



Directors Liability for Underpayments

All employers have an obligation to ensure that their employees are paid for the work undertaken by them commensurate with their legal entitlements. Failure to do so can result in the employer facing significant financial penalties under the Fair Work Act 2009 (FWA) in addition to having to pay their employees all their underpaid wages and entitlements.

For those employers who are sole traders or who conduct business in partnership with another person, their failure to comply with this obligation can result in them being prosecuted personally which presents an obvious substantial risk to both their business and personal assets. While many individuals utilise a company to conduct their business activities so as to safeguard themselves and their assets, the Fair Work Ombudsman (FWO) is now persistently cracking down on directors of companies who underpay their staff, particularly if their company is unable to pay.

How can a Company Director be personally liable?

It is not commonly known that the FWA contains a section that operates similar to the accessorial liability provisions in the Corporations Act. Section 550 of the FWA imposes liability on a person involved in a contravention of a civil remedy provision. Specifically, a person who is “involved” in an employer’s contravention of a civil remedy provision, is also taken to have contravened that provision under employment law.

For the purposes of section 550, the word “involved” includes both active involvement with actual knowledge, through to involvement where the individual does not know or appreciate that the conduct is unlawful. Where an individual is named as a respondent to contravention proceedings, they are also personally exposed to penalty and compensation orders.

A director can be found to have been ‘involved’ in a contravention under the Act if they have:

- Aided, abetted, counselled or procured the contravention; or
- Induced the contravention, whether by threats or promises or otherwise; or
- Been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- Conspired with others to effect the contravention.

In 90% of the cases prosecuted by the FWO against companies in recent years, at least one individual was also prosecuted as an accessory.



What does this mean for Company Directors?

In the recent case of Fair Work Ombudsman v Priority Matters Pty Ltd & Anor heard before the Federal Circuit Court of Australia, the Court declared that two directors of five companies were 'involved' in failing to pay employees certain wages and entitlements, including contravening the National Employment Standards and Modern Awards. The relevant awards included the Professionals Employees Award 2010 and Clerks Private Sector Award 2010 and the underpayments totaled approximately \$1.9 million.

Some of the key aspects that were examined in this case to determine if a director has been 'involved' or is accessorially liable included:

1. **Knowledge and involvement** - the Court held it was not necessary that a person physically do anything to further the contravention. It is sufficient that the person became associated and involved in the contravention by what they said and agreed to do however there is a requirement for actual knowledge of the essential matters that make up the contravention and the person must have intentionally participated in the contravention. But the person does not need to have knowledge that their conduct was unlawful or constituted a contravention – ignorance of the law is no defence!
2. **Wilful blindness** – an individual's knowledge of circumstances can be inferred from the individual's 'wilful blindness', which could include deliberately abstaining from asking questions or making enquiries, or a deliberate 'shutting of one's eyes to what is going on'. What this means is that directors have a positive obligation to ask relevant questions about whether people are being paid appropriately.
3. **Controlling minds** – in this case, the Court found that because a corporate entity can act through the individual and directors are the 'controlling mind' of a company, directors can, in the absence of contrary evidence, be accessorially liable.
4. **Practical connection** - the directors had a practical connection to the contraventions by the companies, including:
 - knowing that they had run out of cash to pay employees;
 - knowing employees were not being paid wages and entitlements when they were due;
 - requiring employees to attend work even though they were unpaid; and
 - intentionally participating in contraventions by offering inducements or bonuses to stay employed by the companies.

Given the FWO and the Courts are increasingly looking to impose personal liability on directors for underpayment of employees' wages and entitlements, it's important for directors of companies to understand the legal obligations involved and put in place compliance systems so that employees are being paid their legal wages and entitlements.

If you want to know more about any employer obligations or require assistance with your employment contracts, contact [Ken Gray](mailto:Ken.Gray@batemanbattersby.com.au) on 02 4731 5899 or email us on commercial@batemanbattersby.com.au.