

Wage Theft

This Fact Sheet discusses 'wage theft' in Victoria and is designed to help you as an employee identify your rights and to take the most appropriate action under the *Wage Theft Act 2020* (Vic) (**the Act**), which came into effect 1 July 2021.

What is wage theft?

Wage theft offences involve dishonest conduct by employers. Dishonesty means anything that a reasonable person would consider dishonest in the particular circumstances.

You may be a victim of the crime of wage theft if your employer has:

- deliberately underpaid you;
- dishonestly withheld wages, superannuation or other employee entitlements;
- falsified employee entitlement records to gain a financial advantage; or
- not kept employee entitlement records to gain a financial advantage.

These crimes are punishable by a fine of more than \$200,000 or up to 10 years' jail for individuals, and a fine of more than \$1,000,000 for companies.

Honest mistakes or actions taken with due care and diligence are not considered wage theft. However, any failure to comply with a notice issued by the Fair Work Ombudsman to pay an employee their entitlements will be evidence against any purported honest mistake or due diligence.

Wage theft offences only apply to conduct that has occurred on or after 1 July 2021. However, entitlements accrued before 1 July 2021 will be captured if the conduct to dishonestly withhold those entitlements occurs after 1 July 2021.

What are my rights and obligations?

You are entitled to receive at least the minimum pay and conditions outlined under the National Employment Standards, relevant Modern Award, Enterprise Agreement or employment contract. Employee entitlements include:

- wages/salary
- allowances and gratuities
- annual leave and long service leave
- meal breaks
- superannuation

It is no defence to a wage theft claim to argue that you agreed to be paid less than you were entitled to under the *Fair Work Act 2009*. Your employer can still be held liable for wage theft if it is shown that the agreed amount was less than you were entitled to under the *Fair Work Act 2009*, Modern Award or Enterprise Agreement.

Who can use this Fact Sheet?

This Fact Sheet is designed for **Victorian** employees only. Independent contractors are not covered by the Act. However, it is important to note that even if your employer has described you as a 'contractor', it may be the case that you are actually an employee. To confirm your employment status, seek further assistance from JobWatch, your union, or a lawyer.

Disclaimer

This Fact Sheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information.

This Fact Sheet is designed for Victorian employees only. If you are not a Victorian employee, you should obtain specialist legal advice about your case as soon as possible.

What are my rights and obligations? (cont.)

It is important to note that **employees** can also be found liable for wage theft. However, this is only the case if you can be described as 'an officer of the employer' and do not act under the direction of the employer. An officer of the employer includes:

- directors;
- office holders;
- partners;
- people who have the ability to significantly affect the financial standing of the employer entity;
- people who make, or participate in making, decisions that have the ability to affect the whole, or a substantial part of, the business of the employer entity.

What are my employer's obligations?

Your employer's obligations include all of their relevant obligations under the *Fair Work Act 2009* and those specific to your employment contract. With particular relevance to the provisions of the *Wage Theft Act 2020*, your employer should:

- Not dishonestly or deliberately withhold your wages and other entitlements (such as superannuation contributions, annual leave or sick leave payments);
- Keep proper and accurate records;
- Provide you with true and correct pay slips within one working day after you are paid (in electronic or hard copy); and
- Maintain a corporate culture that does not encourage or tolerate conduct that would amount to wage theft or other dishonest conduct that would be an offence under the Act.

What can I do if I've been underpaid?

- Write (by text or email) to your employer to see if they can resolve the issue as there may have been an error or oversight.
- Send a Letter of Demand to your employer demanding payment within a certain time (e.g. 14 days) stating that if payment is not made, you will file a Fair Work Ombudsman (FWO) request for assistance without further notice or delay.
- Lodge a request for assistance with the FWO by registering an account on the FWO website and going through the relevant steps.
- If you think your employer deliberately underpaid you or dishonestly withheld wages or entitlements, you can make a report to the Wage Inspectorate. Your case may be evaluated with increased efficiency if you can provide as much evidence as possible. This includes providing your employment contract, pay slips, PAYG summaries and copies of timesheets or other correspondence used to prove your hours.
- Issue legal proceedings in the Federal Circuit and Family Court of Australia (FCFCOA) (seek legal advice!).
- If your claim is less than \$20,000, you can use the small claims procedure in the FCFCOA, which is faster and less formal. Lawyers who wish to appear using this procedure need to seek leave of the Court. You have **6 years** to file a claim in an eligible court from the date of the first underpayment.
- If you are dismissed for making an inquiry or complaining to your employer or the Wage Inspectorate about not being paid correctly, you only have **21 days** to file a claim at the Fair Work Commission if you wish to pursue an unfair dismissal application or a General Protections involving dismissal application.
- Seek further assistance from JobWatch, your union or a lawyer.

Note: The Act specifically protects employees who are merely acting under the direction of more senior employees or directors of the company itself.

The wage theft provisions target those who have a significant amount of influence in the business and have capacity or authority to make significant decisions.

Fair Work Ombudsman

Phone: 13 13 94

Website: fairwork.gov.au

Wage Inspectorate Victoria

Phone: 1800 287 287

Website: vic.gov.au/wage-inspectorate-victoria

Note: The Wage Inspectorate endeavours to respond to all reports within 21 days.

For more information see JobWatch's:

- 'Small Claims Kit'
- 'Getting Paid and Underpayments' Fact Sheet
- 'Unfair Dismissal' Fact Sheet
- 'General Protections Dispute - Termination claim' Fact Sheet
- Example Letter of Demand

What can the Wage Inspectorate do?

The Wage Inspectorate is a body created to carry out its duties and functions under the Act.

It has the power to do “all things that are necessary or convenient to be done for or in connection with the performance of its duties and functions”.

These powers include:

- Compelling the employer to produce documents or any other information it needs to conduct its investigation;
- Compelling any person to attend their office to answer questions, give evidence under oath or affirmation or produce a document or other thing;
- Retaining documents for inspection for as long as reasonably necessary; and
- Limited power to enter, search and seize documents or other relevant information in a premises without a warrant.

The Wage Inspectorate must commence proceedings against an employer or officers of an employer within three years from the date on which the alleged contravening occurred. Accordingly, the affected employee must **report the conduct within three years of it taking place.**

Where to get help

JobWatch

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Wage Inspectorate Victoria	1800 287 287
Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311

Note: The Wage Inspectorate cannot directly recover your unpaid wages and other entitlements. If you want to directly recover your wages and unpaid entitlements see JobWatch's 'Small Claims Kit'.

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JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.