

Franchise Fair Work case study

Most employers are not HR professionals, so this can lead to them creating HR risk without them even knowing it.

Case overview

A Fair Work Ombudsman Activity Report has identified widespread non-compliance within a prominent fast food franchise, with three quarters of audited outlets failing to comply with workplace laws.

The FWO Activity commenced in November 2015 and focused on the engagement of delivery drivers. The FWO audited a total of 34 franchisees of which, 32 engaged delivery drivers. Audits have been finalised with respect to 26 of the franchisees who engaged drivers while inquiries into the remaining six franchisees are ongoing.

Of the 26 completed audits, 24 franchisees (92 per cent) were found to be non-compliant with only two franchisees found to be meeting all of their legal obligations. Of the 24 non-compliant franchisees, the activity found:

- Seven had misclassified delivery drivers as independent contractors rather than as employees;
- Underpayments was owed to workers, mainly for underpayment of minimum hourly rates and allowances such as laundry; and
- Some underpayments were a consequence of the franchisee applying the wrong award or failing to increase rates in line with Fair Work Commission minimum wage decisions.

We use one example below to further explain what these non-compliances have for a franchisee;

A franchisee on the Gold Coast had been penalised a total of \$216,700 after exploiting an Indian delivery driver under a sham contract and using false records to try to cover it up.

A Gold Coast man, who owns and operates one of the franchise outlets, has been penalised \$36,700 and his company has been penalised an additional \$180,000.

The penalties, imposed in the Federal Circuit Court, are the result of legal action by the Fair Work Ombudsman. The penalties were imposed after the franchisee and his company admitted contravening sham contracting laws when they misrepresented to a delivery driver that he was an independent contractor, not an employee.

The driver, an Indian national aged in his 20s, was in Australia as a dependent on his wife's international student visa at the time. The franchisee asked the delivery driver to provide an Australian Business Number (ABN) and then treated him as an independent contractor between November 2015 and May 2016, paying him a flat rate of no more than \$16 an hour.

However, as an employee rather than an independent contractor, the worker was entitled to receive at least \$20.36 for ordinary hours and up to \$40.72 for overtime and public holiday work under the Pizza Hut enterprise agreement that applied to the business.

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He was also underpaid a per-delivery entitlement, superannuation and a uniform allowance. The driver has been back-paid in full.

Penalties of up to \$630,000 per contravention for a company and \$126,000 per contravention for an individual now apply in relation to serious exploitation of workers.

The Fair Work Ombudsman formed the view that the driver was an employee of the company, rather than an independent contractor, for reasons including the level of direction, supervision and control the company had over the driver – and because the driver was not genuinely operating his own delivery business.

Case facts

- 26 completed audits, 24 franchisees (92 per cent) were found to be non-compliant
- Penalties of \$216,700
- Identifying an employee as a contractor
- Full back pay to employee

What they should have done

The franchisee should have identified the staff person as an employee rather than an independent contractor. The franchisee should then have treated the person as an employee by paying them at least the minimum entitlements under the relevant award.

How Happy HR would have helped this business avoid the fair work claim

With the assistance of the Happy HR sub-company software the franchisee would have easily been able to identify that this person was in fact an employee and not a contractor. Once the employee has been successfully and legally on-boarded the Happy HR software our team would be able to assist with correct award interpretation and pay guide interpretation avoiding the \$216,700 fine for the franchisee.

Happy HR ROI (based off a 50-person company)

Fair Work penalty = \$216,700 = An equivalent of 72 years subscription with Happy HR! Plus countless hours saved on administration and in Fair Work!