5 mistakes that may put your business at risk of an underpayment claim

The underpayment of wages is a serious issue for businesses large and small. An employer who fails to pay minimum wages, allowances or penalties that are prescribed by the applicable award or enterprise agreement may be prosecuted to recover the underpaid amounts and be exposed to civil penalties.

However, often the problem arises in more innocent circumstances. Below we examine some of the common mistakes employers make that have the potential to lead to underpayment of employee entitlements.

1. Failing to pay overtime, penalty rates, loadings and allowances

The *General Retail Industry Award* provides a number of allowances, penalties and loadings which apply to retail employees in certain circumstances. Failing to pay these at all, or misunderstanding how they are applied is the most common form of underpaying employees.

For example, did you know that where you require an employee to move temporarily from one shop to another for a period not exceeding three weeks, all the additional transportation costs incurred by the employee must be reimbursed?

Being aware of the circumstances that attract certain penalties and allowances is fundamental to ensuring your employees receive their minimum entitlements. If you are ever unsure the VANA Telephone Advisory Service is just a phone call away.

2. Incorrect wage deductions

The *Fair Work Act 2009* requires an employer to pay an employee amounts owing to them in full in relation to the performance of work.

There are very limited circumstances where employers may lawfully deduct from an employees pay. An employer can only deduct money from an employee if the:

- employee agrees in writing and it is principally for their benefit;
- deduction is allowed by a law, court order or the Fair Work Commission; or
- employee's award or enterprise agreement allows it.

If you are seeking to withhold any monies from an employee's wage we strongly recommend getting advice, getting it wrong has the potential to expose you to civil penalties under the *Fair Work Act 2009.*

3. Unlawful unpaid work experience/internships

Unpaid work experience placements, that are not vocational placements, may be unlawful. If the relationship between an employer and an individual on work experience is similar or mimics an employment relationship then the individual is likely an employee and must be paid for their work.

If an individual is performing work to assist the normal operations of a business as opposed to observing, learning or training, an employment relationship is likely to exist. Another indicator is the

length of time someone will be with your company the longer the period of time they are with you, the more likely they are an employee and must be paid.

An employer can also look at what the person will be doing to determine whether an employment relationship exists. If the work being performed is normally done by your employees or is important in the running of your business, then an employment relationship will arise.

4. Misunderstanding leave entitlements

It is important for employers to keep accurate records of leave accruals. Where a breach of leave entitlements involves a monetary amount the employer may be prosecuted to recover the underpaid amounts.

Grievances can arise if an employee believes they have more leave than what has been recorded, so keeping your systems up to date will help to avoid this. It is also important to make sure you are aware of your employees leave entitlements under the *Fair Work Act 2009* and any applicable award.

5. Commission only arrangements

Unless this is specifically allowed under an award, commission only arrangement for an employee is an unlawful practice.

Due to the turbulent nature of sales, an employer is not able to guarantee that an employee will receive the minimum wage they are entitled to under the relevant modern award. Even if an employee agrees to this arrangement, the employer will still be liable for underpayments.

Commissions may be paid on top of base rates of pay as an incentive, however the employee must be guaranteed their minimum entitlements under the relevant award.

If you are uncertain whether your business is compliant or would like more information on ensuring you are meeting your obligations please contact the VANA Employment Relations Team on (02) 9083 0091.

Common questions about annual leave in retail answered.

Annual leave is a paid entitlement available to every permanent employee under the National Employment Standards (NES). A full time employee accrues 20 days annual leave per year, while part time employees accrue annual leave on a pro-rata basis.

It is essential that employers know and understand how to manage and process annual leave. Below are some of the key questions that come through to the VANA Employment Relations team.

1. **Can I refuse a request to take annual leave?**

The *Fair Work Act 2009* states that annual leave may be taken by mutual agreement between the employee and employer, however an employer must not unreasonably refuse a request.
In determining whether a refusal is unreasonable, objective considerations include:

- whether it is a peak trade period or blackout period;
- how much notice the employee has provided in requesting the time off; and
- operational requirements such as other employees having leave approved at the same time.

2. **Can I direct an employee to take annual leave?**

Some awards allow employers to direct employees to take leave in certain circumstances.

For employees covered by the *General Retail Award,* an employer may direct employees to take annual leave as part of close-down periods with four weeks' notice.

Directing an employee to take annual leave is also permitted in the case that an employee has excessive annual leave, defined as more than 8 weeks accrued, and a mutual agreement cannot be reached on how to reduce or eliminate the excessive leave accrual.

3. **When is annual leave loading payable?**

The *General Retail Award* provides during a period of annual leave an employee is to receive a loading of 17.5% or the relevant weekend penalty rates, whichever is greater.

It is also important for employers to remember that annual leave loading is also payable on termination of employment.

4. **How is annual leave processed when a public holiday falls during that period?**

If an employee would normally work on a given day had it not been for the public holiday, then they are entitled to be absent from work with pay. This principle still applies during a period of annual leave.

For example, if an employee takes five days off, and one of those days is a public holiday, then they are paid for four days annual leave and one day at their ordinary rate of pay for ordinary hours to account for the public holiday.

5. **Can annual leave be cashed out?**

Annual leave may be cashed where an award or registered agreement permits.
The *General Retail Industry Award* provides annual leave may be cashed out **by agreement.** The agreement however, must be made in accordance with the provisions of the award which require, amongst other things, the employee must be left with a minimum four weeks leave, and that only a maximum of two weeks annual leave can be cashed out in any 12 month period.

If you are unsure of your obligations when an employee is requesting annual leave or would like to discuss these questions further please contact the VANA Employment Relations Team on (02) 9083 0091.

Out-of-hours Conduct: Where do employers draw the line?

Living in a society where technology is so advanced and social media is bigger than ever, it is easy to see how the employment relationship has evolved from its traditional roots. No longer is the employment relationship solely based on a 9:00am to 5:00pm structured routine where as soon as the employee finished for the day they were no longer the concern of the employer.

Social media has created a platform for employees to cause serious reputation or emotional damage to both their employer and colleagues outside of work hours. The Fair Work Commission this week handed down an important ruling on out-of-hours conduct, finding the sacking of a worker for sharing pornographic material on social media lawful. The worker had sent the video containing graphic content from home after a night of drinking to a number of his Facebook friends, who included 16 male and 3 female co-workers.

After the HR manager from his place of work discovered the video had been sent to colleagues, an investigation followed and found that the video was unwelcome and unsurprisingly, offended some recipients. The Commissioner found that the Facebook friendship between the employees stemmed only from their employment and therefore there was an established "relevant nexus between the out of hours conduct and the interests of the employer" warranting the investigation and subsequent dismissal.

How we can help you!

This type of incident is becoming a more prominent issue for employers. A current and well-drafted **Code of Conduct**, as well as a thorough **Social Media Policy** can ensure your employees fully understand their obligations both inside and outside of working hours..

Determining whether or not an out-of-hours incident warrants employer intervention can be a difficult task. The three main points an employer should consider are whether the out-of-hours conduct:

1. is likely to damage the employment relationship;
2. is in breach of the employer's interests; or
3. goes against the employee's duties and obligations as an employee.

If you are ever unsure whether or not you should intervene as an employer or require further information in relation to obtaining a Code of Conduct or Social Media Policy, VANA members are encouraged to contact the VANA Employment Relations line on (02) 9083 0091.