



WORKPLACE LAW

IF CULTURE IS THE DJ, COMPLIANCE IS THE DANCE FLOOR. DON'T LET **WAGE THEFT** ROB YOUR GROOVE!



BY CAMPBELL FISHER
Managing Partner & Solicitor Director Accredited Specialist NSW & VIC
B.Ec; Dip. Law; Grad. Dip.
(Employment Relations); M. Bus;
Email: cjf@fcbgrou.com.au



Over the last few years, the public consciousness has turned time and time again to what is seen as a growing problem with what's now named 'wage theft' (everyone loves a catch phrase).

Over the last five years, it was common to see brand after brand splashed across the news and social media platforms as having underpaid their staff monstrous amounts. Politicians have been climbing over themselves to decry wage theft and pushing for harsher penalties on those who exploit the vulnerable.

It is estimated that wage theft – the underpayment of employees' minimum legal entitlements – runs at \$1.4 billion per year.



Why are so many large, sophisticated household brands being splashed across the media for non-compliance?

Over time we have seen three distinctly different levels of gravity of underpayment or wage theft emerge.

1. True wage theft is where an employer or business owner deliberately underpays an employee for personal financial benefit to themselves. At the extreme we have seen franchisees stand over employees at ATM's and demand cash back from the employee's pay!
2. Willful blindness – where an employer or responsible manager has a disregard for compliance. This can sometimes manifest in a business under financial pressure or where a manager is rewarded off profit performance and shaves compliance corners to get the profit and loss result.
3. The most common form is an inadvertent underpayment where a business fails to invest in the sophistication of enabling tools and technical competencies to get the payroll right.

Wage theft – how did we get here?

Wage theft is, in most instances of underpayment of wages, a highly inappropriate label. Having assisted a countless number of clients through a back-payment remediation process, I cannot think of any client who has deliberately designed a wage structure to swindle their staff. Without doubt, there are many businesses that deliberately do this, but they don't reflect the approach to business compliance taken by the bulk of Australian businesses. The overwhelming number of underpayment claims arise due to a business failing to invest in payroll enabling tools and competency of technical staff. As a result, the making of minor mistakes can get dramatically compounded when applied across multiple employees over several years. For example: a \$1 per hour payroll mistake (level 2 or level 3 Award classification) that impacts 1,000 employees over three years will lead to approximately \$6 million underpayment liability. A big number parked next to a brand logo makes for a good headline and sells advertising on news sites via click-throughs. The more accurate heading, "HR Coordinator Makes Friday Afternoon Mistake Three Years Ago!", doesn't seem nearly as interesting.

Based on my experience of thirty years in workplace relations, 10 of the most common mistakes made by companies that lead to wage theft can include:

1. Confusion as to the interpretation and/or interactions of Award or Enterprise Agreement terms;
2. Confusion as to which Award or Enterprise Agreement applies;
3. Employment contracts that are misaligned with the Award or Enterprise Agreement, for example: are penalties and overtime absorbed by a higher rate of pay, or are they separately payable?
4. Ignorance of specific changes to Awards, for example: transitional rates, changes to penalty rates;
5. Failing to properly implement changes to payroll rules when a new Award term or Enterprise Agreement has begun to operate;
6. Certain sites having "their rules" as to how staff are expected to work – often due to productivity-focused operations managers not properly considering labour cost triggers;
7. A lack of consideration as to whether a pattern of work is that of a shift worker, or of a day worker with regular overtime;
8. Rostering beyond the Award or Enterprise Agreement span of hours to meet client needs, without properly satisfying Award or Enterprise Agreement facilitative provisions;
9. "You're on a salary so the Award doesn't apply" – this can be due to ignorance or poor advice, or the staff in question being worked large numbers of hours that don't align with the underlying labour cost calculations that set the "salary"; and
10. Operational managers who are so laser focused on customer outcomes and/or deliverables that they browbeat staff to fit into a business culture that emphasises the importance of "we do what's needed to get the job done and deliver on our promises".

“POLITICIANS HAVE BEEN CLIMBING OVER THEMSELVES TO DECRY WAGE THEFT AND PUSHING FOR HARSHER PENALTIES ON THOSE WHO EXPLOIT THE VULNERABLE.”

Avoiding wage theft and managing a compliance framework

These mistakes can be addressed through consideration of the framework below:

Interpreting & applying the source of legal obligation	Choice & set up of enabling tool	Managing actual working patterns & arrangements	Managing iterative change in a complex, fast moving external environment
Contracts of employment	Payroll systems	Site arrangement	Changes in legal framework
Awards	Time & attendance	Annualised salary structure	Annual audit/health checks
Enterprise Agreements	HRIS	Form of Employment <ul style="list-style-type: none"> • Full Time • Part Time • Casual • Fixed Terms • Employee v Independent Contractor Definition 	Maintenance of enabling tools to ensure continuing compliance
Fair Work Act 2009 (Cth) <ul style="list-style-type: none"> • National Employment Standard 	Expert resources		Expert knowledge and advice in relation to workplace relations systems



What to do and how to respond?

Historically our company has dealt with two types of clients in regard to alleged wage thievery:

1. Clients who've had an underpayment exposure pointed out to them by the Fair Work Ombudsman, a Union or perhaps several aggrieved employees – in this situation the business is in a reactive mode and may be having to focus on damage limitation (Reactive Risk Issue). We'll get to this further.
2. Clients who've uncovered one or more questionable practices within their working arrangements or payroll and would like to explore whether there are broader issues within a department, business line or whole of business (Proactive Risk Issue).

Due to the continued media campaigns that link wage theft with the threat of brand destruction, we've seen the emergence of a third class of sophisticated clients over the last two years – that of organisations seeking annual IR health checks to their businesses. This seems to be the growing trend, especially for organisations with a brand name that can be swamped with negative and hyperbolic social media posts about alleged unethical business practices. Sometimes IR isn't easy and can't be explained in 260 characters on Twitter.



Sadly, most matters involving Reactive Risk Issues present a lot of difficulties in containing the damage. They require the organisation to act rapidly to assess the nature of the problem, determine the extent to which the “contamination” is limited or widespread, ascertain the availability and depth of the best sources of time and attendance and payroll data, develop a strategy (all the while responding to further developments) to try to:

- Figure out how to correct the practices that have triggered the non-compliance, including determining the operating impacts (and labour costs) that will arise by making these operational changes;
- Communicate with the Board, senior leaders, staff members and shareholders;
- Protect your brand and positioning – including liaising with specialist PR agencies;
- Retain staff in areas of the business deeply affected;
- Consult with Unions about the problem, and manage/correct any inaccurate communications to staff;
- Respond to demands by the Fair Work Ombudsman for information, and produce records and/or interviews with managers to explain what has occurred; and
- Find the best method to analyse how much is owed, to whom and for what reasons – is the underpayment amount business-critical and, if not, how is it capable of being funded?

It can be a scramble. You’re essentially building the aeroplane while you fly it! It’s often the case that the problem keeps getting worse as the impact of the error(s) is felt in areas of the business that were unanticipated, resulting in shifts in strategy – never a good move in a crisis.

“THERE’S A LOT TO SIZE UP WHEN THE DARK SPECTRE OF WAGE THEFT KICKS DOWN YOUR OFFICE DOOR.”

Managing a Proactive Risk Issue is generally much more measured, but it’s really only available if key levels of management take the opportunity to listen to concerns raised by staff and are prepared to ask difficult questions. If your business discovers an area of concern, then look to get the issue diagnosed as soon as possible. If the issues look potentially complex, then consider calling in some assistance.

Do NOT underestimate the benefit that legal privilege can offer to the business and any managers “involved”¹ in the design, implementation and/or supervision of the systems of work that may be defective. You cannot retrospectively create legal privilege: emails sent prior to establishing legal privilege are likely to be admissible in a future prosecution. The protection of privilege allows for greater freedom in the communications aimed at working out what has gone wrong, why, and who is impacted. Due to media and public interest in wage theft, we recommend that you limit awareness of your project to an extremely small number of staff. The less knowledge of the issue, the easier it is to minimise leakage. Using the protection of legal privilege, a forensic analysis can be conducted to determine the extent and specifics of the back-payment exposure. At the same time, the business can look to develop strategies on how to fix the problem. Does it require substantial changes to the industrial instruments, contracts, systems of work, and shift patterns, or the renegotiation of client service agreements that may be causing huge overtime obligations? There are many options.

If the business is concerned about the risk of knowledge of the project leaking into the public domain during the initial phases, then consider engaging a Public Relations Crisis Management Specialist. That way, if the problem blows up into a Reactive Management Issue, you can try to get in front of the problem. In our experience in working in this area, we’ve found that PR specialists are a valuable resource who can prepare materials and media strategy ahead of time so you’re not having to react to the story as it unfolds in the press.

Proactively identifying underpayment risks before they become Reactive Risk Issues means that appropriate attention and thought can be applied to critical aspects of the project. You want to create a smooth transition without hostility, brand damage, regulator involvement, decline in morale and financially crippling the business. Some critical aspects in your project will include:



¹ See s550 of the Fair Work Act 2009 (Cth) that is often used to impose personal liability and civil penalties on managers “involved” in the contravention

1. On what day are you shifting from your non-compliant practices to new complaint practices, and who is responsible for consulting with the Union/staff as to these changes?
2. At what point do you need to notify the ASX?
3. Are you confident that your recordkeeping and payroll systems can successfully operate in the new, compliant framework for business? Do you need to run testing parallel to current systems?
4. How are the current and ex-employees who are impacted going to be advised of the backpay due to them, how the problem arose, and how it has been fixed? This needs to be very carefully considered, and the process properly managed. We recommend that one or more specific managers (or a team) is assigned to oversee this process, and it's not broadly delegated out across the business, to:
 - Avoid inconsistencies in messaging to staff;
 - Ensure that any objections and third parties involved (e.g. Fair Work Ombudsman, Unions and bush lawyers – oh there are plenty of the latter!) are given the necessary attention; and
 - Keep any Public Relations Crisis Management specialist informed of any elevated risk of the process spilling into the media.
5. Do you need to provide impacted employees with financial planning advice or assistance with understanding the impacts on their tax, social security entitlements or child support payment?
6. How are you going to manage any negative publicity? Do you have sufficient resources to manage your social media accounts?

There's a lot to size up when the dark spectre of wage theft kicks down your office door. So, to avoid the prospect of that horrible day, foster a management culture that looks to identify potential problems and doesn't ignore them. Consider proactive audits – even random spot audits – in areas of concern. If you can do this, your business should avoid getting drawn into a reactive model – the one where your brand gets labelled a wage thief by the media hungry for stories on this emerging social trend.

We've helped countless clients through these difficult issues, from small businesses to organisations with thousands of staff. Helping businesses to remain compliant is the cornerstone of our services.



**DON'T LET 'WAGE THEFT'
MAKE YOU TOMORROW'S
FRONT-PAGE NEWS.**

FCB PAYCHECK

An award-winning, cost-effective forensic underpayment auditing solution.

Introducing the game-changing PayCheck* service from FCB Workplace Law, leading Employment lawyers for over 27 years. Developed in-house, and winner of the LexisNexis legal Innovation Index award, FCB PayCheck is an auditing solution that delivers fast, detailed and incredibly accurate underpayment audits, to even the largest businesses, at a fraction of the cost of traditional forensic accounting.

Get ahead of any underpayment problem – potential or actual – and protect your business and brand. Call us in-confidence today to find out how the award-winning FCB Paycheck solution could help you.

To start your journey to full compliance and peace of mind, contact Matthew Robinson (Partner and Accredited Specialist) on 02 9922 5188.



How would a wage underpayment prosecution affect your brand and finances?



No more jumping between lawyers and forensic accountants. PayCheck is a complete, comprehensive audit.



Fast, efficient and targeted interpretation of complex data, thanks to our bespoke coding.



Audit costs using PayCheck are only a fraction of standard forensic accounting fees.



Legal privilege, along with our proven strategies for managing information, helps you stay in control of the narrative if an issue is discovered.



Receive precise underpayment or overpayment values, to the cent, for every employee (going back years if necessary).



Effective strategies to address data inconsistencies or missing data.



Comprehensive data visualisation to help you clearly understand your options going forward. Depending upon your appetite for risk, you'll have the option to take a pre-emptive rather than reactionary approach to help you avoid large fines.

**Please be aware of expensive imitations – this is not merely a rebranded payroll service.*

fcbgroup.com.au
info@fcbgroup.com.au

Sydney

Level 11, 83 Mount Street
North Sydney NSW 2060
P 02 9922 5188
F 02 9955 9575

Melbourne

Level 18, 607 Bourke Street
Melbourne VIC 3000
P 03 9098 9400
F 03 9098 9499

Brisbane

Level 4, 300 Ann Street
Brisbane QLD 4000
P 07 3046 2100
F 07 3046 2199

Disclaimer

The material contained in this document is intended for general use only and should not be considered to be complete or definitive. Readers should obtain professional legal advice before acting or relying on any material contained in this document. Your use of this information is not intended to nor will it create any relationship of client and solicitor. Note that the sending of your details and/or inquiry to FCB does not create a contractual or legal relationship or retainer between us. A relationship or retainer is only created when an express agreement is on an agreed basis.

Copyright

Copyright © FCB Group 2021. No part of this publication may be reproduced, adapted or distributed without the permission of the copyright owner.



WORKPLACE LAW