



Changes to state employment laws in WA

Increased penalties and accessorial liability

New higher penalties are being introduced in the state industrial relations system for contraventions of state employment laws and not providing employees their legal employment entitlements, including higher penalties for serious contraventions. Accessorial liability provisions will also be introduced that extend liability to persons who are involved in a contravention.

These changes have been introduced by *Industrial Relations Legislation Amendment Act 2021* and will commence early in 2022.

This fact sheet provides general information on the new penalties, what will be considered a serious contravention and new provisions on accessorial liability for being involved in a contravention. There is a separate fact sheet, **New compliance tools**, which provides information on the enhanced powers for industrial inspectors available at www.dmirs.wa.gov.au/new-employment-laws.

This fact sheet provides information on **entitlement provisions** and **civil penalty provisions**. The term entitlement provision means:

- a provision of a WA award, industrial agreement, employer-employee agreement and certain orders of the Western Australian Industrial Relations Commission (WAIRC);
- a provision of the *Long Service Leave Act 1958* (LSL Act) which gives an entitlement to long service leave; and
- a minimum condition of employment under the *Minimum Conditions of Employment Act 1993* (MCE Act).

There are a range of civil penalty provisions in state employment laws, and examples include:

- new record keeping and pay slip requirements in the *Industrial Relations Act* (IR Act);
- provisions relating to obstruction of industrial inspectors and other authorised officers; and
- the new protection of employee rights provisions.

State employment laws are changing

This fact sheet is part of a suite of information on the changes to state employment laws that will commence early in 2022. For details on the changes visit www.dmirs.wa.gov.au/new-employment-laws.

Increased penalties

Under the new penalty provisions:

- maximum penalties for contravening an entitlement provision have increased from \$2,000 to \$65,000 for bodies corporate and \$13,000 for individuals;
- maximum penalties for contravening a civil penalty provision have increased from \$5,000 to \$65,000 for bodies corporate and \$13,000 for individuals;
- higher penalties for serious contraventions have been established - \$650,000 for bodies corporate and \$130,000 for individuals; and
- penalties for contravening the LSL Act have been introduced.

Bodies corporate are liable for higher penalty amounts. For example, incorporated national system employers covered by the LSL Act are subject to the higher penalty amounts for a contravention of the Act. Bodies corporate that are held to be accessorially liable are also subject to the higher penalty amounts.

The penalty amounts for non-compliance with an order of the Industrial Magistrates Court (such as an order to produce certain employment records to an industrial inspector) will also be increased. As non-compliance with such an order will be an offence provision, the penalty amounts will be expressed as fines. A person will be subject to a fine of \$13,000, as well as a daily fine of \$1,000 for each day or part day during which the offence continues.

Serious contraventions

New provisions relating to serious contraventions of civil penalty provisions and entitlement provisions will be added to the IR Act. These provisions are intended to address contraventions that are knowingly committed and form part of a systematic pattern of conduct by a person (commonly referred to as 'wage theft').

The maximum penalties for serious contraventions will be 10 times higher than for other contraventions, reflecting the seriousness of the conduct and the need for specific and general deterrence. There will also be the capacity for representation costs to be ordered against a person who has committed a serious contravention.

A contravention is a serious contravention if the contravening conduct was **knowingly committed** and part of a **systematic pattern of conduct** relating to one or more other persons. The term "knowingly commits" is intended to refer to a conscious and deliberate choice. The term "systematic pattern of conduct" is intended to refer to a recurring pattern of methodical conduct or a series of coordinated acts over time – it is not intended to encompass ad hoc or inadvertent conduct.

A body corporate may be liable for a serious contravention and a contravention by a body corporate is knowingly committed if it expressly, tacitly or impliedly authorised the contravention. The authorisation may be given by an individual within the organisation, such as an office holder. Alternatively, the authorisation may be given via a policy, rule or practice that exists within the organisation.

There are a range of factors that the Industrial Magistrates Court may need to consider in determining whether there has been a systematic pattern of conduct, including:

- the number of contraventions committed;
- the period over which the relevant contraventions were committed;
- the number of other persons affected by the relevant contraventions;
- the person's response, or failure to respond, to any complaints made about the relevant contraventions; and
- whether there were also concurrent record-keeping contraventions.

These factors are not exhaustive, and are not intended to limit the circumstances in which a serious contravention may occur. For example, while one of these factors is the number of persons affected by the contraventions, a serious contravention may only relate to one employee.

With regard to the new accessorial liability provisions, in the context of a serious contravention, a person involved in a contravention committed by another person (the principal) only commits a serious contravention if:

- the principal's contravention is a serious contravention; and
- the person knew that the principal's contravention was a serious contravention.

Accessorial liability

New accessorial liability provisions will be included in the IR Act that extend liability to persons who are involved in a contravention of an entitlement provision or a civil penalty provision.

A person is 'involved' in a contravention if the person:

- aids, abets, counsels or procures the contravention; or
- induces the contravention, whether by threats or promises or otherwise; or
- is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- conspires with others to effect the contravention.

A person will only be involved if they intentionally participated in the contravention. Intentional participation requires actual, not constructive, knowledge of the essential matters that make up the contravention.

A person who is involved in a contravention of an entitlement provision is taken to contravene the provision. A person who is involved in a contravention may be jointly and severally liable, along with the employer, to rectify any underpayment to the employee. They may be ordered by the Industrial Magistrates Court to pay a monetary penalty and further ordered to rectify any underpayment.

On the facts of a particular case, accessorial liability could extend to a range of persons including the office holders of a company, managers, human resources consultants, external accountants and the end users of labour hire.

Importantly, accessorial liability will not allow directors of failed companies to hide behind the corporate structure to avoid employment obligations. They could be held jointly and severally liable with the company if they are knowingly concerned in a contravention.

A person who is not the employer may be held accessorially liable and may be jointly and severally liable for any underpayment. For example, if a director of a company is held accessorially liable for a contravention of the LSL Act by the company, they may be ordered to rectify any underpayment of long service leave.

End users of labour hire could also be held accessorially liable if the labour hire rates are 'too good to be true' and they fail to ask questions of the labour hire provider (a combination of suspicious circumstances and failure to make inquiries about workers' pay rates).

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