

Payroll Remediation Program Guide

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About this guide

Under the Fair Work Act 2009 (FW Act), the Fair Work Ombudsman's (FWO) role is to promote harmonious, productive and cooperative workplace relations by:

- providing education and assistance on workplace practices
- monitoring compliance with the FW Act and fair work instruments (awards and enterprise agreements)
- inquiring into and investigating breaches of the FW Act
- taking appropriate enforcement action.

This guide applies to remediation of employee entitlements under the FW Act by employers, and aims to:

- provide employers with a suggested framework for conducting an employee-centred Payroll Remediation Program (PRP), particularly for larger enterprises or where employers have discovered complex issues relating to multiple fair work instruments, or where the quantum of underpayments or number of affected employees is high
- outline our approach to assessing a PRP and provide information about dealing with us
- give examples of what we consider to be the most appropriate corrective actions to facilitate a culture of compliance.

The guide addresses:

- the increase in self-reported compliance issues observed by the FWO
- requests from the workplace community for guidance to undertake medium- to large-scale PRPs to address non-compliance and ensure future compliance.

The guide assists employers who've become aware of actual or suspected non-compliance and intend on undertaking a PRP to assess and address the issues. Employers undertaking a proactive PRP to assess payroll compliance may find aspects of the guide helpful, but the guide is not specifically designed for that purpose. Employers should consider what regular testing and controls are appropriate to ensure proactive compliance for their business.

The information in this guide should be scaled to the size of the issues to be remediated and the circumstances of the enterprise. We will similarly consider the size of the employer when dealing with self-reports of compliance issues. For small business employers, or larger enterprises with simple or smaller underpayment issues, employers can refer to our website for general information at fairwork.gov.au/workplace-problems/common-workplace-problems/i-think-ive-underpaid-my-employee. Where employers identify an underpayment of employee entitlements, their focus should be on taking efficient steps to ensure accurate and timely remediation of all affected employees and to guard against further non-compliance. We take the view that a model PRP puts employees at the heart of all stages of the PRP. Adopting an employee-centred approach demonstrates a genuine commitment to addressing the impact and loss caused to employees and to making things right. This means putting employees in the position they would have been in if the issues had not occurred, and ensuring they have sufficient opportunity to both inform and understand the PRP.

The FWO looks at the remediation steps taken by employers when considering if conduct requires compliance and enforcement action under our Compliance and Enforcement Policy (fairwork.gov.au/compliance-and-enforcement). We consider it highly relevant if employers:

- adopt the most appropriate approach (relevant to their circumstances)
- consult effectively with their workplace
- are transparent and cooperative with us.

The information in this guide has been informed by the FWO's experience with PRPs that result in better outcomes for both the employer and employees. Case studies or examples are for illustrative purposes only. They aren't intended to imply rules or requirements or to exhaustively describe what a model PRP looks like in each case. Employers must make their own decisions to ensure compliance with workplace laws.

This guide does not constitute legal advice and is not a checklist for compliance with obligations under the FW Act or other laws that regulate employee entitlements. The FWO has a range of other tools and resources available to help with understanding minimum entitlements and obligations, including:

- tailored information and priority service online through My account at fairwork.gov.au/register
- Pay and Conditions Tool (PACT) at fairwork.gov.au/pact
- Templates, guides and fact sheets at fairwork.gov.au/resources
- online learning centre at fairwork.gov.au/learning
- information for franchises at fairwork.gov.au/franchises
- resolving workplace problems at www.fairwork.gov.au/workplace-problems
- upcoming webinars at fairwork.gov.au/webinars
- language help at fairwork.gov.au/languages

For small business employers, we have additional information tailored for your needs:

- Small Business Showcase at fairwork.gov.au/smallbusiness
- Employer Advisory Service via fairwork.gov.au/eas

Overview of a PRP

The diagram below summarises the recommended elements of a PRP that are outlined in this guide. Although each element will feature in most PRPs, they may not always progress in a linear or sequential manner. Some employers may need to revisit elements in response to new information or emerging issues. Strong governance and project management around a PRP can provide employers with confidence that critical elements are not overlooked.

Designing your PRP

- ▶ Identifying issues, scope and period of review
- ▶ Consulting and seeking advice
- ▶ Resourcing and governance

Methodology issues

- ▶ Interpreting and applying fair work instrument(s)
- ▶ Applying classification to jobs or roles
- ▶ Data sources for calculations

Communications

- ▶ When to communicate and with who
- ▶ Different communication channels
- ▶ Handling enquiries or requests for information

Making payments

- ▶ Paying interest
- ▶ Processes for employee requests for review

Former employees and outstanding payments

- ▶ Finding former employees
- ▶ Paying outstanding amounts as unclaimed monies

Corrective measures

- ▶ Ways to avoid continuing non-compliance

Future compliance

- ▶ Ongoing assurance and audit processes
- ▶ Changes to culture and governance
- ▶ Updating systems and technology



10 key features of a model PRP

1. Comprehensive, fair and transparent. This includes understanding the scope of potential non-compliance issues, their cause(s) and the impact.
2. Clearly defined guiding principles and appropriate governance including documenting the approach, progress and decisions, with senior oversight appropriate to the scale of the issues.
3. Timely, without sacrificing quality needed to accurately redress loss caused by non-compliance. This requires investment in adequate resourcing and prioritisation by the employer over and above business as usual activities.
4. Puts employees at the centre of all decisions and ensures wherever possible that outcomes put employees in the position they would otherwise have been in, but for the non-compliance.
5. Involves genuine consultation and input on the remediation approach from employees and their union or representatives and any enterprise level consultative bodies or forums.
6. Makes it easy for employees by minimising complexity and avoiding the need for them to take onerous steps to get their owed entitlements.
7. Assumptions consider available evidence sources, are beneficial to employees or give them the benefit of the doubt, so the employer doesn't benefit from its poor record-keeping or systems (where assumptions are required e.g. due to the employer not keeping appropriate records or poor data quality).
8. Communicates pro-actively and effectively with employees and their representatives through the life of the program, including being responsive to issues or concerns, transparent with relevant information and providing opportunities for individuals to dispute findings relevant to them.
9. Identifies learnings and adapts or implements improvements to ensure optimal outcomes and future compliance, both during the remediation process and for a future culture of compliance.
10. Adopts a cooperative and transparent approach to engagement with the FWO and other regulators or stakeholders.

Designing your payroll remediation program

- ▶ Identifying issues, scope and period of review
- ▶ Consulting and seeking advice
- ▶ Resourcing and governance

Discovery and diagnosis

Once it's determined to undertake a PRP, the first step usually involves a discovery and diagnosis phase to identify potential compliance issues. This will inform the focus, scale and planning for the PRP. For example, where an employer can be satisfied that the compliance issue is confined to a specific issue, it may be appropriate to confine the PRP to steps which address those issues. If multiple issues are identified or the cause relates to failed records or systems or cannot be properly identified, a broader PRP scope may be needed.

Employers should draw on a full range of information and expertise to understand the extent and causes of potential issues. This includes identifying what information sources exist, if there are any gaps, and looking across all potentially relevant enterprise systems that could hold records relating to work performed (not limited to those usually focussed on employee pay and entitlements).

There are a range of approaches that can be taken to help an employer assess the risks of underpayments. This can involve a combination of steps such as:

- sample testing of payroll outputs against a model of what is expected to be the output for a representative sample of employees across the business
- analysis of payroll queries and adjustments, employee complaints or disputes and whistleblower disclosures to assess any common trends and indicators of potentially systemic issues or risk
- environmental scanning of industry/sector compliance issues in other businesses or common underpayment issues based on similar processes or systems
- undertaking a reconciliation or assessment of wages paid against other sources of data reflecting actual working patterns to validate if system generated rosters, timesheets or annualised salaries reflect the work actually being performed by employees
- the use of data analytics tools to assess payroll data and identify potential anomalies or significant deviations from expected outcomes e.g fewer employees are claiming entitlements than would be expected to apply to their work group, or time or attendance data does not reflect expected payroll outcomes
- examination of payroll system rules or code against applicable fair work instruments to assess potential errors in interpretation
- identifying and testing areas of higher risk for errors, such as where there is a claim-based process for commonly occurring entitlements that apply automatically under fair work instruments, where there are manual processes for payments to be made, or where line managers exercise discretion over payment approvals
- surveys or other processes to test any corporate culture risks present within all or a part of the business, to identify whether any local practices or other issues could be driving behaviour that doesn't accord with legal obligations and isn't being picked up in regular checks e.g assessing whether metrics or key performance indicators for labour budgets adequately enable the work to be performed at the full cost of labour, or if outputs achieved would attract a higher labour cost than budgeted

- testing activities of risk controls that are designed to ensure work is being performed in accordance with enterprise risk frameworks and compliance with workplace law obligations
- internal or external audits of payroll controls, implementation of new workplace law obligations or fair work instruments (including the Fair Work Commission's Annual Wage Review) and/or processes and systems for job mapping of employee classifications against applicable awards and agreements and changes in duties or roles
- assessment of record management practices, including retention of documents required to be kept under the FW Act or an award or agreement, systems with default recording settings for rosters, work patterns or records of hours worked that have not been adjusted or updated as expected, and whether there are any separate systems or record keeping practices operating in business units outside of enterprise systems.

Scope and period of entitlement review

Review scope

Identifying the scope of review and remediation is an important step in ensuring that all impacted employees are identified and assessed. We understand that PRPs may have variable scope, depending on factors such as the:

- type and scale of compliance issues identified or assessed as a risk
- size and structure of the employer
- nature and number of fair work instruments at issue
- size of the likely impacted cohort of employees.

Scoping of a PRP should be flexible to allow variation in response to changing information or the identification of new issues. We commonly see employers appropriately varying the scope of a PRP during a review, or adding further phases or subsequent reviews, as information develops.

Employers may be undertaking a proactive PRP to assess payroll compliance or they may have become aware of actual or suspected non-compliance through other means. This will impact the prioritisation of assessment and review of issues, including the likelihood of discovering further issues in the process. We encourage leaders of PRPs to identify the potential need for expanded scope as an inherent risk in all good quality PRPs when engaging with internal stakeholders or approvers such as Boards, senior executive leaders and Chief Financial Officers.

Employers should give serious consideration to whether the review process will be:

- end-to-end (a comprehensive review of all fair work instruments, terms, and employees), or
- more targeted or risk-based.

Preliminary risk analysis or sample reviews may assist in informing this decision, including the outcomes of the discovery and diagnosis phase. Employers should be agile in adapting the approach if additional issues or considerations arise during the PRP. A record of the basis for their risk assessment and scoping decisions should be made so that this can inform any assurance review by the FWO.

When reviewing PRPs, we seek information to enable us to understand the scope of the PRP being conducted by the employer. We generally want to understand:

- If the PRP is a full, end-to-end payroll review for a specified period.

- If not, is the PRP targeted or risk-based, and if so, how the employer has approached the scoping exercise. This enables us to seek assurance about the inclusion of appropriate issues or cohorts within the PRP scope or any gaps.
- The specifics of what is in and out of scope (fair work instruments, particular terms, particular employee cohorts, employing entities or locations). We will look at whether the approach is employee focussed, adopting an inclusive rather than exclusive approach.
- Where an aspect of scope, entitlements, time or employee cohort is excluded, we will look at the basis on which the employer considers that this aspect does not have compliance issues, or alternatively, how the employer's existing or anticipated governance and compliance processes address compliance monitoring for that excluded aspect.

We may recommend changes to scope or other future compliance measures if we identify gaps in the PRP scope.

The FWO understands large-scale PRPs may be structured in tranches to consider a broad range of employees, fair work instruments and entitlements. We can take this into account in our oversight and assurance processes where employers are transparent about structure, areas of suspected non-compliance, and project milestones and timelines.

Time period of review

The FWO will seek information about the period being reviewed. Whilst the period of a review may be dependent on the relevant issues, we generally expect that the period looks back as far as possible considering:

- the availability of employee records or other reliable data sources to assess and quantify underpayments
- the point in time when non-compliance started to occur.

We see employers often elect to review and remediate for a longer period where records allow and we consider this in determining the employer's posture towards addressing the non-compliance and level of contrition.

We recognise the statutory limitation period of six years in the FW Act for the commencement of proceedings to recover an underpayment or seek penalties for contraventions. In circumstances where the underpayment issue was (or may have been) occurring prior to that, the FWO expects that six years should be viewed as a minimum period for review, and not as a bar to additional remediation. We will want to understand the basis for any decision to limit a PRP to the statutory limitation period.

Similarly, where a PRP review period is less than the statutory limitation period, we'll seek to understand the basis for this approach. This may impact our assurance review including consideration of whether the PRP is likely to ensure employees receive their lawful entitlements. For example, we'd have concerns if an employer elected to conduct a two-year PRP where the cause of the non-compliance suggests that underpayments were occurring prior to that period.

Consultation and advice

Model PRPs consult early and effectively with stakeholders to ensure that the PRP is of high quality and methodology decisions are fully informed and optimised.

We expect employers to engage with relevant workplace participants about the methodology to inform the most accurate approach. This should include:

- employees
- relevant unions
- workplace consultation bodies
- third parties such as payroll technology providers and professional advisors.

Employers may also consider establishing an employee voice on the decision-making body for the PRP such as a Steering Committee.

In our experience, where employers consult with employees, workplace consultative bodies and unions, they are often provided with highly useful information or evidence. This can increase the accuracy of records or assumptions to be applied, including information about work practices and working patterns not known or readily available from managers, advisors or by looking at systems. For example, employers will often consult with internal staff responsible for pay or HR and with operational managers about how work is performed in practice. It also builds trust in the PRP and may reduce instances of employee misunderstanding or disagreement with decisions taken.

Unions or employer organisations may also provide additional information to inform interpretation of fair work instruments, particularly where they've been involved in drafting processes.

Third party professional providers may be able to address areas of complexity or volume by offering expertise to optimise data collection, accuracy, structure and analytics or remediation methodology. Broad consultation on a proposed methodology resolves key issues within the workplace, which in turn enhances accuracy and reduces the likelihood of dispute at a later stage.

We seek to understand the extent to which an employer has consulted with and incorporated the views of relevant stakeholders in deciding its approach. Confirmation that consultation has occurred may increase our level of assurance and reduce the requirement for more detailed investigation steps.

Planning, resourcing and governance

The remediation process should be comprehensively planned, appropriately resourced to ensure timely and successful delivery, and have clearly articulated principles and governance processes.

Resourcing

PRPs that are of a moderate or large scale can rarely be successfully undertaken solely by internal payroll or human resources teams, if they're also responsible for day-to-day payroll and workplace relations management work at the same time. Where this occurs, it generally:

- places an unfair burden on these employees
- delays outcomes
- can be an indicator of the seriousness of the employer's commitment to addressing any non-compliance.

Successful programs usually involve a combination of the following components and expertise, commensurate to the scale of the PRP, size of the enterprise and availability/capacity of internal expertise to deliver the outcomes of the PRP:

- project management expertise, to develop the overarching project plan and manage the project delivery against projected timeframes, budget and outcomes
- data science and data analysis expertise, to develop calculation models, manage large data sets and data quality issues, and provide insights and quality assurance
- appropriate representation of business/operational expertise, including employee representatives, to provide practical and technical advice to other subject matter experts,
- workplace relations expertise, including professional third-party advice from advisors with experience in PRPs, auditing and/or legal advice
- expertise in communications, such as people who know how to communicate and consult effectively with employees
- people with subject matter expertise in enterprise systems such as payroll software, time and attendance systems and human resource information systems.

Planning

Good PRPs will develop a project plan, incorporating:

- the approach and objectives
- scope
- deliverables
- milestones
- resources
- reporting
- risks
- mechanisms for review and incorporation of lessons learned or continuous improvement.

A PRP will usually include the following key features.

Scope

- Definition and approval of the scope of the PRP and what issues it will include.

Business requirements or rules

- Development and approval of detailed business requirements or rules for each issue in-scope.
- These usually document:
 - the source of each entitlement
 - the interpretation of award or agreement provisions
 - who is in scope or out of scope
 - how the entitlement will be applied in the calculation model in technical terms (i.e. the rules that will be applied)
 - how the entitlement interacts with other entitlements in terms of ordering or hierarchy of payments
 - the data sources that will be used, including treatment of any conflicting or incomplete sources
 - any exclusions or instructions for specific scenarios.

Data input

- Data acquisition from relevant systems and records, including key employee identifying information, role and classification history, pay slips, rosters, time and attendance data and leave records
- Data analysis, cleansing and transformation as required to undertake calculations.

Calculation model development

- Building the calculation model(s) that will recreate historical employee entitlements for the PRP period.
- Typically, this will include:
 - defining the formulas
 - step-by-step technical interpretation of the business requirements/rules in the calculation method
 - steps in the calculation process to calculate the entitlement based on the business rules
 - the data to be used, including the hierarchy of data where there is conflicting evidence
 - the order or hierarchy of entitlements where there is potentially more than one procedure applicable to the entitlement assessment.
- Assumptions, limitations and design decisions specific to the calculation model are made at this stage, approved and documented.

Testing

- Testing and validation of data and calculation model(s) should always be undertaken to identify any issues, errors and bugs and reduce the likelihood of needing to re-do parts of the PRP in the future, saving employers money in the long term.
- Depending on the scale of the PRP, this stage usually involves validation of calculations model outputs for a targeted sample set of employees, selected to ensure that all components of your calculation model are tested and assessed for accuracy. Any issues or observations should be considered, and adjustments made to the calculation model and repeated until you are satisfied the model is working correctly. Sampling should be representative of all in-scope categories and consider how to address any data gaps.
- Testing with business representatives should also be considered. This may involve performing separate calculations outside the remediation model for a sample group in sample periods, and having people not involved in the calculations validate that the outcomes produced by the model for the sample are correct.

Outputs

- Once testing and validation adjustments are addressed, the calculations model should be approved by the relevant decision-maker(s) accountable for the PRP. Decision makers may seek independent quality assurance from independent technical advisors if appropriate in the circumstances of the PRP and depending on its complexity and scale.
- Undertaking remediation calculations using the approved calculation model(s), delivering remediation outcomes for individual employees and loading relevant data into the employer's system for payment and record-keeping purposes.

Governance

A good PRP includes accountability and oversight by senior personnel at a level proportionate to the scale of the PRP. For large programs this should include reporting at board or senior executive level,



or to an appropriate audit and risk governance body (that in turn provides updates to the most senior decision makers in the business). It may also be appropriate to consider independent audits or reviews at critical stages of a PRP, such as validation stages before payments are fully quantified.

It sends a positive message to employees, stakeholders and the FWO when a board or senior executive(s) take responsibility for oversight and delivery of a PRP. It also enables a line of sight over the PRP scale and complexity, so that expectations of internal and external stakeholders can be managed in relation to time, cost and liability.

To monitor the progress and effectiveness of a PRP there should be an appropriate process to identify and track meaningful measures that indicate progress against the PRP outcomes. This should be identified in the scoping phases and incorporated into planning – not left until the last minute. Progress should be recorded and reported regularly, so that adjustments can be made to projected timelines or resourcing, and any measures revised if circumstances change, or lessons are incorporated into a project plan.

Good governance also includes ensuring administrative hygiene is embedded into a PRP including:

- Documenting decisions, approvals and outcomes
- Documenting and ensuring records management and governance of procedures, methodology or technical documentation, including any updates or changes during the PRP
- Maintaining and continuously reviewing and updating risks and mitigation strategies
- Recording lessons learned and making appropriate adjustments or changes to the PRP or future compliance implementation plans where appropriate.

Common methodology issues

- ▶ Interpreting and applying fair work instrument(s)
- ▶ Applying classification to jobs or roles
- ▶ Data sources for calculations

The calculations methodology is the set of business rules that underpin a remediation model and produce the calculation outputs relied on by an employer to rectify underpayments. A robust methodology that has been appropriately designed and tested is necessary for a PRP to achieve its purpose of accurately remediating all affected employees.

Methodology review is a critical component of our PRP review process. Where an employer provides detailed information regarding a PRP's calculation methodology, this may decrease the instance or scope of further information requests by the FWO or the use of our compliance powers. For further information about our review process, refer to 'What to expect after notifying us'.

Cooperation on methodology is useful even where the employer and the FWO are not in full agreement on the approach. It generally enables assessment and narrowing of any contentious issues at an early stage.

Some of the common areas we may seek to understand are discussed below.

Fair work instrument application and interpretation

We will want to know about what fair work instruments apply to the workforce, and the relevant employing entities (where there is more than one employer in a group structure). Understanding any transfer of business and transmitted instruments is also important. Employers should ensure that applicable instruments are mapped to business units or employee groups and capable of verification.

We will also want to understand what terms of the fair work instruments have been applied or excluded, the reason for this, and how the employer has interpreted the terms of any fair work instrument in its calculations. Answers to common questions about awards or the FW Act can also be found in our online library at library.fairwork.gov.au

We expect employers to apply all terms of the applicable fair work instruments relevant to the work performed by all employees within scope when calculating entitlements in a PRP.



Case study: Creating a suitable model

An employer took steps to confirm the applicable fair work instrument(s) covering their impacted employees. This included getting advice on ambiguous and complex areas.

They then considered the entitlements under the applicable fair work instruments *in totality*, not just those at high risk of non-compliance or that were easy to calculate.

They also accounted for 'downstream' entitlements if remediation of entitlements was necessary. For example, where additional overtime was payable, the model considered what allowance entitlements arose. And, where additional days of work were identified, the model factored in which hours attracted penalties or overtime as well as any allowances employees were entitled to.

In interpreting ambiguous entitlements, the employer adopted a reasonable and defensible approach that was evidence-based and to the employee's benefit. For instance, all relevant hours including paid leave hours and non-worked public holidays counted in the calculation of overtime to avoid any understatement of entitlements.

This all meant that the remediation methodology developed was sufficiently sophisticated to accurately account for interactions between various entitlements.

Throughout, the employer was responsive to FWO feedback about the correct interpretation of entitlements.

Classification of employees

We will usually want to understand how the employer has applied job classifications and if a classification or role mapping exercise has been conducted to validate classification of employees under the relevant fair work instruments. This is particularly relevant where there are significant numbers of different job titles for employees that have not been reviewed against the underlying award or agreement classification structure.

A comprehensive role mapping process can also be a relevant measure to promote future compliance, by ensuring that job classifications reflect evolving work requirements or changes to roles.

Data sources

We will seek to understand what sources of pay, time and attendance, and employee data sets are available, and what sources are being used to conduct the PRP. We expect employers to assess if data is complete or has any gaps or quality issues, and to explain the steps taken to address any gaps or issues.

Where primary data sources are absent or incomplete, for example there is no time and attendance data or rosters for a particular period, we expect the employer to explore other sources of information that could assist to overcome gaps or issues. For example, other business systems that identify when employees attended work such as security or access logs, worksheets or job logs, computer systems or customer service systems.

Consulting with employees about their work patterns can also provide a rich source of data to develop reasonable work pattern models where records have not been made or kept. It can also

validate the employer's approach as reasonable, where notwithstanding the absence of records, employees do not have additional information to provide that suggests any models are inaccurate.

Assumptions

The FWO understands that assumptions may be necessary where records or data sources required to assess employee entitlements are incomplete, are of poor quality or do not exist. Model PRPs enable employers to overcome inadequate records in a time and cost-efficient manner whilst also ensuring outcomes are employee focused.

If an employer can provide a clear explanation of the need for assumptions and the proper basis for them, we are more likely to accept that these provide an appropriate level of assurance in the circumstances. We usually seek information about assumptions and the process for developing them, including what other information sources were explored and why they were determined to be appropriate or not appropriate. This enables us to assess if the approach is robust and reasonable considering the specific data or record limitations.



Case study: Positive approach to assumptions

One employer based their entitlement determination on good quality data or applied employee-beneficial assumptions to overcome data gaps.

The remediation program considered evidence of actual work practices, rather than 'what should have happened', including from sources other than just time and attendance and payroll data to confirm actual work patterns. They referenced IT systems access, security systems and service delivery records as additional reliable sources of information about which employees worked when. The program then extrapolated available data to develop evidence-based assumptions.

Impacted employees, their line managers and their representatives were consulted to validate the accuracy of the data and/or assumptions used in determining entitlements owed.

As part of the process the employer considered any contradictory evidence and incorporated this in entitlement determination for the impacted employee or employee cohort.

The employer gave employees written information to help them understand the issue and supported them in checking remediation calculations against their own evidence or recollection of their actual work practices.

A robust employee feedback mechanism was put in place to support reviews of alternative evidence provided by employees and enable calculation corrections if necessary.

If employers elect to apply assumptions on a commercial basis to overcome extensive or costly manual review processes, we expect such assumptions to be sufficiently employee focused and be demonstrated to be an interpretation that does not disadvantage or is beneficial to employees.

Where an employer hasn't made or kept records that enable assessment, the FWO does not consider it appropriate to exclude entitlements for assessment based on assumptions that employees did not perform particular work without a proper basis. Where there is evidence to indicate that Employees did perform particular work or it cannot be excluded, employees should be given the benefit of the doubt, particularly where the employer's record keeping practices have been deficient.



Case study: Poor approach to assumptions

Another employer didn't use available evidence but instead relied on generalised or universal assumptions to make calculations. Their assumptions were unlikely to be capable of reflecting the true work patterns or entitlements of all in-scope employees. This meant there was a high risk that non-compliance wasn't fully rectified.

For example, they excluded pay periods from calculation if time or pay records were missing, instead of developing evidence-based assumptions to fill those gaps.

Affected employees weren't kept in the loop and were even ignored when they made direct enquiries or sought to provide evidence of their own to support calculations.

Ultimately, the employer's assumptions and interpretation of fair work instruments had no evidentiary basis and produced results that were detrimental to employees.

Offsetting payments

Some employers pay employees under an annualised salary, where the relevant salary is fixed as an annual amount and paid in even amounts over the year in each pay period (e.g. weekly, fortnightly or monthly).

A common question when back paying employees is whether an employer can calculate back pay by looking at what an employee was paid overall in a period and comparing it to what an employee should have been paid overall for the same period, or whether an employer can apply higher amounts paid for one or more pay entitlements to satisfy a different entitlement that was underpaid.

Whether an employer can do either of these things in a particular PRP depends on the circumstances, including any annualised wage provisions in an applicable award or agreement and the terms of the employment contract, and should be carefully considered when designing the PRP.

The FWO's general position is that:

- employers need to pay their employees in full for each pay period in accordance with the applicable fair work instrument(s) or the FW Act. This means that if they pay an employee more than the minimum amount in one pay period, they can't use this to satisfy a less than minimum amount paid in another pay period
- if employers specifically pay their employees more than the minimum amount for one designated entitlement, they can't use this to satisfy an underpayment of a different entitlement. For example, if an employer pays an employee a higher base rate of pay, the amount more than the minimum can't be applied to satisfy an entitlement under an award to annual leave loading.

In assessing PRPs, we always seek information about how the employer has treated payments made during the review period to an employee's minimum entitlements over the same period. If the approach is different to the general position above, we will seek to understand the legal basis for the employer's approach.

If the employer relies on contractual terms contained in any employment agreements or contracts of relevant employees about how payments made to the employee will be treated (including payments above the minimum entitlements in an applicable award or agreement), the FWO will generally

require evidence of the terms relied on to assess the employer's approach and whether the allocation of payments is lawful.

Overpayments

While undertaking a payroll review and remediation process, employers may identify instances of employees being overpaid one or more entitlements. An overpayment in this context is considered by the FWO to refer to an amount of money that an employee did not have a legal entitlement to and was paid by mistake.

A payment that is made by an employer above minimum entitlements under a contract, or which is paid as part of a conscious decision to pay higher rates of pay or entitlements above the applicable minimum in the relevant fair work instrument, is not considered to be an overpayment by the FWO – rather, it is the payment to which the employee was entitled and which ought to be rectified in the event that it is found to have been underpaid. Our approach to above-minimum amounts paid to employees is discussed above in Offsetting payments.

We recommend that employers seek specific advice about how they approach overpayments and any proposal to clawback or recover overpayments as part of a PRP, as there can be complex considerations depending on the circumstances in which the payments were made to employees and the legal basis to recover amounts paid in error. It is not generally open to an employer within a PRP to reduce an amount or amounts that are owing to an employee by the amount of an overpayment that was mistakenly made to that employee.

If an employer seeks to recover overpayments, any process for recovery must comply with the FW Act. For more information visit www.fairwork.gov.au/pay-and-wages/deductions-and-related-issues/overpayments

In the context of a PRP, we may seek information about the employer's assessment of any overpayments, how they occurred and how they have been treated in the assessment of any underpayments. A decision by an employer not to recover overpayments from employees can be a relevant consideration in assessing the employer's posture towards addressing the non-compliance and level of contrition, particularly where employees did not contribute to the overpayments by the employer.

Communications with employees

- ▶ When to communicate and with who
- ▶ Different communication channels
- ▶ Handling enquiries or requests for information

An employee-centred PRP will have a comprehensive communication plan. The success and timeliness of a PRP are frequently impacted by the quality and efficacy of the employer's communication with employees, their union, and workplace representative bodies such as consultative committees (if applicable).

Clear and appropriately detailed communication can:

- assist employees in understanding their personal situation, such as where it is similar or may differ from other employees
- provide confidence to impacted employees, the FWO and unions about the approach taken to remediate underpayments
- significantly reduce instances of disputes or employee queries, including individual requests for assistance to the FWO, which in turn reduces the use of public resources and increases the efficiency of the employer's PRP.

Employers should exercise care when considering making a request for employees to keep information about their individual remediation payment confidential, or requiring the execution of release agreements or deeds of release. Such mechanisms could be available to employers in some circumstances. Generally, communication with employees should not require that they keep information about individual remediation payment confidential or be contingent on signing a release agreement or deed of release.

Subject to any existing contractual clauses in place before 7 December 2022, employees have the right to disclose their pay and their employment conditions that would be needed to work out their pay should they wish to do so, and communications which suggest otherwise may contravene workplace laws. In addition, formal agreements in return for payment may be legally ineffective if the payment comprises no more than an employee's minimum entitlements.

Whether or not pay secrecy laws apply, or if a confidentiality agreement is enforceable or not, the FWO may consider an unreasonable or unlawful imposition of such requirements by an employer as being relevant to their contrition or corrective actions. In such circumstances, we look to understand the basis for the employer's approach, the manner in which the requirements have been communicated and explained to affected employees, and to carefully consider if any requirements that were imposed misrepresent employees' lawful rights to make a complaint or inquiry in relation to their employment entitlements to the FWO or another person or body, or to be paid correctly under an applicable fair work instrument, which may contravene the FW Act.

Employers should understand that such releases or deeds are not binding on the FWO and the FWO may investigate or take enforcement action, including seeking information from employees notwithstanding the existence of a release or deed. If the FWO identifies that an employer has provided inaccurate information to employees about confidentiality or releases we will seek that this be corrected.

A good communications plan for a remediation program typically encompasses the following seven principles:

1. Who you communicate with

Communications should typically include all employees (including former employees) in a relevant cohort or impacted part of the enterprise affected by the non-compliance issue(s), not just employees ultimately determined to be individually impacted by an underpayment, unless the employer has identified a compelling reason for adopting a narrower communication approach.

In our experience, this type of broad communication:

- reduces potential for confusion in the workplace
- helps employees understand if their entitlements and circumstances have been considered
- can alleviate anxiety for employees who may wonder why they haven't received a payment when another person has.

Communications should be tailored for specific employee groups and include enough detail to assist them to understand how the process does (or does not) apply to them.

Engage openly and constructively with employee representatives such as unions and workplace consultative bodies, to ensure that they are:

- well informed of the remediation program
- have sufficient information to communicate effectively with their members and employees
- well-positioned to assist employees with the remediation process in accordance with their role and responsibilities within the workplace.

2. When you communicate

Employers should generally notify employees (including former employees) as early as possible that a remediation process is being undertaken and:

- tell employees what it means for them
- be clear and upfront about the time it will take
- give them an opportunity to get more information.

The actual timing of such communication may vary across PRPs, depending on how early in the process the employer has gathered sufficient information and understanding of the underlying issues to enable a meaningful communication with affected employees.

Communications plans should consider and set out:

- when you will communicate i.e. at key milestones or stages
- what messages and information you will communicate
- how often and who communications will come from.

Knowing the workforce, think about when the best time is to communicate with employees to ensure they can engage with the communication.

Do not be averse to letting employees know if more information is still required, or some answers are not yet known, and provide a best sense of when those matters might be known, or when further updates might be expected.

Provide information to employees at the stage when it is most relevant and useful to them. For example, information that will be most relevant and useful at the completion of the remediation, such as payment arrangements and review rights, should be provided near completion of the remediation, not early in the process.

In many remediation programs, additional communication beyond what is initially planned will be required to achieve good outcomes and manage expectations. This would usually include follow-up communications, updates, reminders if employees have supporting information to provide, and early notification of material changes in the PRP or delay of outcomes.

3. The channels you will use

The channels used for communications should be fit for purpose and appropriate to employees' circumstances and preferences (if that information is available).

Multi-channel approaches help maximise reach and response rates, particularly for former employees. Some examples of communication channels include email, phone calls, SMS, letters by post, workplace notification platforms or apps for existing employees.

Different channels may suit different types of messages and content. For example, SMS may be suitable to advise an employee to check an online portal for payment information, or to call to verify payment details, but unsuitable for confirming their PRP outcome.

Consideration should be given to ensuring communications appear authentic and that employees can independently authenticate or verify the communication to ensure it is less likely to be considered a possible scam or phishing attempt.

Creating a public facing and prominent remediation page on your website is a strategy we've seen some employers use to good effect. Relying solely on the company's intranet may not be appropriate where the PRP includes former employees who no longer have access. A public webpage has multiple benefits. In addition to transparency, it also lets current and former employees concerned about scams independently verify the PRP and communications if it is included in the communication.

4. Not onerous for employees

Employers should provide in-language options or interpreter access if required by any employees to understand information or requirements of them.

Where a response or action is required from the employee, this should be carefully planned and allow reasonable time for consideration and response. For example, consideration should be given to any peak periods for operational requirements or leave, and any groups where additional time or a different approach is needed, such as employees on extended periods of leave.

Requirements for identity verification and payment details should be made as simple as possible, taking into consideration the steps required being proportionate to the quantum of the employee's entitlement.

Ideally employees will be able to complete actions electronically or have options to choose a method that best suits them. Highly manual or complex claim processes can impose an unreasonable burden on employees and deter engagement in responding.

5. Be transparent

Communications should be transparent about what has happened and what is being done to address it. Transparency and accountability are essential to ensuring trust in the employer.

Communications should always provide appropriate levels of detail for employees to understand the issues and information, and a genuine opportunity to ask questions or consult on the issues.

Opaque communications should not be used to obfuscate calculations decisions taken by an employer, which it anticipates may be contested by employees or which are unsupported by sound methodology.

In communicating the outcome of a PRP to an employee, be transparent about the underpayment amount and how it was calculated, with sufficient detail or breakdown of underpayments by entitlement and the components of any payments, including superannuation, interest and taxation. We generally view communications stating a total gross and net outcome with no particulars or breakdown as inadequate. We've also regularly observed such communications to be the cause of avoidable disputation between employers and employees.

6. Mechanisms for enquiries or information

Provide simple avenues for queries and dispute resolution. A single point of contact, such as a portal, telephone hotline or dedicated email channel, may increase consistency and responsiveness. If this uses existing processes or resources, the employer should ensure that remediation related queries are able to be identified separately from business-as-usual queries and are appropriately resourced (particularly enabling prompt responses during peak communication periods).

Where there's a contact channel for employee enquiries, care should be taken to ensure staff are appropriately trained to provide tailored interactions and deal with complex issues as they arise. Tools like tailored call scripts and quality assurance processes (e.g. call or response monitoring and auditing) should be used to ensure quality, consistency and employee-centred outcomes. Generic scripted responses that don't engage with, or answer questions increase frustration and undermine trust in the PRP, and generally also result in more employees approaching the FWO for assistance.

Employees should be provided with clear information about who to contact if they:

- have questions about their PRP outcome
- want more detail about how the outcome was arrived at
- are to receive calculations of their entitlements.

There should be a clearly communicated process to seek a review of the outcome or to provide information or evidence that may change the outcome for an employee. The FWO considers that the inclusion of effective employee communications and review mechanisms may be indicative of a well-designed and robust PRP, providing greater compliance assurance to the FWO.

7. Review and adapt

Consider using behavioural insights to optimise your communications and engagement with employees. This can enhance efficiency and promote better outcomes in the PRP but should not be used to influence employee behaviour to suit the employer's interests to the detriment of the employee's interests.

Consider feedback, complaints or trends in enquiries or questions after each communication stage and apply any lessons to adapt your communications plan, channels or design of future communications.

Practical tip: Writing effective employee communications



- ▶ Tailor messages to employee groups needing different information, by preparing separate communications for each. It's not one size fits all.
- ▶ Keep it short by leading with the key information. What do they most need to know or do? Consider including more detailed or general information in separate information sheets or FAQs.
- ▶ Design communications to look good and engage the reader. Break up text with bullet point lists and headings written as a question, an action or instruction e.g. What do I need to do now?
- ▶ Use direct and plain language, avoiding corporate jargon or highly technical or legal language.

Making payments to employees

- ▶ Paying interest
- ▶ Processes for employee requests for review

Interest

We expect back payments to employees to include interest. This puts employees in the place that they would have been if the underpayments hadn't occurred.

While not a legal requirement outside of proceedings for recovery of wages, this reflects our view of good practice in remediation programs and is a tangible demonstration of an employer's acceptance of responsibility for underpayments. Given employees have been deprived of the benefit of monies as they fell due, the application of interest is a necessary step on the part of the employer to rectify that loss.

The payment of interest for underpayment amounts and the specific interest rate applied are factors we consider when deciding whether compliance or enforcement action is appropriate. Alternatively, the employer can demonstrate an approach to remediation that's more favourable to the employee in a manner similar to payment of interest. For example, by applying an 'uplift' amount to repayments, or making repayments at a higher rate of pay.

In general, we accept that a simple interest calculation on the underpayment is appropriate. An acceptable approach to calculation of interest is to use the Pre-Judgement Rate from the Federal Court of Australia's Interest on Judgments Practice Note, which is the relevant Reserve Bank of Australia cash rate for each half year period plus 4%.

Where a different approach is taken, we expect that the employer can demonstrate why its approach is appropriate in the circumstances.

Payment information and assistance

When making payments:

- provide relevant pay slips and PAYG summaries in accordance with the FW Act or relevant taxation obligations (or a timeframe in which they will be provided)
- provide information about any taxation and superannuation implications, or recommend that the employee seek such information
- consider offering access to paid independent financial advice for employees receiving substantial remediation payments.

Outcomes of reviews

Where an employee seeks a review of their PRP outcome they should be provided with a reasonable opportunity to provide information, evidence or submissions about their outcome. Employers should promptly consider requests for a review and provide an explanation of their decision.

If, on review, an employee is entitled to additional payments, this should be paid promptly and the outcome communicated in writing. If such reviews provide information that would alter the outcome for other employees (e.g by indicating an exception to an assumption adopted as part of the PRP), employers should:

- proactively review any other potentially impacted employees' entitlements
- communicate with those employees
- make further payments calculated as owing.



Case study: Effective review process

An employee lodged a request for assistance with the FWO about their payment outcome.

They'd been disappointed by a generic response from a third-party operated employee hotline and believed the fair work instrument and classification applied in calculating their repayment was wrong. This was a business for which multiple fair work instruments applied.

At the direction of the FWO, the employer engaged with the employee more effectively and reviewed their outcome. The employee was able to give additional information about the work he performed, which showed he was entitled to be paid at a higher classification and an additional payment was made.

The employer then communicated with other employees that had received a similar outcome. They outlined the additional information they'd become aware of and offered to review outcomes if employees believed the same or similar circumstances applied to them.

The employer didn't require documentary evidence to be provided where it didn't exist due to the poor records kept by the business. It also provided a direct channel for employees to communicate with the employer, after accepting feedback about the poor response from the third-party provider.

The employer proactively reported to the FWO on the outcomes from the reviews, including payments, as well as the volume and nature of employee enquiries or review requests to provide us with assurance that the issues had been addressed.

Finding former employees and dealing with outstanding payments

- ▶ Finding former employees
- ▶ Paying outstanding amounts as unclaimed monies

Finding former employees

We expect employers to take all reasonable steps to locate and make payment to all former employees who are owed entitlements.

What is reasonable will vary based on the facts and circumstances of the remediation process, including:

- the number of employees involved
- the quantum of outstanding amounts
- the employer size and resources
- steps that have already been taken.

Generally, we expect employers to make repeated attempts to locate an employee via multiple channels, for instance:

- via all known contact details from the employee's personnel files such as:
- calls and SMS to mobile telephone or emergency contacts
- emails
- post to a last known address
- attempting to contact via direct message on known social media accounts
- via relevant unions, employee networks, professional associations or registration bodies
- advertising via social media, online or print media in appropriate circumstances.

Depending on the numbers of employees remaining uncontactable and the size of the underpayment, or where an employer doesn't have sufficient up-to-date contact information, some employers have used information search facilities to locate employee address information.

Where a PRP occurs in tranches, we expect the employer to make attempts throughout the remediation process. Contact attempts may become more effective as a remediation process progresses, particularly if former employees become aware of the process via other contacts, or if amounts owed increase.

Employers are encouraged to make employee communications as clear as possible and capable of authentication via independent means (for instance by an employee accessing information from a dedicated page on the employer's website or a dedicated phone or email contact). Considering ways to generate trust in the authenticity of the communication reduces the likelihood of contact being dismissed as a potential scam or phishing attempt.



Practical tip: What we've seen work well

- ▶ Repeat and multi-channel contact attempts are more likely to result in locating and engaging former employees.
- ▶ Direct messaging via known or verified social media accounts (e.g. LinkedIn, Facebook).
- ▶ Employee networks within the organisation (e.g. former colleagues or managers who remain with the employer), unions, professional association or registration bodies.
- ▶ Social media posts and/or ads in targeted industry media publications encouraging former employees to update their details or make contact to find out if they're owed money (depending on the size of the cohort being located).
- ▶ Make payment to known employee bank account (if preferred, of a nominal amount) to determine if the account is in use. This is more likely to be effective if the employee departed within the previous 12 months.
- ▶ Make processes for confirming identification and other information simple and ideally electronic. Complex or manual claim processes for receiving funds can slow or deter employee responses.

Payment to the Commonwealth of outstanding amounts

If employers have taken reasonable steps to locate employees, we can discuss the process for making payment of residual outstanding amounts to the Commonwealth pursuant to section 559 of the FW Act, as unclaimed monies. At that point we require information about attempts to locate former employees and their information.

Payment to unclaimed monies only discharges the employer's liability for the specific amount in relation to the former employee. It does not discharge an employer's liability to address issues that are not fully compliant or not remediated correctly, or other non-compliance in respect of that former employee not addressed within the scope of the PRP.

The FWO accepts gross sums only of amounts that were payable to the employee under the FW Act or a fair work instrument, exclusive of any interest or superannuation amounts. This means that:

- no PAYG withholding amounts are to be deducted from any amounts owing
- any amounts determined as payable in a remediation program relating to entitlements under other legislation (e.g. long service leave) or workplace policies can't be included in a payment to the Commonwealth
- Employers should obtain professional advice on whether any such entitlements can be included in an amount payable to the Commonwealth.

We encourage employers to hold any interest amounts calculated as payable to employees (as set out in this guide above under 'Making payments to employees'), so that the amount can be paid to the employee if they approach the employer or if the FWO locates and pays the employee pursuant to section 559 of the FW Act.

Superannuation Guarantee amounts may be payable on amounts that were payable under the FW Act or a fair work instrument under s 559 of the FW Act. Employers should seek professional tax advice or contact the Australian Taxation Office (ATO) about their superannuation payment obligations.

Corrective measures

► Ways to avoid continuing non-compliance

Measures to avoid continued non-compliance

Once an issue is identified with sufficient clarity, the employer should prioritise immediate steps to ensure that any further underpayments or impacts to employees are prevented.

Employers should make reasonable endeavours to put interim measures in place for any compliance fixes that require significant planning or implementation, such as procurement, new systems, or third-party changes to systems not within the direct control of the employer. The aim being to prevent further underpayments rather than allowing non-compliance to continue. Measures can take the form of management or process controls, manual reconciliations and/or payment of additional compensation to mitigate the likelihood of further underpayments.

Allowing non-compliance to continue during the conduct of a remediation program, without taking appropriate steps to address it, may give rise to serious contraventions of the FW Act.

We will generally seek information about these steps, including how the PRP will be extended to address any 'mop up' period where corrective actions have been implemented after the end of the assessment period in the PRP, to ensure employees receive their entitlements.

Take appropriate and immediate steps to address and correct the cause of non-compliance.

Create a culture of compliance by implementing robust compliance measures, including fit for purpose governance arrangements, compliance controls and reporting across operational and executive levels.

Ensuring future compliance

- ▶ Ongoing assurance and audit processes
- ▶ Changes to culture and governance
- ▶ Updating systems and technology

Any PRP will have at its core a focus on:

- identifying the causes of historical (or ongoing) non-compliance
- introducing measures to correct those causes and prevent further contraventions
- rectifying any underpayments that have occurred as a result.

The most successful PRPs will look one step further, to consider what additional steps or measures can be implemented to strengthen an employer's payroll compliance more generally, and to guard against future contraventions of any nature relating to workplace relations obligations.

In this section, we share observations of steps taken by employers through their PRP to generate broader cultural, systemic or capability enhancements to create a culture of compliance and lessen their risk of costly repeats of non-compliance. Not every measure will fit every workplace. Steps taken will need to be guided by the terms of applicable structures, fair work instruments or contractual arrangements within a given workplace. However, employers considering how best to ensure future compliance should consider which of the following measures are already working well in their organisation, and which represent gaps that should be addressed.

Assurance and audit

- Conduct a broad review of applicable fair work instruments, cohorts or practices to identify and diagnose potential additional compliance risks.
- Review or create new employment contract templates aligned with award or enterprise agreement obligations, seek to standardise position descriptions where possible.
- Create a comprehensive obligations matrix to identify and assign ownership of risks, accountabilities and reporting on key workplace compliance issues, including an initial gap analysis of obligations not currently owned or managed.
- Procure appropriately qualified external advisors (or build internal capability) to conduct a broad-based review of current payroll policies, controls, systems and processes.
- Have clear terms of reference for audit, people and culture or remuneration committees to oversee payroll compliance.
- Include elements of assurance and compliance into payroll roles, including by considering a dedicated payroll compliance manager.
- Introduce a program of regular reconciliations and targeted or risk-based compliance monitoring or internal audits. Confirm applicable rules or obligations, extract the relevant data, calculate expected outputs and reconcile with sample cohort. This will enable swift remediation of any shortfalls and interventions to address root causes.
- Introduce metrics to measure and monitor compliance checks – ensure trends in employee issues and pay queries are reported on, analysed and actioned.
- Embed assurance controls and reporting on testing and exceptions. Ensure multiple lines of defence.
- Support annualised salary reconciliation processes by:

- ensuring appropriately broad capture and record-keeping of hours worked
- generating weekly, fortnightly or monthly 'pay comparison' reporting based on time and attendance data, comparing the amount received by an employee during that period to the amount the employee would have received had they been paid in accordance with the pay rules for the equivalent waged profile under the applicable fair work instrument
- considering adoption of common start date for annual reconciliations.

Culture and governance

- Address any disconnect between areas of the business responsible for bargaining terms and conditions (e.g. industrial relations teams), and those responsible for implementing the terms of the bargain (e.g. human resources teams or payroll functions). Particularly where each area is managed by a different senior executive or through distinct lines of accountability.
- Review and validate business rules and interpretations of applicable fair work instruments at the time of coding them into the payroll system, particularly for new enterprise agreements or entitlements, and for new roles or changes to roles.
- Ensure adequate lines of sight from board or executive to the operational environment.
- Leaders should speak to the people who work in and with the business about attitudes to compliance, accepted ways of doing things or poor practices that might exist in parts of the business, and reset them.
- Put workplace relations compliance on the agenda for the Board or relevant committees.
- Ensure an executive sponsor has clear accountability for workplace relations obligations.
- Introduce new teams or roles dedicated to ensuring compliance with obligations, including teams dedicated to:
 - payroll assurance and compliance, with a central repository of people processes, managing assurance across operational functions and providing guidance and advice on ways to rectify operational compliance issues
 - supporting strategic programs of work to ensure compliance.
- Champion compliance initiatives and incentivise a 'speak-up' culture for emerging risks or issues, guard against a culture which discourages employees or senior officers from raising risks or problems.
- Make clear the expectation of compliance – look for problems in branches, stores, outlets, networks. Are local managers setting the same expectations for compliance, or driving non-compliance? Are middle-managers operating with tight labour budgets telling staff not to record their hours accurately at clock-on and clock-off? How would you know if they are?
- Ensure employees can perform their duties within allocated hours of work, to reduce likelihood of unauthorised additional hours.
- Embed employee voice and collaboration into workplace compliance – ensure you have channels for active dialogue with employees and their representatives to gain their observations or early warnings about concerning trends or potential compliance issues.
- Monitor information from union or consultative committees to understand what is being said about compliance and corporate culture.
- Put in place processes for employees to make anonymous reports that are visible to senior management.

- Pay close attention to employee queries or complaints to the HR or payroll team, look for trends in isolated pay queries to see if they indicate a systemic issue affecting broader employee cohorts.

Systems and technology

- Review existing payroll or human resources systems to identify if they remain fit for purpose. Aim for uniform, standardised, centralised and integrated time and attendance systems, limiting reliance on physical records.
- If retaining existing systems, target your review to reconfiguring or eliminating high-risk operations, such as eliminating or minimising manual interventions or claims-based processes.
- Ensure processes for capturing and actioning entitlements arising outside of an award or enterprise agreement, such as undertakings given in support of the agreement approval process.
- Revisit quality assurance processes on systems generally and interrogate system configurations for high-risk compliance issues (such as leave being incorrectly deducted on public holidays, particularly in seven-day working week environments).
- Consider opportunities for automation of entitlements to reduce the risk of omissions and human error in entitlement calculations, such as automatic application of higher duties allowances when specified cohorts perform higher duties.
- Use automation to flag forward-scheduled roster patterns that will attract higher payments under the relevant award or agreement, for example excess hours of work, insufficient days off or short breaks between shifts that may trigger loadings, penalties or higher rates of pay for subsequent shifts. This provides managers an opportunity to proactively adjust rosters so that they align with the work patterns that employee salaries have been designed to compensate.
- Consider deploying 'detective controls' to aid in assurance processes, for example automated reporting or data analytics to detect new or emerging risks. Some automated checks could include:
 - employees recording significantly more than their ordinary weekly hours
 - employees recording identical numbers of hours worked
 - employees consistently working outside their span of hours
 - employees claiming allowances (or conversely, not claiming allowances) in a manner not expected based on their role.

People and process

- Identify areas of additional or refreshed education, training or guidance for payroll staff, people leaders, line managers, employees.
- Review resourcing, capability and training of critical compliance functions including payroll, audit, employer relations and human relations.
- Review, update and reinforce payroll processes to promote compliance. Implement continuous review processes for wage and benefits compliance.
- Clearly document processes and expectations, including standard operating procedures, internal guidance and other procedural documentation for payroll processes and controls.
- Dedicate effort to simplifying fair work instruments and entitlements, complex contractual arrangements etc. This could include fixing problematic clauses in new enterprise

agreements, consolidating the number of enterprise agreements with different entitlements, reducing the number of employing entities or employment types offered.

- Ensure processes are in place to review rates of pay to ensure they continue to meet relevant minimum entitlements, and that buffers remain sufficient to capture all entitlements.
- Create a detailed map of roles aligned to award or agreement classifications as a reference for allocation of classifications to new starters or employees changing roles.
- Send time sheet confirmations to all employees to confirm clocking data, where staff are required to clock in and out (regardless of whether they are waged or salaried employees).

Reporting an issue to us

When to notify

Isolated payroll errors resulting in underpayments over a short period of time (up to 12 months) do not need to be actively reported to the FWO, as long as:

- employees are appropriately informed of the underpayment
- employees are back paid in full as soon as possible
- changes are implemented to ensure the error does not happen again.

For broader and/or potential systemic non-compliance, we encourage employers to report at an early stage, even if all facts and details are not yet available or understood. This is beneficial in:

- enabling us to discuss the approach to the PRP
- sharing of feedback and information before the PRP is completed
- reducing potential for expensive recalculations or further remediation payments to address an area of concern raised by the FWO
- increasing the confidence of employees and stakeholders in the conduct of the PRP.

We acknowledge that in notifying us early, employers may not yet have fully identified or assessed all issues. This isn't a cause for concern provided subsequent and ongoing communication about the progress of the PRP is transparent and forthcoming. In these circumstances we discuss with the employer our preferred approach to receiving information as it becomes available. This may include a period of compliance monitoring that enables our assurance process to reflect the progress of the PRP if we're satisfied with the approach and ongoing disclosure and cooperation.

Often, we'll request a series of milestones or checkpoints by which the employer anticipates being able to update us about steps in the PRP, such as completing of scoping, information gathering, compilation of business rules or engagement of third-party advisors.

Where an employer notifies us immediately prior to communicating outcomes of the PRP or making payments to employees, they should be aware that we prioritise matters based on our operational requirements and regulatory priorities. Our timeframes for assessing information provided by an employer may not align with the employer's PRP timeframes. Accordingly, employers should not await endorsement or approval by the FWO to take any step in its remediation program, such as communicating with employees or making rectification payments.

If we become aware of potential non-compliance via other channels prior to notification by the employer, and in the absence of a satisfactory explanation or basis for the timing, the employer's

subsequent notification generally won't be treated as an early or voluntary self-report of non-compliance.

How to notify

All notifications of actual or potential non-compliance should be directed by email to corporateassurance@fwo.gov.au

Any notifications directed via other avenues will be redirected internally, so employers are requested to send notifications to this address.

Notifications should include information set out in our Compliance and Enforcement Policy, to the extent that the information is known at the time of reporting, including:

- details of the non-compliance
- what led to or contributed to it
- actions taken to assess and rectify it (including back payments and interest)
- details of corrective measures implemented to prevent further non-compliance (including enhancements to governance arrangements, systems or process change and management training)
- confirmation of notification to the ATO (if there will be likely tax and superannuation implications). Notifications to the ATO can be made via [Voluntary disclosures in the approved form](#)
- confirmation of notification to any other third parties such as a union.

What to expect after notifying us

The assurance process

A primary focus of our investigation process is seeking to obtain assurance that steps taken by the employer:

- are likely to result in employees receiving accurately calculated entitlements in a timely manner
- have identified and addressed the causes of non-compliance
- have implemented appropriate governance and compliance measures to ensure current and future compliance, to reduce the likelihood of any ongoing, repeat, or new non-compliance issues.

Obtaining assurance allows us to:

- be satisfied as to compliance, as well as the need for general or specific deterrence
- consider which enforcement outcome may be appropriate in the public interest.

Our assurance process is evidence-based and tailored in each matter and may occur as part of, or in parallel with, investigative steps. For example, whilst we engage with an employer to obtain information about the PRP we may also gather information or records from employees or other parties. We will expect the employer to provide information about the root causes of issues identified so we can consider if remediation steps properly address those causes and to inform us as to whether enforcement action would be appropriate.

The FWO generally won't accept general statements of assurance about a PRP in the absence of a willingness to provide appropriate supporting evidence. The extent of our requests for detailed calculations and records may be reduced if we're satisfied with the information provided by an employer and their level of cooperation with our enquiries.

We generally provide the employer with the opportunity to provide information voluntarily to assist the assurance process. We will use appropriate statutory powers to compulsorily obtain information to conduct our own assurance review process and investigation if information isn't provided voluntarily, or if at the FWO's discretion, there's a reason for proceeding directly to use of statutory powers. Generally, this approach is likely to involve more resource investment for both the FWO and the employer.

The FWO is more likely to use statutory powers to progress an investigation if employers are uncooperative or not timely in relation to requests for information.

Information we are likely to request

We seek information to help us understand the adequacy of the PRP approach, including:

- ▶ project plans, or other documents describing the project's scope, milestones and anticipated timeframes, including where changes occur during the PRP
- ▶ information demonstrating the root cause of issues
- ▶ specific sources of data and records relied upon as inputs to calculate entitlements
- ▶ approach to addressing any data quality issues and data gaps for employees, particularly for incomplete roster and/or time and attendance data of actual work performed
- ▶ methodology used to perform calculations of entitlements, including:
 - any rules or interpretations of relevant fair work instruments
 - the terms of the fair work instrument(s) applied in the assessment
 - any assumptions and the rationale or reasons for the assumptions being applied
- ▶ how the employer has allocated payments made to employees in the review period to entitlements calculated, including if any over-award or other payments to entitlements have been applied (either over a period or by applying different payments in satisfaction of different payments)
- where the employer has applied offsetting of payments, the basis for the approach including whether contractual terms in any employment agreement is being relied upon and evidence of the relevant term(s)
- ▶ details of employee communications, employer channels for enquiries on the program and any trends in employee enquiries or disputes
- ▶ details of consultation processes with employees, unions and other stakeholders, including if consultation has occurred about the remediation methodology and approach
- ▶ regular updates about remediation repayments and amounts outstanding, that separately identify the quantum of the underpayment, interest and superannuation components and number of employees paid, or yet to be paid
- ▶ information showing steps taken or planned to address causes, including changes to systems, processes, resourcing, training, governance, consultation and communications.

If we're not assured about the correct application of fair work instruments to employee data based on information provided, we may seek to review some, or all the employer's calculation outputs or the underlying methodology or code.

We will conduct our own enquiries with employees, unions or other third parties as necessary to verify or validate the employer's approach and corrective measures if we consider it appropriate to do so.

The benefits of assurance and cooperation

A critical consideration and driver in the assurance process is the employer's level of cooperation with the FWO's investigation, as this can have considerable impact on the:

- information available to us to conduct and complete our assurance review
- the need for deterrence and the public interest in pursuing a more intensive investigation and/or enforcement action.

Where we can obtain a high level of assurance, this may:

- indicate that a lower level of investment in investigation is required, or enable investigation resources to be focussed on specific areas, issues or conduct
- indicate that enforcement action is not appropriate in line with the FWO's Compliance and Enforcement Policy.

Employers can assist us by providing relevant information at an early stage or as it becomes available, to facilitate the assurance process occurring without (or reducing) the need for the use of statutory compliance powers. The features of this assistance include:

- thorough, cooperative and timely responses to FWO requests for information to help us to understand the issues and the employer's approach
- frank and fulsome explanation of the cause(s) of the non-compliance
- willingness to engage in good faith to define and resolve issues
- facilitating access to relevant people and information to sufficiently understand the employer's approach and processes.

This assistance is given considerable weight in our assessment of the level of investigation and enforcement action required in the circumstances the matter.

Large-scale remediation programs may be complex and involve significant data and resource investment for employers, both internally and through the engagement of expert external advisors and project teams.

Usually, the most efficient use of public resources is to validate a comprehensive calculation model rather than replicate the underlying work by obtaining all the records and data, developing a calculation model and performing the calculations.

Where we can verify the accuracy of this work through an assurance review, this ensures that taxpayers do not bear the cost of calculating employee entitlements. This is the responsibility of the employer.

If we are unable to obtain assurance on relevant issues, this may indicate:

- that a higher level of investment in investigation is required
- where investigation resources and compliance powers need to be focussed, to address the lower assurance level
- that enforcement action is appropriate in line with our Compliance and Enforcement Policy to ensure compliance and deterrence.

It's commonly accepted that an employer's posture, and specifically, their level of cooperation during regulatory investigations and enforcement action, is a relevant factor in determining the need for deterrence. Other factors are not addressed in this section but are discussed in our Compliance and Enforcement Policy at fairwork.gov.au/compliance-and-enforcement

In summary, the key benefits of cooperation include:

- enabling efforts to efficiently focus on any areas of dispute or contention, where these can be identified and narrowed at an early stage
- the acceptance of an employer's calculations, subject to our assurance review, rather than the FWO conducting separate calculations
- resolution without recourse to statutory compliance powers or enforcement tools
- recognition of cooperation in determining the appropriate enforcement tool if enforcement is deemed appropriate.

What happens when employees approach the FWO during a PRP

We often receive requests for assistance from employees while employers are undertaking a PRP. Common, and often avoidable, reasons for employees seeking our assistance include:

- ineffective communication
- delays or failures to respond to employee questions or requests for information using employer channels
- inability to access their own employee records, including where the employer declines to provide these or doesn't adequately explain if/why these do not exist.

If we receive a request for assistance related to a broader remediation process, we will consider the appropriate approach on a case-by-case basis. We may, subject to the employee's consent:

- give information to the employer about the request and ask them to take steps to resolve it
- assist the employee with directing the query to the employer's specific employee pathways for the remediation process
- seek information about the steps taken by the employer to resolve the query
- investigate the circumstances of the request and seek to resolve the request, including through compliance or enforcement action if appropriate.

There have been instances of employers refusing to engage with employees or their representatives about issues, underpayments, or PRPs, on the basis that they've self-reported to the FWO. We impose no such restriction on employers. To the contrary, we expect employers to engage meaningfully with employees and their representatives throughout a PRP as set out in this guide, irrespective of their engagement with us. The FWO would generally consider any misrepresentation of our position in respect of these issues to be a matter of significant concern.

Providing information to us

How we approach requests for information about remediation programs

The nature and extent of information requests will vary in each investigation, depending on:

- the scope and complexity of issues
- the degree to which the employer provides information on a voluntary basis.

We understand that large scale remediations will frequently involve significant data sets and high volumes of documentary evidence, the production of which can involve cost to the employer and the FWO. Whilst we will request large volume data sets or records if necessary, we also seek to streamline requests for the benefit of both parties where this will not impact the FWO's performance of its functions.

We obtain information necessary to perform our functions on a case-by-case basis. We may:

- Communicate to confirm if information will be provided voluntarily pursuant to a formal request for information or via use of statutory powers (or a combination of these). The approach adopted remains entirely at the FWO's discretion.
- Discuss in general terms the nature and extent of information sought, so that the party can raise questions or concerns and potentially resolve them prior to issuing the request or statutory notice
- Seek information about systems, processes or other relevant information to enable us to tailor or scope a request or reduce the potential for unanticipated/unintended complexity in the search and production process. This may include a request for our staff to meet with the relevant advisors or technical experts to enable us to understand available data sources and formats, to facilitate requests for information in an existing form.
- Discuss anticipated timeframes for search and production and the basis for these, if this informs our view regarding the timeframes for voluntary or compulsive production. This may include production of material in tranches.

In large scale matters involving significant document production, we will generally provide employers with Document Production Guidelines and liaise with technical teams about the form and platform for production, such as via e-discovery platforms.

Timeframes and requesting extensions

We endeavour to request or require production of information within reasonable timeframes, which consider:

- the nature and extent of the request
- available resources and relevant circumstances of the employer or third party, particularly where this may impact what is a 'reasonable' time for compliance with a statutory notice
- information provided to us by the party about the requirements of the request
- the efficient and effective performance of FWO's functions.

Concerns about the timeframe for provision of information should be raised with us at the earliest possible opportunity. If an employer wishes to request an extension, in the first instance or after a

request has been issued, they should provide relevant information and/or evidence to us to assist us to consider the request.

We expect employers will allocate adequate resources to prioritise cooperating with our investigation and ongoing PRP steps. Failure to meet timeframes of a voluntary request for information or a statutory notice without a reasonable excuse, including unilateral or late changes to production timeframes, may indicate a lack of (or reduced) cooperation by the employer.

The FWO is less likely to offer the opportunity to produce materials voluntarily and more likely to use statutory powers if timeframes have not previously been met (without reasonable basis), due to the impact this may have on efficient performance of our functions.

We may also proceed directly to use of statutory powers if the employer has confirmed it intends to make a claim of LPP. This can facilitate efficient dealing with the LPP claim for both parties.

Requests for confidentiality

We acknowledge that material produced to us by employers may be commercially sensitive or confidential.

Confidentiality or commercial sensitivity is not a lawful basis for declining to produce records in response to the exercise of our compliance powers and is not regarded as a 'reasonable excuse' within the meaning of FW Act.

Information or records provided to us voluntarily, or under a compulsive power, will be used to further the FWO's statutory functions under the FW Act. The use and disclosure of information held by the FWO is handled in accordance with Commonwealth laws, in particular section 718 of the FW Act.

There are also various mechanisms by which we may be required to produce documents or records containing information or to refer to its contents. We comply with legal requirements regarding consultation with a producing party, for instance in relation to Freedom of Information requests.

Where information is regarded by the employer as being commercially sensitive or confidential, this can be identified to the FWO. We will consider an employer's position about information being commercially sensitive or confidential when exercising statutory functions and powers, including legal provisions that authorise or compel the disclosure of information.

The FWO does not otherwise agree to limitations on the disclosure of information provided to it. For more information about how we handle information, see [How we handle information](#) below.

For entities listed on the Australian Stock Exchange, we are aware of the disclosure obligations contained in the ASX Listing Rules. Any information provided to us that is potentially market sensitive is treated accordingly. We take additional steps to limit access to information on a strictly need-to-know basis within the agency and ensure that any potential conflicts of interest are identified prior to, and when, communicating information internally.

Claims of legal professional privilege

We recognise the lawful and legitimate right to not produce information that is covered by a genuine claim of legal professional privilege. Where claims of legal professional privilege arise in the context of responding to requests for information or statutory notices, we will cooperate in a reasonable way to resolve or narrow matters in dispute.

Our approach to claims of legal professional privilege over documents or records relevant to an investigation is set out in our Legal Professional Privilege Policy.¹

We encourage employers to consider the balance between asserting their legal right not to produce information subject to legal professional privilege, with opportunities to:

- streamline the assurance process and investigation, particularly where the employer:
 - asserts to the FWO that the PRP and calculations are sound and should be accepted as accurate
 - states an intent publicly or to the FWO that it welcomes our oversight and will fully cooperate
- reduce the burden on both the employer and the FWO associated with the production of high-volume primary source employee records, and the cost to taxpayers of replicating calculation models to determine if the employer's model is in fact accurate.

Encrypted emails and documents

The FWO has information technology security requirements in place that prevent all encrypted or password protected information from direct delivery to recipients until a security assessment of the communication is undertaken. Any such email communications (including any attachments) will be blocked and diverted upon receipt, and therefore where possible they should not be encrypted, or password protected.

If an employer's or third party's security requirements require encryption or password protection on emails and attachments sent externally, a separate email containing the password should be sent immediately following the sending of the relevant email. This will expedite the security assessment of emails.

If employers hold a concern about the security of information in transit, they can discuss with us other potential methods for the provision of information.

How we handle information disclosed to us

How we manage information and data

The FWO's [Privacy Policy](#) explains how we collect, hold, use and disclose personal information received, including employee information, to carry out our functions and activities.

Requirements relating to our retention of records are detailed in the National Archives of Australia Records Authority 2020/00426412. Records documenting investigations into alleged breaches of workplace relations laws are generally destroyed seven years after the last action.

We are subject to the Commonwealth Protective Security Policy Framework and the Australian Signals Directorate's Information Security Manual in relation to security of official information. Our security, technology, personnel management and information management practices and systems are designed to ensure the protection and use of information and records in accordance with the Protective Security Policy Framework and Information Security Manual. This includes that:

¹ [FWO Legal Professional Privilege Policy](#)

- all data and information collected by the FWO is stored securely in Australia and only accessible by FWO staff members or any contracted advisors on a need-to-know basis
- all data and information systems are classified and protected in accordance with Commonwealth requirements
- all personnel engaged by the FWO are subject to security vetting and undergo regular training in their obligations as APS personnel in protecting Commonwealth records.

Media comment by FWO

If we receive a media enquiry about a particular matter, we will generally confirm whether an investigation is underway. In general, we do not otherwise comment on matters under investigation.²

Using information in this guide

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² [FWO Media Policy](#)




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We are committed to providing practical advice, education and assistance that can be relied upon based on the information you give to us at the time as set out in our [Customer service charter](#). We update our information regularly. We take care to ensure that it is accurate and incorporates changes to information as soon as they come into effect.

Although we take care to make changes as soon as they come into effect, there may sometimes be a delay. For example, between when a change takes effect and when the information in our guidance material is updated. Despite the level of care we take, this means that we can't guarantee the accuracy, reliability, currency or completeness of the information available in this guide.

The information in this guide is general in nature. You may wish to get independent legal advice from:

- a union
- an employer association
- a workplace relations professional, or
- a lawyer.

Find out about accessing legal advice at [Legal help](#).

Stay informed

[Subscribe for email updates](#) to stay up to date and be notified about changes to workplace laws.

Links and resources

- Fair Work Ombudsman website www.fairwork.gov.au
- Compliance and Enforcement Policy at fairwork.gov.au/compliance-and-enforcement
- Register My account for tailored information and priority service at fairwork.gov.au/register
- Pay and Conditions Tool (PACT) at fairwork.gov.au/pact
- Templates, guides and fact sheets at fairwork.gov.au/resources
- Online learning centre at fairwork.gov.au/learning
- Information for franchises at fairwork.gov.au/franchises
- Library of detailed knowledge articles at library.fairwork.gov.au
- Resolving workplace problems at fairwork.gov.au/workplace-problems
- Upcoming webinars at fairwork.gov.au/webinars
- Language help at fairwork.gov.au/languages
- Small Business Showcase at fairwork.gov.au/smallbusiness
- Employer Advisory Service via fairwork.gov.au/eas