

THE MISCONCEPTION ABOUT SALARIES AND ABOVE AWARD PAYMENTS

There is a common misconception by employers that paying employees a salary or a rate which is above the minimum award rate circumvents the need for a written employment contract or to pay any additional overtime, allowances, penalties and so on

However, this is not the case. There is also a similar misconception that senior management roles, or the like, are not covered by modern awards because they attract a higher remuneration.

The Fair Work Commission has confirmed that high levels of remuneration do not prevent a finding that an award covers an employee whose duties and principal purpose of employment aligns with an award classification.

If employees are covered by an award, even if they are paid a wage which is above the award rate, the clauses relating to allowances, penalties and so on still apply unless they have been specifically set off.

In other words, if employers offer award covered employees a "salary" or above award rate, they must have an employment contract with a carefully drafted set off clause (setting off the award component against the award entitlements).

Failure to do this could result in the employer being required to pay the allowances, penalties etc. on top of the above award amount (plus potential penalties for breaching the award) because there was no clear written agreement to the contrary.

Modern Award Entitlements

The Vehicle Manufacturing, Repair, Services and Retail Award 2010 (Award) requires employers to pay their full-time employees overtime and penalty rates if they work more than the standard thirty-eight (38) hours per week, regardless of

whether or not their annual salary is above the minimum wage rate set out in the Award.

The Fair Work Ombudsman is actively conducting audits and pursuing employers for costly breaches of the Award. Fair Work Inspectors have strong and effective investigative powers, including the power to inspect and copy documents and records on an employer's premises. Inspectors are also able to conduct compliance audits.

Employers are being caught unaware that the arrangements made in good faith with employees are non-compliant. If an employer chooses to pay above the award pay rate they are still required to pay the employee penalty rates, allowances and loadings – at the above Award rate of pay.

If an employer is found to have breached the Award, they may face an underpayment claim as well as significant penalties of up to \$54,000 for a corporation and \$10,800 for an individual.

What should employers do?

To avoid breaching Award conditions and ensure that arrangements made between you and your employees are compliant you can:

- Implement comprehensive employment contracts tailored to your workplace.
- Include a "set off" clause in the employment contract which clearly sets out that the salary or above award payment includes all entitlements under the Award which would otherwise be payable. Remember, it is not legal in itself to simply state that the amount in the contract of employment compensates the employee for all entitlements. The amount



must be equal to or more than the entitlements payable under the Award.

- Enter into an Individual Flexibility Agreement (IFA) with the employee.

An IFA allows an employer and an individual employee to agree on an arrangement which varies the effect of the Award in order to meet the genuine needs of the employer and that individual employee.

A "better off overall test" will apply to the agreement which means that the employee is better off as a result of the agreement. For example, if the agreement requires that the employee is to work 42 ordinary hours per week then the employee's hourly rate must be better than if they were to be paid the normal 38 hours plus four hours overtime according to the Award.

An example of this arrangement could be that the employer agrees to pay the individual employee an annualised salary which is paid in calculation of the employee's Award overtime rates, penalty rates, allowances and leave loading.

Advantages to the employee are a predictable and consistent wage and expected hours and the employer has the advantage of not being encumbered with varying wage calculations of penalty rates and allowances, thus streamlining employer wage payment accounting, and gaining commitment to set hours of work.

Need assistance?

Contact Employer Assist on 1300 735 306 or aaaa@employerassist.com.au to discuss how we can assist you with employment contracts or IFAs in your workplace.

