



# NINE MISTAKES ALL EMPLOYERS SHOULD AVOID

A guide to safeguarding  
your business





Everyone looks forward to a public holiday. However, ignorance of public holiday entitlements – which form part of the National Employment Standards (NES) – can result in a lawsuit for employers.

Whether it's not paying enough on public holidays, or not knowing what employees are entitled to, here you'll find the most common employer mistakes and how to avoid them.

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Find the [list of public holidays](#) in your state or territory.



### **Mistake 1: Forcing an employee to work on a public holiday**

An employer may not be entitled to direct employees to work on public holidays. The type of contract you have with your employees will determine whether or not you can enforce leave.

There are different entitlements for both you and the employee based on the contractual agreement that you have in place with them – it could be based on an award, an enterprise contract or an outright contract.

As Joe Murphy, Director, Workplace Relations of Australian Business Lawyers & Advisors (ABLA) explains, a modern award is a legally-binding instrument that determines the minimum arrangements you have with your employee.

That means you need to check your governing award or contract to deem what entitlements staff can access.

[Awards and enterprise contracts](#) are legal documents outlining the minimum entitlements your employees receive for wages and conditions of employment. Some of these entitlements include hours of employment, leave, pay rates, consultation or penalty rates like overtime or casual loadings.





### **Mistake 2: Thinking you don't need to pay penalty rates because you already pay above the required award rates**

Don't assume that because you are paying above-award hourly rates you don't have to pay penalty rates that align with the award. Employers often make this mistake, advises Murphy.

How the over-award payments are defined in your contracts is important. If you are paying staff above the award rate on purpose and plan to offset the amount of overpayment against penalty rates you would otherwise pay (on public holidays, for example), you need to safeguard your business by including a clause in the employment contract outlining how the overpayment offsets any penalty rate payments.

"You need to have the employee's agreement for the contract to be binding – you can't just force it on them," Murphy says.

"Where you do implement new contracts, it is important that you do so in a way that ensures not only the contract is binding, but that it doesn't sour the relationship you have with your employees."

### **Mistake 3: Failing to update employee contracts**

It's common for employment contracts to collect dust once they've been signed by the employee and employer. Frequently, the only time the contract is seen is when an issue arises between the employee and employer. But contracts have a nominal expiry date, meaning that the pay the employer agreed to is strictly bound, even after the contract expires. Failing to renew your contract will open you up to potential liability.

Well-written employment contracts help the employee and employer know what is expected from them and what they're entitled to. It's vital you review your contracts every few years. Unless someone does something to try and terminate that contract, or replace it after that date, the contract will continue on forever and remain binding for both yourself and your employee.

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### Mistake 4: Underpaying employees

You may not be aware that you're paying staff incorrectly. However, once you find yourself facing an underpayment claim, it can go to the Fair Work Ombudsman. The Ombudsman will investigate and may send you compliance notices requesting payments to rectify the error, plus a fine for a breach in complying with your obligations as an employer to pay the right rate of pay to employees.

"If you have rectified the error because you've understood that it was wrong and you've paid the short-fall in payments quickly, then that will mitigate against penalties," says Murphy.

According to Fair Work, employees have [up to six years](#) to make a claim in respect to underpayment.

For that reason, employers are [obliged](#) to maintain payroll records, and keep them for a period of seven years.

"It's very important to have the right wording in your contract – pay the amount under the contract and be very specific about what that payment is for."

### Mistake 5: Accidentally overpaying your employees

Perhaps there's been a clerical error, incorrect data has been entered into your payroll system or perhaps a misinterpretation of the industrial instrument has occurred (e.g. the award, contract, enterprise agreement).

*If you've overpaid an employee  
you can't deduct money later.*

Either way, if you've overpaid an employee you can't later deduct money per week from their pay for a certain number of weeks. The Fair Work Act prohibits deductions. So just check the payment status of employees with your workplace advisor for dollars-and-cents clarity on whether you're paying above the award rate, or below (and therefore underpaying).

### Mistake 6: Letting staff go because they've had a 'big night out'

Over a public holiday weekend, you often have a higher risk of employees turning up to work after a big night out, according to Murphy. [For example, a VicHealth study](#) found significant increases in alcohol-related incidents in the lead up to the majority of public holidays, particularly Good Friday, Australia Day, ANZAC Day, the days before New Year's Day as well as the last working day before Christmas.

"There are some increased risks of employees turning up to work in circumstances where they've been out the night before, especially if you have a young, casual workforce with an active social life. This increases health and safety risks with employees who are enjoying the holiday period (alcohol and illicit substances)," says Murphy.

The absence of a testing facility makes it hard to determine whether someone has been affected by drugs or alcohol. If you don't have solid evidence it's difficult to take disciplinary action like dismissal.

According to [Workplace OHS](#), implementing drug and alcohol tests in the workplace may result in more problems than benefits for employees. Rather, they suggest investing in management training and systems to create a safe and high-performing environment.

### Mistake 7: Failing to consider a reasonable refusal from an employee to work on public holidays

If an employee is asked to work on a public holiday, but requests not to work, then an employer needs to consider whether their refusal is reasonable, take that into account and work towards a mutual agreement.

Perhaps an employee has family obligations due to child care centres being closed on public holidays. Another scenario might be if an employee refuses to work on Easter because of their religious practices (e.g. "I have to go to church"), says Murphy.

"One of the base provisions around public holidays is reasonable refusal – the employer has to consider whether or not that is reasonable and determine whether or not they can accommodate that."

Equally, as an employer you cannot simply roster on all your non-religious staff on a religious holiday, for example – then you would be making a decision based on religion which is discriminatory.

Employers should seek advice to ensure they have the appropriate industrial arrangements in place.

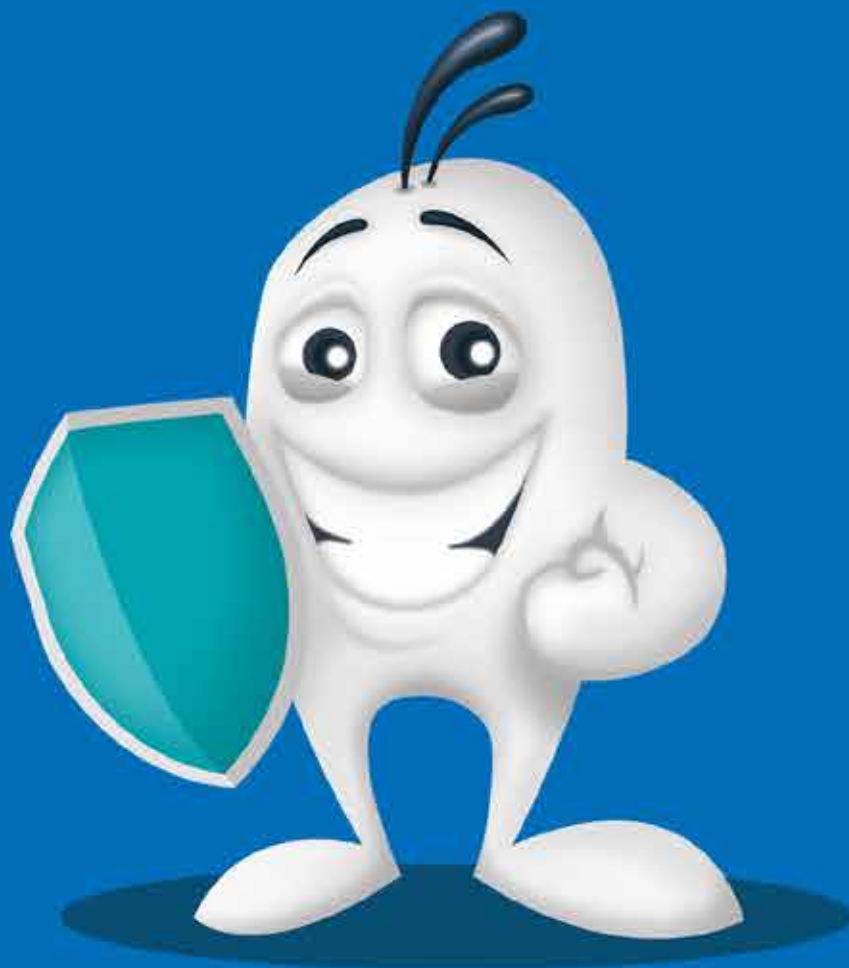




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### Mistake 8: Incorrect leave payouts

Many employers aren't aware of long service and superannuation entitlements, and find themselves in trouble as a result.

Long service leave differs due to:

- State
- Accrual amount
- Reason for termination

Tracy Angwin, CEO, Australian Payroll Association stated in a recent SmartCompany webinar:

"Small to medium businesses don't understand that long service leave (LSL) applies to them. They can get a shock when they see what their liabilities are when someone has worked for them for – normally – more than 10 years," says Angwin.

"Depending on the reason for termination, long service leave may have to be paid out before 10 years," she says.

The main issue with LSL is that it is always measured in weeks and not in days or hours.

"If you've an employee who starts part-time, goes to full-time, then perhaps takes time off for parental leave, and then returns as part-time, [the employee] might have had 10 years of working for you, but that LSL is based on what is considered a week on the time of taking it. If you work nine years part time, and the tenth year full time, those weeks are actually at your full time rate," she says.

Employers also need to be aware that all eight states and territories have different LSL rules.

"When you're looking at your LSL liability, be aware of what state legislation you're using as this will form the basis of your accrual amount and what your obligations are to pay up that leave prior to the LSL being an entitlement. Check what the termination reason is and if there is any implications on LSL based on termination reasons."



Mistake 9: Using a payment system that calculates the wrong pay cycle per modern award entitlement

It’s an easy and harmless mistake to make, but some employers don’t realise that some of the awards that apply to their employees have restrictive payment arrangements. For example, some awards may have provisions that entitle employees to receive their pay every week or fortnight (known as a pay cycle).

Some businesses make the mistake of investing in HR systems and processes that only enable monthly pay cycles without having the flexibility to change the pay cycle. This may sound rudimentary but if you are not paying staff by the pay cycle they are entitled to, this is considered a breach. If an employee was to complain, or the Fair Work Ombudsman conducted an investigation, they would fine the organisation for the breach itself plus the breach made per employee.

Penalties can still apply to businesses even when there is no monetary loss

“For a company, those penalties can cost up to \$54,000 per breach,” says ABLA Director, Joe Murphy. “Large businesses have payroll systems that are geared towards a monthly payroll and cannot adjust them in any way. Therefore they’re stuck with a monthly payroll and every month they’re in risk of compounding this breach,” he says.

“The breach is the mistake itself times the number of employees the breach impacts. If an organisation has four employees who are covered by the award, the company will be penalised four times over.”

Take this example: If you have five staff who are supposed to be paid fortnightly and you are paying them monthly, you would be fined \$54,000 for the breach, then \$54,000 for EACH employee who was affected – so:

Cost of the breach itself	\$54,000 x 1 = \$54,000
Cost of each staff member impacted by the breach	\$54,000 x 5 = \$270,000
Total cost of the breach to your business	= \$324,000

“Penalties can still apply to businesses even when there is no monetary loss. Judges can issue penalties for failure to consult (as there are consultation requirements) when making an employee redundant or transferring an employee (Queensland Rail was fined \$660,000 for failing to consult their employees for redundancies and transfers),” says Murphy.

Put simply, the best way to avoid penalties is to comply!

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Now that you're aware of the most common mistakes employers make it's time to start thinking about the best ways to safeguard your business. Getting the fundamentals right is critical to ensuring peace of mind when managing staff.

If you need help seeking expert advice on employment relations with no strings attached, access the **Free Employer Workplace Advice Line** with one complimentary phone call per caller on **1300 496 955**. The team behind the Workplace Advice Line has more than 60 years' experience advising businesses on workplace issues. The team is backed by Australian Business Lawyers & Advisors (ABLA), Workplace Assured's legal partner, who recently won Australia's **Workplace Relations and Employment Team of the Year** at the Australian Law Awards and Finalist for **Employment Law Specialist Firm of the Year 2017**.

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