



Back to Basics: Withholding Final Pay Upon Termination.

Often as an employer, it is easy to get caught up in not wanting to pay employees' money they are entitled to after a termination or when an employee has not given sufficient notice.

Employers have an obligation to pay their employees on time and in full. This obligation has only been strengthened since the recent passing of legislative changes.

Timeframe to pay the employee.

In accordance with the Vehicle Repair, Services and Retail Award 2020 ("the Vehicle Award"), it is a requirement that the employer ensures that the employee is paid **within 7 days** of their employment ending or on the **next scheduled pay day**.

Conditions where it is reasonable to deduct money from the termination payment.

The Vehicle Award 2020 permit an employer to deduct an amount of up to 1 week of wages from an employee's final pay if:

- The employee has not given enough notice in accordance with the notice period provided by the award and the employer does not agree to the short notice the employee has provided the business with, and
- The employee is 18 and over, and
- The deduction is reasonable in all of the circumstances.

We do not recommend that an employer deduct this from annual leave or long service leave, as it may be considered to be a breach of the National Employment Standards.

What is ordinarily included in the final payment?

- Outstanding wages.
- Any outstanding annual leave
- If it applies, any redundancy pay,
- Long service leave or pay in lieu of notice.

Ending the notice period.

Payment in lieu of notice is a payment an employer provides an employee when their employment is terminated without requiring the employee to work through that period. The employee's termination date is then said to be the date the notice was paid out.

Payment in lieu of notices must be provided ***before*** an employer terminates the employment of the employee.

Payment in lieu of notice is a contractual entitlement and therefore if the contract of employment does not permit this then the employer should not pay notice in lieu and therefore end the employment relationship earlier. In this circumstance, we recommend that the employee is placed on a period of paid gardening leave which means that the employee is paid

their full rate of pay in their normal pay cycle and their last date of employment remains unchanged as per their resignation letter.

Penalties for withholding final pay upon termination.

An employer commits the criminal wage theft offence from **1 January 2025** if an employer is required to pay an amount to (or on behalf of) an employee (whether under the Fair Work Act 2009 (Cth) (FW Act) or an industrial instrument (e.g. modern award, enterprise agreement) (Required Amount) and the employer engages in conduct which results in a failure to pay the Required Amount “in full” on or before the day it is due for payment.

The new wage theft laws carry a maximum penalty of 10 years’ imprisonment and or a maximum fine of the greater of:

- Three times the amount of the underpayment, if the court can determine that amount.
- For an individual, 5,000 penalty units (\$1,565,000).
- For a body corporate 25,000 penalty units (\$ 7,825,000)

This offence will apply to payments that are employee entitlements under the Fair Work Act, modern award or enterprise agreement. This will not apply to contractual entitlements, payment for jury duty or payments for long service leave.

Small businesses.

The Fair Work Ombudsmen is developing the Small Business Code. This Code is to provide Small Business with a “safe harbour” regime in the event that Small Business self-reports any underpayments to staff. This Code is to be developed by the commencement of the legislative obligations.

If you have any questions about this article or employment related questions in general the Employee Relations team may be contacted on 02 9016 9000.