



CIRCULAR NO. GEN/201/NAT/201/25
DATE: 3 January 2025
SUBJECT: Criminal Penalties for Wage Theft
ATTENTION: Chief Executive Officer

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, which passed through parliament on 7 December 2023 included provisions to introduce criminal penalties for the underpayment of staff.

These provisions came into operation on **1 January 2025** and significantly increase the risk exposure of employers found guilty of underpayment by markedly increasing fines, introducing the penalty of imprisonment and granting jurisdiction to the Australian Federal Police and the Director of Public Prosecutions to prosecute this offence.

Penalties - Summary

Employing Entities ('Employers')	Fines, the greater of \$8,250,000 or 3 times the underpayment
Individuals	Fines, the greater of \$1,650,000, or 3 times the underpayment and/or 10 years imprisonment

s327A – Offence – Failing to Pay Certain Amounts As Required

In order to establish whether an employer has engaged in criminal underpayment, the following requirements set out in the new section 327A of the Fair Work Act 2009 (Cth) must be established:

- The employer is required to pay an amount to, on behalf of, or for the benefit of an employee under the Fair Work Act, Fair Work Instrument or a transitional instrument;
- The required amount is not a contribution payable to the employee's superannuation fund, is not referable to a period of long service leave taken by the employee, or is not a period of paid leave taken by the employee due to being a victim of crime, for jury service, or for emergency services duties; and
- The employer engages in conduct which results in a failure to pay the required amount to, on behalf of, or for the benefit of the employee in full on or prior to the day when the required payment is due to be paid.
- Importantly, this conduct must be intentional, and the criminal standard of proof applies, such that any conduct must be established beyond reasonable doubt.

The legislation states that where a course of conduct of underpayments arises, that this shall be treated as one offence. However, the aggregate amount of each of the underpayments in a course of conduct will be taken as the amount of the underpayment for the single offence.

Voluntary Small Business Wage Compliance Code

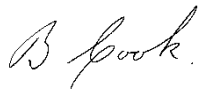
For small business employers (those with less than 15 employees), a Voluntary Small Business Wage Compliance Code ('Code') came into effect on 16 December 2024. Where a small business employer complies with the Code, the Fair Work Ombudsman must not refer any conduct that resulted in an underpayment to the Director of Public Prosecutions or the Australian Federal Police.

In complying with the Code, an underpayment must not be intentional. In determining this, relevant matters include whether the employer has:

- Made reasonable efforts to ascertain correct rates of pay and entitlements;
- Made reasonable efforts to stay up to date with the employer's obligations relating to amounts payable to an employee;
- Considered and relied upon information relating to an employee's role, duties, classification, etc, that the employer reasonably believed was accurate;
- Sought information or advice from reliable sources in relation to amounts payable to an employee;
- Been provided information that the employer reasonably believed was accurate in seeking that information or advice;
- Taken reasonable steps to rectify the failure to pay the applicable amount after becoming aware of the failure; and
- Cooperated with any inquiry or investigation by the Fair Work Ombudsman after becoming aware of the underpayment.

Finally, the circumstances surrounding the underpayment, and how the employer became aware of the underpayment, are also relevant.

If you have any queries in relation to the above information, please contact SIAG's National Advisory Service on 03 9644 1400 or 1300 742 747.



Brian Cook
Managing Director

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