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Job Watch Inc is...

an independent, not for profit, employment rights legal centre. It provides a free, confidential telephone information and referral service and other assistance to Victorian workers

HOURS:

Mon - Friday
9.00am-5.00pm
 (closed Tuesday
 12.00noon - 2.00pm)

Metro
9662 1933
 Rural
1800 331 617

If your employer has deducted money from your wages, paid you with something other than money or unreasonably requires you to spend part of your wages in a particular way, you may have grounds to file a complaint for unlawful payment of wages or an unlawful deduction.

This infosheet is designed to help you identify your rights and to take the most appropriate action under the unlawful deduction provisions of the *Fair Work Act 2009* ('the Act').

The Act came into operation on 1 July 2009. If there is already an existing agreement allowing your employer to deduct money from your wages, for example in your employment contract, this agreement must comply with the Act.

What are wages?

Wages include:

- allowances
- overtime payments
- penalty rates
- leave payments
- incentive bonuses and loadings.

However wages do not include cars or other goods and services that may be included in a remuneration package.

How must wages be paid?

Wages must be paid in money. They must not be paid in goods or services. For example, a baker cannot pay his staff in bread.

Wages must be paid in cash, by cheque or money order, Electronic Funds Transfer (EFT) or a method authorised under your modern award or enterprise agreement. If an applicable modern award or enterprise agreement specifies a particular payment method, your employer must pay your wages by that method.

Wages must be paid in full on a regular weekly, fortnightly or monthly basis.

Can my employer deduct from my wages?

Your employer may make a deduction from your wages if:

- You have given your employer written authorisation to make the deduction and the deduction is principally for your benefit; or
- Your applicable modern award or enterprise agreement allows your employer to make the deduction or you have authorised the deduction in accordance with that award/agreement – so

long as the deduction is reasonable (see below); or

- A law, Court order or a Fair Work Australia order authorises your employer to make the deduction.

For example, modern awards may allow your employer to deduct wages and entitlements where you haven't given the required amount of notice of resignation.

Your employer can only lawfully deduct money from your wages if the deduction is:

- **for your benefit** and you have given a **written authority**; or
- allowed under your **modern award or enterprise agreement** and it is **reasonable**; or
- authorised by a **law, Court order or Fair Work Australia order**

What are reasonable deductions?

A deduction is considered to be **reasonable** if:

- Goods or services have been provided to you in the ordinary course of your employer's business and your employer provides the goods or services to the general public on the same or not more favourable terms and conditions.

For example:

- ◇ A deduction for a loan repayment made by your employer that is a

financial institution; or

- ◇ the deduction of health insurance fees made by an employer that is a health fund; and
- ◇ The amount of the deduction is not more than the general public would pay for the same or similar services.

- It is for the purpose of recovering costs directly incurred by your employer as a

result of your voluntary private use of your employer's property (whether authorised or not).

For example:

- ◇ The cost of items purchased on your employer's credit card for your personal use;
- ◇ The cost of your personal calls on your employer's phone; or
- ◇ The cost of petrol purchased for your private use of a work car.

Unreasonable payments and deductions for your employer's benefit

A term of a modern award, enterprise agreement or an employment contract has **no effect** if it:

- Permits your employer to deduct an amount from your wages or requires you to make a payment to your employer or someone else if the deduction/ payment is for your

employer's benefit and it is unreasonable; or

- Requires you to spend any part of your wages and the requirement is unreasonable.

For example:

- ◇ If your employer is a clothing shop, it could be unreasonable for

your contract of employment to state that you must spend a certain amount of your wages on clothing from your employer's shop; or

- You are under 18 and the deduction or payment is not agreed to in writing by your parent or guardian.

Unreasonable requirements to spend money

Your employer **must not** require you to **spend** any part of your wages if the requirement is unreasonable.

Authorisations

Written Authorisations

A written authorisation to allow a deduction from your wages may be made at the time of the deduction or it may be a part of your employment contract.

Your written authorisation must state how much money is to be deducted. It is also a good idea that

your authorisation includes the following information:

- Whether the deduction is a single one-off deduction or if it will happen more than once;
- Who will receive the deduction; and

- The reason for the deduction.

Once you have agreed to the deduction in writing, your employer will be allowed to make the specified deduction/s from your wages.

What if my employer forces me to sign a written Authorisation

If you feel that your employer has placed undue pressure or influence on you to agree or not to agree to a deduction from your wages, (e.g. your employer has forced you

to sign an authorisation allowing a deduction under threat of dismissal or demotion), the authorisation may be deemed as ineffective by a Court so you can still make a claim under the

Act (see 'Making a claim' on page 4).

What if I am dismissed?

Your employer is prohibited from terminating or threatening to terminate your employment because you have exercised or tried to exercise your rights under the Act. If this occurs you may also be able to lodge a **General Protections Dispute** claim (*Please refer to JobWatch's other infosheets for more information about these claims*) or an **Unfair Dismissal** claim or an **Employment Activity Discrimination** claim.

Also note that you only have:

- **14 days** from the date that you are dismissed to make an Unfair Dismissal claim;
- **60 days** to make a General Protections

Dispute - termination claim; and

- **1 year** to make an Employment Activity Discrimination claim.

Alternatively, if you are concerned that you may be dismissed or treated unfavourably by your employer if you send a demand letter to your employer for repayment of the amount deducted or if you make a claim under the Act, you may consider delaying your claim, for example, until you get a new job. This is because you have **6 years** of the unauthorised deductions or unlawful payments occurring to file a claim in Court.

Nevertheless, the longer you wait, the more difficult it may become to

recover any money. For example, your employer may go out of business and cease to exist meaning you may not be able to recover any money at all.

You may also have a claim for underpayment or non-payment of your relevant wage or entitlements, including if your wages have not been paid in full. If so, you can file a claim with the **Fair Work Ombudsman (FWO)** to recover your unpaid wages (see 'Where to get help' on page 5).

Please note there is a 6 year time limit from the date your wages are due to be paid to you to file your claim at Court.

What remedy do you want?

Once you have established that you are eligible to make a claim, you should think about the remedies that you want.

The Federal Court or Federal Magistrates Court can make the following orders:

- An order that stops your employer from unlawfully deducting money from your wages;
- An order that your employer pay any amount owing to you plus interest;
- Any other order that it considers appropriate; and
- On application, it may impose a monetary penalty on your employer. An individual employer can be ordered to pay up to

\$6,600 and an employer who is a company can be ordered to pay up to \$33,000.

The Magistrates Court of Victoria can only order your employer to pay any amount owing to you, and impose a monetary penalty on your employer.

Making a claim

There are three steps you may take in making a claim

1. Letter of demand

Before you take action under the Act, you should consider first sending a letter of demand to your employer requiring that your deducted wages be repaid to you or that you are paid correctly. An example of a demand letter is attached to this infosheet. You should keep a copy of this letter as a record.

This letter should specify that if the correct payment is not made within a specified timeframe, then you will file a claim with the FWO.

You can send a demand letter either during your employment or after you have left your employment. If you are still employed, you should consider that, although it

may be unlawful, your employer may decide to dismiss you when it receives your letter of demand.

If you have concerns, you should speak to JobWatch, the Fair Work Ombudsman, or a lawyer (see *'Where to get help'* on page 5) before taking any action.

2. Apply to the Office of the Fair Work Ombudsman

If your letter of demand is unsuccessful, you can then file your claim with the FWO.

This is done by lodging the application form **'Wages and Conditions - Workplace Complaint Form'**.

This is available from:
The Office of the Fair Work Ombudsman:
Ph: 13 13 94
www.fwo.gov.au

You have **6 years** from the date of the first

deduction to make your claim to the FWO but you should file your claim sooner because your employer may lose your employment records or go out of business and cease to exist.

Additionally, if the FWO cannot recover your money, your claim may have to go to Court and you only have **6 years** from the date of the unlawful deduction to file at Court. This means, for

example, if you wait 6 years to file your claim with the FWO, you or a Fair Work Ombudsman Inspector may not be able to file your claim in Court because you will be out of time.

If you are unsure about time limits, you should obtain legal advice as soon as possible (see *'Where to get help'* on page 5).

What happens next?

Once the FWO has received your claim, they should investigate the matter.

If FWO thinks your employer is unlawfully deducting money from your wages, it may ask for your employer's pay

records and/or send a compliance letter to your employer/former employer.

3. Taking further action

If your employer does not comply with the Fair Work Ombudsman's request, then the following options could be available:

- The FWO may decide to take your employer/former employer to

Court; or

- If the FWO decides not to do this, you may take your employer/former employer to Court. Before doing this you should first obtain legal advice

(refer to Law Institute of Victoria, see below) about the likelihood of success, and what remedies are available to you.

Where to get help

JobWatch Inc
Metro: (03) 9662 1933
Rural: 1800 331 617
www.jobwatch.org.au

Fair Work Infoline
(Office of the Fair Work Ombudsman)
13 13 94
www.fwo.gov.au

Magistrates Court of Victoria Industrial Division
03 9628 7718
www.magistratescourt.vic.gov.au

Federal Court of Australia
03 8600 3333
www.fedcourt.gov.au

Federal Magistrates' Court
Fair Work Division
03 8600 3333
www.fmc.gov.au

Law Institute of Victoria
(for referral to a lawyer - 30 minutes free of charge)
(03) 9607 9550

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DISCLAIMER

Job Watch Inc disclaims any liability in respect of any action taken or not taken in reliance on the contents of this publication. This information is current at the time of printing January 2010.

The information in this infosheet is of a general nature only. It is not a substitute for professional legal advice. Readers should not act on the basis of any information contained here without first obtaining legal advice relevant to their particular employment situation.

Example **Letter of Demand** for employees seeking to recover wages deducted unlawfully by their employer

Mr John Employer
Smiths Furniture Pty Ltd
12 Eden Street
ABBLEASTY 4567

14 July 2009

Dear Mr Employer

Payment of wages deducted unlawfully, employee no. 123456

On 2 July 2009 whilst driving to work, I had an accident in my work vehicle. The accident was not the result of negligence or recklessness on my behalf.

On 5 July 2009, you told me that you would be deducting the amount of the insurance excess from my wages. I told you that I did not agree to this deduction.

On 10 July 2009, you deducted \$750 from my monthly wages without my written authority.

I believe that this deduction was unlawful because it was not authorised by me in writing and it was not a reasonable deduction in the circumstances.

Please arrange for payment of this amount to be made immediately. In the event that payment is not received within 14 days of the date of this letter, I will consider filing a complaint with the Fair Work Ombudsman and/or commence legal proceedings against you to recover this money and my costs.

Yours faithfully,

Sue Worker