



Compliance and enforcement: Civil penalties and sham contracting

The *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* amends the civil penalties regime in the *Fair Work Act 2009* to provide a graduated scale of penalties and enforcement tools and reform the defence to sham contracting.

What has changed?

Increasing civil penalties for bodies corporate that are not small businesses

The amendments increase the maximum civil penalties for standard civil breaches and serious contraventions of certain civil remedy provisions, for bodies corporate that are not small business employers, in line with the Australian Government's election commitment to implement the recommendations of the Migrant Workers' Taskforce Report (2019).

The amendments also change the threshold for what will constitute a serious contravention, from one that is done knowingly and systematically, to one that is done either knowingly or recklessly. This ensures serious civil contraventions operate sensibly alongside the wage theft criminal offence introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.

For individuals and small business employers, maximum penalties for most provisions will not change from what is currently provided in the *Fair Work Act 2009* (the Act), including for serious contraventions.

The penalty for non-compliance with a Fair Work Ombudsman compliance notice will be brought in line with other underpayment-related penalties – from the current level of 30 penalty units (\$9,390) for an individual, to 60 penalty units (\$18,780).

For civil remedy provisions related to underpayments (including sham contracting and unlawful job advertisements), maximum penalties for bodies corporate that are not small business employers will increase. Maximum penalties for these provisions will be the greater of:

- 1,500 penalty units (\$469,500) (currently 300 penalty units or \$93,900)
- three times the amount of the underpayment, if the applicant seeks this kind of penalty.

For serious contraventions, maximum penalties for bodies corporate that are not small businesses will increase to the greater of:

- 15,000 penalty units (\$4,695,000) (currently 3,000 penalty units or \$939,000)
- three times the amount of any associated underpayment, if the applicant seeks this kind of penalty.

Sham contracting

The amendment will change the defence to misrepresenting employment as an independent contractor arrangement, known as ‘sham contracting’, in subsection 357(2) of the Act.

Employers will be able to successfully establish the defence if they can show that they *reasonably believed* the contract was a contract for services.

This change implements the recommendations of the Post Implementation Review of the Act, the Productivity Commission’s Report on the Workplace Relations Framework, and the Black Economy Taskforce Final Report. These reports identified that the sham contracting provision is not an effective deterrent because the current defence of ‘recklessness’ is not fit for purpose.

What do these changes mean?

Reckless civil breaches of prescribed provisions may be treated as serious contraventions, with increased maximum penalties.

Employers who have allegedly misrepresented employment as an independent contractor arrangement will need to show that they reasonably believed they were correct in classifying a worker as an independent contractor.

When will or did these changes come into effect?

The changes to maximum civil penalty units, the threshold for a serious contravention, and the defence to sham contracting commenced on 27 February 2024.

Penalties calculated by reference to the amount of the underpayment commence at the same time as the new criminal offence for intentional wage theft, legislated in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, which will be the later of 1 January 2025 or the day after the Voluntary Small Business Wage Compliance Code is first declared by the Minister for Employment and Workplace Relations. The wage theft offence – and civil penalties calculated by reference to the amount of the underpayment – will not commence if the Code is not declared.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>