

## Article Information

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## Is the price right? Wage compliance for small business employers

*The Fair Work Ombudsman (FWO) has recently released the [Voluntary Small Business Wage Compliance Code](#) (Code), striking a balance between recognising the importance of wage compliance and practical difficulties that can be faced by small businesses. What does it take for a small business to comply with the Code?*

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### The Small Business Wage Compliance Code

The Code, which came into effect on 1 January 2025, establishes protections for small businesses who have unintentionally underpaid their employees. The Code intends to promote harmonious, productive and cooperative workplaces by establishing a non-exhaustive list of ways that small business employers can ensure they are paying employees correctly.

Importantly, the Code is only applicable to small businesses. For the purposes of the Code, broadly, a small business employer is an employer covered by the *Fair Work Act 2009* (Cth) (**FW Act**) with fewer than 15 employees.

These protections provide a pathway for small businesses to avoid the threat of criminal prosecution under new wage theft provisions.

The wage theft provisions, found in the new section 327A of the FW Act, criminalise the intentional underpayment of an employee's wages or entitlements. Corporate bodies who violate wage theft provisions are liable to receive punishments pursuant to Part 2.5 of the Criminal Code. However, wage theft criminal proceedings can only be initiated by the Commonwealth Director of Public Prosecutions (**DPP**) or the Australian Federal Police (**AFP**).

If convicted of the criminal offence, a court may impose a maximum sentence of 10 years' imprisonment on an individual. Further, a court can also impose the following significant pecuniary penalties:

- for a body corporate, if the court can determine the underpayment amount, the maximum penalty will be the greater of 3 times the underpayment amount or \$8,250,000 (if the court cannot determine the underpayment amount, the maximum penalty is \$8,250,000); or
- for an individual, if the court can determine the underpayment amount, the maximum penalty will be the greater of 3 times the underpayment amount or \$1,650,000 (if the court cannot determine the underpayment amount, the maximum penalty is \$1,650,000).

However, if the FWO is satisfied that the employer has complied with the Code, it cannot refer a small business to the DPP or AFP for criminal prosecution under wage theft provisions. This protection is confirmed by the new section 327B of the FW Act.

Importantly, regardless of whether a small business is found to comply with the Code, the FWO or a Fair Work Inspector may still pursue civil action against small business employers for underpayments. This may include the issuing of compliance notices or acceptance of enforceable undertakings from an employer. Further, penalties may be imposed by a court.

For more information regarding the new wage theft provisions, please see our [Employment Relations Podcast](#) and [Webinar Q&A](#).

**What does compliance with the Code look like?**

The Code does not set out a blanket “check list” for compliance, instead establishing a list of factors that may indicate that a small business has been compliant. These factors are unlikely to be “new” concepts or processes for compliant employers: they are steps that many employers had already chosen to undertake as part of good practice.

When an underpayment occurs the FWO will look at the entire circumstances surrounding the underpayment, including the particular circumstances of the small business. Because the Code does not establish a checklist of requirements, it is for the FWO to determine whether an employer has been compliant or not.

Small business employers will comply with the Code if they do not make intentional underpayments.

The Code sets out an array of factors to be assessed on a case-by-case basis, including whether the employer has:

- taken reasonable steps to ascertain correct employee pay rates and entitlements;
- made reasonable efforts to stay up to date with changes to their obligations as an employer, including in industrial instruments;
- checked and relied on employee information the employer reasonably believed was accurate in relation to wage payments;
- sought information or advice from a reliable source about paying employee entitlements correctly;
- provided information when seeking advice that the employer reasonably believed was accurate;
- taken steps to fix the underpayment;
- cooperated with any inquiry or investigation the FWO has conducted relating to the underpayment; and
- other circumstances, such as what prompted the underpayment or the way the employer became aware of the underpayment.

The FWO will also consider whether the small business has taken steps since the underpayment occurred to ensure that such an underpayment will not happen again. This reiterates the importance of a small business’ response to a potential underpayment in complying with the Code.

Importantly, the FWO has also released [guidelines](#) to help small business employers comply with the Code.

### **Self-reporting unintentional underpayments**

Self-reporting underpayments is an option available for businesses to report contraventions of the FW Act, encouraging the FWO’s use of non-litigious compliance tools. This is a pathway available to both small and non-small businesses looking to amend non-compliance issues, including the making of underpayments.

Depending on the severity of any underpayments, the FWO may issue a compliance notice or contravention letter detailing their findings after an investigation. However, for more serious or repetitive displays of non-compliance, the FWO may accept an enforceable undertaking, as discussed below.

Any self-reports should identify a range of matters as identified by the FWO’s [Compliance and Enforcement Policy](#). This includes details of the underpayment, what caused the underpayment and approaches taken to rectify the underpayment and prevent future non-compliance.

### **Potential civil action against a complying small business**

The FWO has a range of statutory compliance and enforcement functions, as established by the FW Act. These functions are used to promote positive workplace relations and compliance with the FW Act and associated instruments. The FWO’s functions may be implemented where a business – whether small or otherwise – has unintentionally made underpayments. Some of the FWO’s powers include issuing compliance notices, accepting enforceable undertakings and commencing civil court proceedings.

#### Compliance notices

Compliance notices are a non-punitive way for the FWO to require an employer to correct underpayments without pursuing court proceedings. A compliance notice may ask the employer to calculate and repay any underpayments or produce evidence of compliance.

If an employer complies with a compliance notice the FWO cannot commence court proceedings for the underpayments that were the subject of the compliance notice. Importantly, an employer who has complied with a compliance notice is not taken to have admitted to the contraventions or to have been found to have committed the contraventions.

#### Enforceable undertakings

If the FWO forms a reasonable belief that an employer has unintentionally underpaid its employees it may accept a written undertaking from the employer in relation to the underpayment. These undertakings, intended for more serious and systemic self-reported contraventions, provide the employer an opportunity to resolve their wrongdoing. Providing that the employer complies with the enforceable undertaking, the FWO cannot commence civil proceedings against the employer for the contraventions covered by the undertaking.

If the employer does not comply with the enforceable undertaking, the FWO may commence civil proceedings in court to seek orders for the compliance with the enforceable undertaking, compensation, or any other appropriate order.

#### Civil court proceedings

The most serious option available to the FWO with respect to an unintentional underpayment is to commence civil litigation against an employer. However, the FWO's policy is to only initiate proceedings where there is sufficient evidence to do so and where such proceedings would be in the public interest. Public interest factors include the nature and seriousness of the alleged contraventions, the impact of the alleged contraventions and the impact of litigation on deterrence, the administration of justice and the integrity of the system. The FWO may seek orders directing:

- that the underpayments be rectified;
- that compensation be paid for the contraventions;
- for a civil penalty to be paid to the Commonwealth, or where appropriate, an impacted party; or
- for an injunction to stop, prevent or restrain further misconduct.

#### **What about businesses not captured by the Code?**

While the Code is only applicable to small businesses, its contents provide clear guidance around wage compliance for larger employers.

As shown by factors considered by the FWO in interpreting compliance with the Code, the Code consolidates what is already seen by many employers to be "good practice". Although it does not protect larger businesses, it does seem likely that businesses that comply with the Code would also be able to demonstrate that they have not infringed the FW Act's wage theft provisions.

Further, larger employers can still self-report any underpayments to the FWO where appropriate. Providing that the underpayments were unintentional, this may prompt the FWO to use less litigious or punitive measures to respond to the non-compliance, or to seek reduced penalties.

However, it should be reiterated that all allegations of wage theft or civil underpayments are to be assessed on a case-by-case basis.

#### **Key takeaways for employers**

- It will be important for all employers to become very familiar with the Code to avoid potential sanctions under new wage theft provisions.
- Small and large businesses alike should consider reviewing their current payroll practices and seeking appropriate advice to ensure that they are compliant.
- If an employer does detect an underpayment, it should take reasonable steps to rectify any underpayments as soon as possible. This includes repaying the employee, investigating why the underpayment occurred and taking appropriate steps to amend any procedural faults to prevent future underpayments. It is good practice to remain transparent with employees throughout this process.
- The new wage theft provisions also serve a useful reminder for employers to, in addition to reviewing their payroll systems, regularly review employee contracts, particularly when there have been changes to any applicable enterprise agreement or modern award. Ensuring that all employees are appropriately classified and remunerated is a key component in payroll compliance.
- Legal advice should be sought as to whether it is appropriate for particular underpayments to be self-reported to the FWO.