



Business Update

Annual Leave Loading

“ACCOUNTANTS
YOU CAN TALK
TO...”

A new approach being taken by the Fair Work Ombudsman (FWO) on leave loading has the potential to leave you facing back-pay claims. The new approach being endorsed by the FWO requires annual leave loading on accrued annual leave balances be paid out when employment ends - even if a Modern Award does not require the loading to be paid. Essentially, the reasoning behind this is that employees should not be disadvantaged for not taking their accrued annual leave before their employment ends.

The new advice has come about after the Commonwealth Government sought advice from the Australian Government Solicitor. The advice states that the National Employment Standards (NES) - which guarantee minimum work entitlements - provide that upon termination any accrued annual leave entitlements must be paid at the rate they would have been paid had they taken the annual leave whilst still employed.

So while a Modern Award may expressly stipulate that leave loading is not payable on termination, that particular provision is meaningless. The NES overrides terms in Modern Awards and agreements that are less generous.

Essentially, what this means is that if your Modern Award provides for leave loading on accrued annual leave, then you must pay leave loading on termination or resignation. To make matters worse, the FWO has indicated that employers should pay out leave loading retrospectively to 1 January 2010. It's this retrospective nature of the ruling that has the potential to hit employers hard and, at the end of the day, it's simply neither fair nor reasonable for employers.

If you have not paid leave loading on accrued holiday pay to exiting employees (because the Modern Award provisions indicated otherwise) then you are now exposed to back pay claims from every one of those employees who want to recover the unpaid annual leave loading.

With 103 out of a possible 122 Modern Awards affected and only 19 Modern Awards unaffected by this new advice, there's a high probability that your business may be affected.

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What you need to do now is:

- Review the terms for annual leave loading in the Modern Award(s) for your employees;
- Review whether you've paid leave loading on accrued annual leave to any exiting employees;
- If yes, you are compliant with this new advice;
- If not, alert your financial team that you will need to set up a contingency to cover any unpaid amounts in this year's accounts.

Of course there is nothing you could have done to prepare your business for this and, while it may be reassuring to know that the FWO is unlikely to penalise your business for this underpayment, you will still be required to pay the loading.