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UNDERPAYMENT CLAIMS

HOW CAN YOU PROTECT YOUR BUSINESS?

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COMMON ISSUES

1. Non-payment or incorrect calculations of overtime, and penalty rates
2. Non-payment or incorrect payment of annual leave loading and other allowances.
3. Incorrect application of travel provisions

COMMON ISSUES

4. Misclassifications

5. Lack of review of wage rate and entitlements throughout employment.

6. Not keeping the right documentation and records

RISKS ASSOCIATED

- Costly and time consuming to 'fix'
- Multiple Employees bringing forward with a claim
- Non compliance with record keeping obligations under the Fair Work Act, can result in penalties.

NON-COMPLIANCE AND PENALTIES

- Employees have 6 years to make a claim
- During this time they may either seek assistance from the Fair Work Ombudsman
- May also seek assistance from a Union
- **Under \$20,000:** Employee would make a claim under \$20,000 (small claims) at either the Magistrates Court or the Federal Circuit Court (small claims division). Faster and more informal. In most cases, the hearing would be listed months down the track usually 4-6 months later. During COVID it's been known to be listed a year later.
- **Claims greater than \$20,000:** Made to either the Federal Court or Federal Circuit Court.

VICTORIAN WAGE THEFT ACT 2020

- On 16 June 2020, Victorian Parliament passed the Wage Theft Bill 2020
- Proposed that the legislation will be effective from 1 July 2021
- The legislation will create the following offences:
 1. Dishonestly withholding employee entitlements
 2. Falsification of an employee entitlement record to dishonestly obtain financial advantage or prevent exposure of a financial advantage obtained
 3. Failure to keep an employee entitlement record to dishonestly obtain financial advantage or prevent exposure of a financial advantage obtained
- Penalties of up to 6,000 penalty units (\$991,320) or up to 10 years' imprisonment.

RESPONDING TO A CLAIM

- Work out the underpayment period
- Work out what should have been paid
- Find the amount that has been paid
- Seek clarification and advice where required
- Speak to your accountant about your tax and superannuation obligations
- Calculate the amount owing and make payment
- **Take the time to understand your current and future obligations**

RECORD KEEPING OBLIGATIONS

- Employers must keep time and wages records for 7 years.
- This includes a record of all hours worked
- Keeping accurate time and wage records is crucial to reduce risk associated with a successful underpayment claim.

Annualised salary arrangements

As of **1 March 2020**, employers that engage employees under the annualised salary arrangement must:

- provide the employee with information regarding the provisions of the Modern Award that are covered by the annualised salary;
- record the “outer limits” of ordinary hours, which attract penalty rates and set out the overtime hours that are included as part of the annualised wage arrangement;
- pay the employee for all hours worked in excess of the “outer limits” every pay cycle;
- keep a record of the starting and finishing times of work, including any unpaid breaks taken and ensure that the employee acknowledges the record is correct every pay cycle;
- every 12 months, or on termination of employment, make required calculations.

EMPLOYMENT CONTRACTS AND ENTERPRISE AGREEMENTS

- Enterprise Agreements can be used as a tool to reduce risk of underpayment.
- Inclusion of a 'set-off' clause in employment contract if paying above Award or Agreement.
- Contract to be reviewed throughout employment, cannot set and forget as minimum rates will change throughout employment



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