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## **FWO guide on employer obligations when underpayments are discovered**

The Fair Work Ombudsman (FWO) has published a [Payroll Remediation Program Guide](#). The Guide provides employers with a suggested framework for remediating employees and former employees when payroll errors are discovered, particularly for larger enterprises and where the quantum of underpayments or the number of affected employees is high.

The FWO looks at the remediation steps taken by an employer when considering whether it will take compliance and enforcement action against the employer. The Guide includes advice and guidance on numerous topics that often arise when an employer discovers that it has underpaid employees, including the following:

- When potential underpayments are identified, the FWO generally expects that an employer's review will look back as far as possible. The FWO recognises the six-year limitation period in the Fair Work Act on orders that a Court can make for the recovery of an underpayment. However, six years should be viewed as a minimum period for review, and the FWO will want to understand the basis for any decision to limit remediation to the statutory minimum period.
- If employers elect to apply assumptions to overcome extensive or costly manual review processes, the FWO expects such assumptions to be sufficiently employee-focused and based on interpretations that do not disadvantage employees.
- If an employer relies on set off terms in written employment contracts to pay above-award salaries which take into account all relevant entitlements, the FWO will generally require evidence of the terms relied upon, so that the FWO can assess whether the employer's approach is lawful. Subject to any set off terms in employment contracts or annualised salary clauses in industrial instruments that allow a different approach to be lawfully applied by an employer, the FWO's position is:
  - Employers need to pay their employees in full for each pay period, in accordance with the applicable award or enterprise agreement. An above-award payment made in one pay period, cannot be used to satisfy an underpayment in another pay period.
  - If an employer specifically pays its employees more than the minimum amount for one designated entitlement, the employer cannot use this to satisfy an underpayment of a different entitlement. For example, if an employer pays an employee an above-award base rate of pay, the amount above the minimum cannot be applied to satisfy an entitlement to annual leave loading under a relevant award.
- The FWO expects back payments to employees to include interest, thereby putting employees in the position they would have been in if the underpayments had not occurred. The FWO considers that an acceptable approach is to use the Pre-Judgment Rate from the Federal Court of Australia's [Interest on Judgments Practice Note](#), which is the relevant Reserve Bank of Australia cash rate for each half year period plus 4%.
- The FWO expects employers to take all reasonable steps to locate and make payment to all former employees who are owed entitlements.
- The FWO expects employers to prioritise immediate steps to ensure that any further underpayments or impacts to employees are prevented.

- The Guide states that isolated payroll errors resulting in underpayments over a short period of time (up to 12 months) do not need to be actively reported to the FWO, as long as: employees are appropriately informed of the underpayment; employees are back paid in full as soon as possible; and changes are implemented to ensure the error does not happen again. For broader and/or potential systemic non-compliance, the Guide encourages employers to report the underpayment to the FWO at an early stage, even if all facts and details are not yet available or understood.

The maximum civil penalty for *each* contravention of an award, an enterprise agreement or the National Employment Standards is \$495,000 for a company (with 15 or more employees), or three times the underpayment amount per contravention. For a 'serious contravention', these maximum penalties increase tenfold to \$4,950,000, or three times the underpayment amount. For individuals, the maximum penalty is \$19,800 for each contravention or \$198,000 for each serious contravention.

In addition, where a director, manager or other individual is "by act or omission, directly or indirectly, knowingly concerned in or party to the contravention", the accessorial liability provisions in section 550 of the Fair Work Act apply and the above penalties for individuals can be imposed.

Further, on 1 January 2025, the Fair Work Act was amended to include criminal penalties of up to 10 years' imprisonment for individuals who are knowingly involved in a company's deliberate underpayment of wages or entitlements. If the FWO considers that a company has deliberately underpaid wages or entitlements, it is empowered to refer the matter to the Director of Public Prosecutions for criminal prosecution of the individuals concerned, including any individuals who aided an employer in committing the offence.

Actus Workplace Lawyers is available to provide extensive assistance to employers with compliance and underpayment matters, including payroll auditing, privileged and confidential legal advice, underpayment remediation, and liaison with the FWO. For further information or assistance, please contact Stephen Smith, Principal of Actus Workplace Lawyers on 0418 461 183 or Email: [stephen.smith@actuslawyers.com.au](mailto:stephen.smith@actuslawyers.com.au).