

The government's latest private member's bill could see wage theft by employers become a criminal offence

The House of Representatives will soon meet for its first debate on the Crimes (Theft by Employer) Amendment Bill.

If passed into law, the Crimes Act 1961 will be amended to criminalise employers who withhold their employee's monetary entitlements

The Bill was introduced as a private member's bill by Labour List MP Ibrahim Omer, who was a victim of wage theft himself when he first immigrated to New Zealand in 2008.

There are a number of ways an employer can commit wage theft, including:

- Underpaying the employee's wages;
- Withholding the employee's holiday pay; and/or
- Failing to pay the employee's KiwiSaver contributions.

If the Bill becomes law, an individual employer who commits wage theft could face either a fine of up to \$5,000, or one year in prison. The company which the employer works for could face a fine of up to \$30,000.

Of course, some employers will be concerned that an inadvertent error which results in paying their employees incorrectly may expose them to criminal liability, even where they have taken steps to rectify the incorrect payment. However, as the Bill currently stands, only employers who *intentionally* steal from their workers will be liable. Ultimately, it is expected that the Bill will change nothing for employers who endeavour to pay their workers correctly.

The rationale

Currently, employees who steal from their employers (either by sneaking cash from the till, or via more sophisticated means) can be prosecuted under the theft provisions of the Crimes Act 1961.

On the other hand, employers who commit wage theft do not face the same criminal liability. The explanatory note to the Bill states that wage theft cannot be prosecuted as a criminal offence because *"currently, offences relating to a person in a special relationship are insufficient to account for wage theft by employers. Existing processes are too complex, and can be a deterrent for those that are victims of wage theft."* Amending the Crimes Act to explicitly criminalise wage theft would resolve this complexity, and encourage employees to come forward if they believe their employer has committed wage theft.

The law as it stands

While employers can currently avoid criminal sanction for wage theft, and employee can still bring a civil claim under the Wages Protection Act 1983, Holidays Act 2003, and Minimum Wage Act 1983, which are enforced in the employment jurisdiction.

Under the Wages Protection Act, it is unlawful for an employer to deduct from an employee's pay without a specific request from the employee, or the employee's written consent. The obvious exception to this is any deduction required by law, such as PAYE tax, ACC levies, or student loan repayments.

Employers sometimes think they can rely on a general deductions clause in the employment agreement to make a deduction without needing to speak with the employee. However, the employer is still required to consult with the employee before making the deduction. Notably, the employee is not required to provide their consent, and the employer should avoid pressuring them to do so.

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Overpayments

Generally, where an employer accidentally overpays an employee, the same rules apply. That is, consultation and the employee's consent are required in order to lawfully deduct the overpayment from the employee's next pay.

However, different rules apply where the overpayment has occurred as a result of the employee being one of the following during the pay period in question:

- Absent from work without authority;
- On strike or lockout; or
- Suspended without pay.

In those circumstances, the employer may recover the overpayment without consent *if* –

- It was not reasonably practicable to avoid the overpayment (due to methods or equipment used by the employer for paying wages); and
- The employer gives notice to the employee of their intention to recover the overpayment.

Want to know more?

If you have any questions about payment of wages, please contact our specialist [Employment Team](#).