100 million. The FWO clearly has its sights on claims relating to underpayments of salaried employees, which result in employees not being 'better off overall', as salaries fail to adequately cover overtime and penalty rates.

Costs and Penalties

In cases like these, not only do employers such as Star, Crown, Woolworths and Coles face expensive back pay liabilities, they also face the potential of the FWO seeking penalties for alleged non-compliance with:

- salaried arrangements passing the Better Off Overall Test (BOOT) under the applicable modern award; and/or
- for failing to maintain adequate records of salaried employee's actual working hours for the required seven year period relating to overtime, loadings, penalty rates and allowances.

The maximum civil penalties applicable to breaches of civil penalty provisions of the *Fair Work Act 2009* (Cth) are currently up to \$13,320 per contravention for an individual, and \$66,600 per contravention for the employing entity.

If you are thinking you're only a small or medium sized business so this won't affect us, think again! Despite many employers voluntarily coming forward to reveal underpayments, and committing to repay any money owed, the FWO is increasingly seeking penalties against these employers, with the FWO, Sandra Parker, stating in response to Woolworths' admissions:

'we will hold them to account for breaching workplace laws... [companies] must understand that admission is not absolution. Companies should expect that breaking workplace laws will end in a public court enforcement outcome'.

So how does this affect you and your business?

The strictest salaried arrangement requirements appear in the *Clerks - Private Sector Award 2020* [MA000002] (Cth) (**Clerks Award**).

Under the Clerks Award, the General Retail Industry Award, and the Manufacturing and Associated Industries and Occupations Award, employers are required to:

- have written documentation recording which provisions of the award are intended to be included within the annual salary;

Disclaimer

The information contained in this update is intended as a guide only. Professional advice should be sought before applying any of the information to circumstances. While every reasonable care has been taken in the preparation of this update, Law Ensure does not accept liability for any errors it may contain.

- specify the 'outer limits' of the number of overtime or penalty rate hours that are included in the salary in each pay period/roster cycle;
- pay an employee for any hours worked in a pay period/roster cycle that exceed the 'outer limits';
- keep records of the start times, finish times and unpaid break times for each employee and have the employee sign, or acknowledge their pay period records as being accurate;
- perform an annual 'reconciliation' to calculate the amount the employee would have been paid if they were paid on an hourly basis in accordance with the applicable award; and
- compare this reconciliation with the salary being paid, and if any shortfall, pay this within 14 days.

What are your obligations?

If your employees are not covered by one of the modern awards that contain salaried provisions, others like the *Social, Community, Home Care and Disability Services Industry Award 2010* (Cth) [MA000100], state that the terms and conditions of salaried arrangements, '*must not, when viewed objectively, be less favourable than the entitlements otherwise available under this award*'.

Accordingly, unless employers are keeping accurate pay records of employee's ordinary hours, overtime hours, penalty rates, breaks and applicable allowances, there is no accurate way of being able to demonstrate that an employee's salary results in them passing the BOOT. As the FWO declared:

'If companies do not prioritise workplace compliance from the outset, it can take significant resources and time to fix, particularly where companies do not have accurate records of times worked and wages paid.'

What if you discover an underpayment?

There is no positive obligation on employers to self-report to the FWO and even where employers self-report their conduct, the FWO's default position is not always one of general acceptance. Instead some employers may face demands from the FWO that they enter into an enforceable undertakings, complete training and audits, and make contrition payments.

Contrition can bolster employee and public trust in the business and reduce negative media scrutiny, and can also mitigate the risk of prosecution and any action taken by the FWO, or if proceedings are commenced, can reduce the quantum of penalty ordered.

By comparison, where an employer is found to have been aware of contravening conduct and failed to report or take other corrective action, the FWO may pursue prosecution and press for greater penalties.

Takeaways for employers

The greatest means of avoiding FWO involvement and reducing the liability for backpay is by:

- undertaking annual audits, including self-auditing improving payroll and compliance systems, and engaging external experts;
- seeking advice early to ensure employees are classified correctly under any applicable modern award;
- complying with time keeping practices;
- reconciling annualised salary arrangements against actual hours worked to ensure they meet the minimum pay obligations in the underlying industrial instrument;
- ensuring employment agreements set 'outer limits' and state the assumptions relied upon when calculating the salary (ie: overtime, penalty rates and allowances etc);
- ensuring employment agreements contain appropriate 'set off' clauses;
- appointing internal compliance officers where appropriate; and
- ensuring all human resource and payroll staff are adequately trained.

If you require any further information or assistance in relation to salaried arrangements and what your specific obligations may be, contact us today to see how we can assist!