

EBOOK

A Practical Guide to Annual Salary Agreements

*Help ensure compliance with insights from leading
employment law specialists Workplace Law*

 **Workplace Law**



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Are you ensuring compliance with the annual salary agreement changes?

On 1 March 2020, the Fair Work Commission (FWC) made amendments to several Modern Awards introducing new obligations for employers who pay annual salaries to employees covered by those Awards.

One of the new obligations was to conduct annual reconciliations – comparing what the employee was paid to what they would have earned if they had been paid strictly per the Award. The first of those annual reconciliations was due on 1 March 2021.

Understandably, many organisations may be uncertain about whether the new obligations apply to their employees and what they must do to ensure compliance. Some of this confusion has been driven by misconceptions regarding the changes.

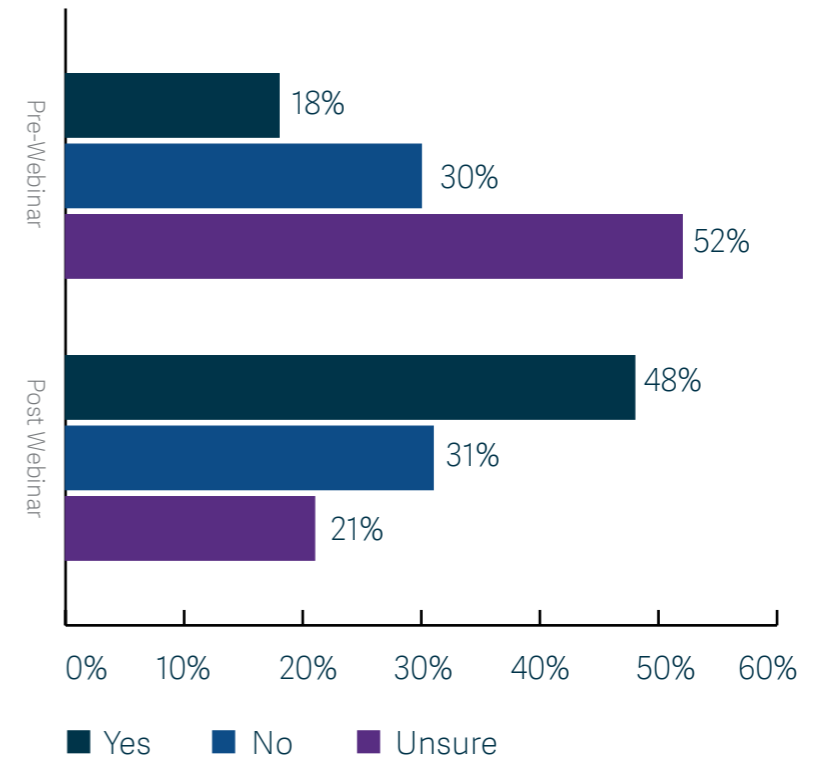
This uncertainty was highlighted in a 2021 Sage webinar run in conjunction with Athena Koelmeyer, Managing Director and Principal of leading employment law firm Workplace Law.

A pre-webinar poll revealed only 18% of attendees believed they were at risk of non-compliance with the annual salary agreement changes. After Athena clarified the legislation and debunked some of the myths surrounding the changes, a second poll revealed a dramatic increase in those who believed they were at risk.

In this eBook created jointly with Athena Koelmeyer and Workplace Law, we examine the annual salary agreement changes from a legal point of view, to help clear up the confusion surrounding them and ensure your business doesn't get caught out.

Read on as we tackle the four common misconceptions about annual salary agreements, what types of awards and employees they apply to, and the obligations employers must satisfy to ensure compliance.

Do you think you may be at risk of non-compliance with the legislative changes?





Why were the annual salary agreement changes introduced?

In recent years, the number of Australian organisations found underpaying staff has grown dramatically, with an alarming trend of new issues arising seemingly on a weekly basis! You've probably seen the news stories of businesses across various sectors having to admit to underpaying their employees, resulting in significant reputational damage, backpay obligations, and penalties.

Whilst there are several factors contributing to the rise in underpayment cases, confusion around paying annual salaries as opposed to calculating earnings under a modern award has been central to some of the worst, including:

- A leading supermarket chain that underpaid staff \$390 million after failing to pay in line with the General Retail Industry Award
- A leading restaurant group that underpaid staff by \$7.8 million after failing to adhere to annual salary agreements

The FWC introduces annual salary agreement clauses to modern awards

The increase in salary underpayment cases compelled the FWC to act. On 1 March 2020, new annual salary agreement model clauses were introduced into 22 modern awards.

The intent of these changes is to ensure employees paid under an annual salary agreement are not worse off than they would be under the normally applicable conditions of the modern awards.

The new model clauses introduced new obligations for employers, including specific record keeping requirements and the need to perform a yearly reconciliation to ensure an employee's annual salary has not resulted in any underpayment.



13% of Australian workers are estimated to be underpaid a total of \$1.3 billion per year.¹



Who's impacted by the new annual salary obligations?

Regardless of what industry your organisation is in, if you pay a salary to any of your staff in compensation for Award entitlements, it's likely someone in your organisation is impacted by the annual salary agreement changes.

When first created, the modern awards were intentionally designed to cover most Australian organisations. For instance, the [Clerks Award](#) covers a wide range of duties, which are listed below. It's hard to imagine that an organisation with more than 20 employees wouldn't have someone performing one of the following:

- Handling accounts, invoices, orders and store requisitions
- Reconciliation of accounts
- Preparation of payroll
- Preparing cash payment summaries, banking reports and bank statements
- Executive assistant duties (like managing diaries, travel, etc.)
- Customer support/call centre duties
- Sales operations duties
- Using software to create and manage records
- Any other clerical-based duties

If anyone in your organisation performs one or more of these duties, it means that you're impacted by the annual salary agreement changes. Regardless of how much you pay them now, you'll need to ensure compliance by conducting your annual reconciliation after 1 March 2021.

Please [visit the FWC website for the full list of modern awards](#) that feature one of the new model clauses, and are therefore affected by the annual salary agreement changes.





4 common annual salary agreement myths

Since the annual salary agreement changes were introduced, several myths have emerged around their application. Much of the confusion surrounding the changes stem from these misconceptions, which can place employers at risk of breaching their obligations to employees receiving an annual salary.

Let's debunk the four most common annual salary myths:

Myth 1 **We don't have any employees covered by awards**

This is a misconception which Athena Koelmeyer from Workplace Law says she hears about regularly.

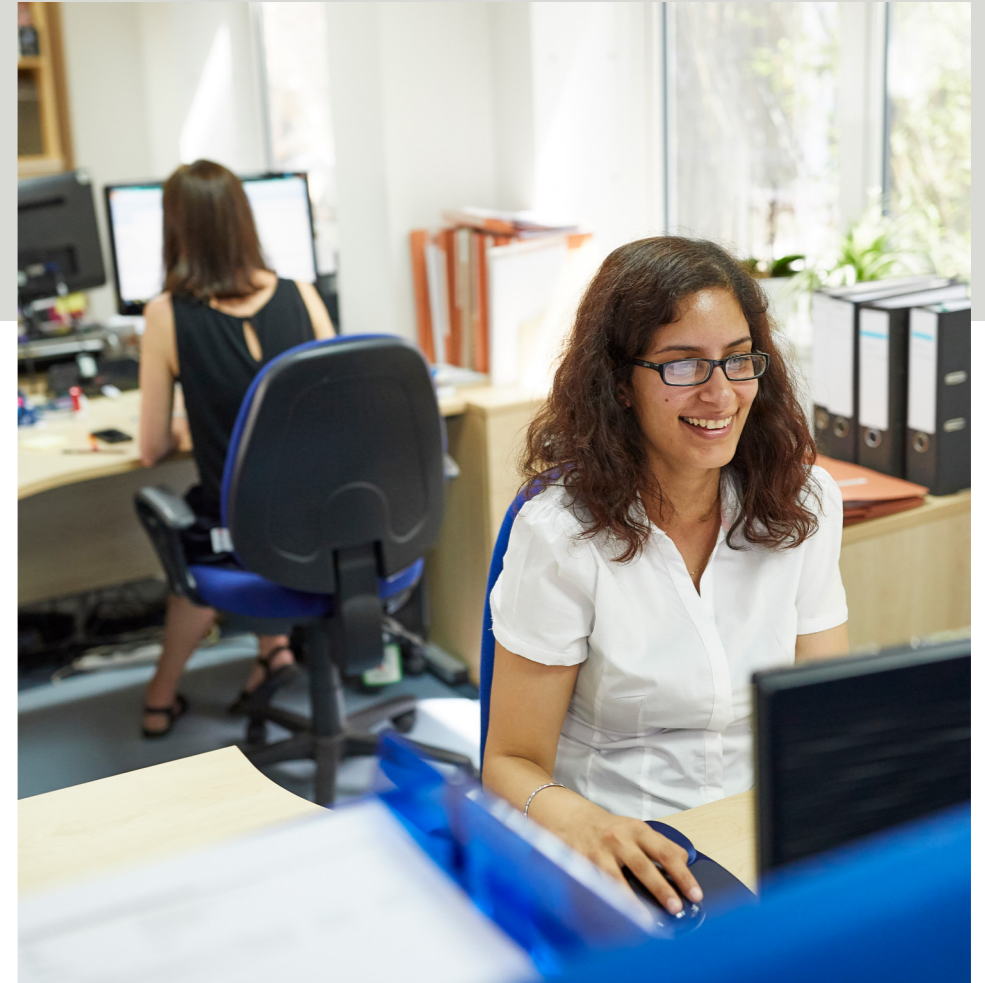
However, given modern awards were designed to cover the vast majority of Australia's workforce, she says "it's very unlikely that any Australian employers do not have award coverage within their workplace."

The new annual salary agreement clauses apply to 22 modern awards, which cover a wide range of industries, including banking, finance, insurance, manufacturing, hospitality, and telecommunications, to name a few.

And some awards cover a broad range of roles. For example, the Clerks Award, which Koelmeyer says covers roles which may not typically be identified as a clerical position.

"You can see it is intended to cover people in the finance team, people in the marketing team, people in the HR team, our friends in payroll... and it is something that not necessarily everyone thinks of," she says.

It's therefore important for employers to assess which awards cover their employees, and then identify whether those awards are affected by the annual salary agreement changes.





4 common annual salary agreement myths

Myth **2** **We've done the BOOT, so we're compliant**

Many employers believe that they can't be underpaying an employee if they have internally administered their own version of the Better Off Overall Test (BOOT).

"The BOOT test is administered by the FWC when they are looking at approving enterprise agreements," says Koelmeyer. Employers internally administering their own test to check whether an employee is paid more than the Award is not a defence to any non-compliance with an award. It's also fraught with risk. For example, what if an employer missed an award entitlement they should have included in their test – like an allowance, or an obscure penalty provision?

Even assessing the salary for the role against the Award rate is not a 'set and forget' exercise. An employer might think they're paying an employer adequately for their role, but over time they may not realise how much the base award rate has increased.

"You might not be as generous as you think. If an employee does a little bit of overtime and a little bit of work on a day when a penalty applies and maybe comes in on a public holiday, then you're going to find there's a real difficulty there in terms of underpayment," says Koelmeyer.

"So thinking that this annual salary is generous and fine and you don't have to worry about it, and that you 'have done the BOOT'... that will certainly not act as a defence to any sort of charge that you have underpaid people according to the award."

Another common myth surrounding the BOOT is that testing a salary once at the commencement of employment is enough. However, it isn't enough, and regular checking of salary payments against actual hours worked is the only sure way to ensure that a salaried employee is paid a sufficient amount to compensate them for all Award entitlements they would otherwise have earned.





4 common annual salary agreement myths

Myth 3 We look after our employees with extra benefits

Many employers believe benefits like tickets to events or gifts can be provided to employees in lieu of, or to offset Award entitlements like overtime pay.

However, Koelmeyer says that “the Fair Work Act makes it abundantly clear that pay for work must be in money.”

In the eyes of the FWC, extra benefits provided to employees are not a defence against underpayments.

“There was a pizza restaurant that wanted to pay people for working additional hours in pizza, and they were prosecuted by the Fair Work Ombudsman because they weren't paying their staff properly or in actual money,” says Koelmeyer.

Myth 4 We pay our staff well

Some employers may feel that because they are ‘paying staff above the market rate,’ they won’t be in breach of Award annual salary requirements.

However, this too won’t stack up as a defence if the employer is found to have underpaid the employee.

“If you’re not paying your people properly in accordance with your award, you will wind up in some difficulty down the track,” says Koelmeyer.

And businesses must not only pay an employee correctly, but also be able to mathematically prove that is the case. This is part of the purpose of the new annual salary clauses. By requiring specific working hours records to be kept, the base data for regular checking and annual reconciliation against the Award is readily available.





Examples: Correctly applying an annual salary agreement

To help provide more clarity on how an annual salary agreement must now be applied, let's look at two hypothetical examples.

In the first, the employer is compliant with the annual salary obligations stipulated by the award. In the second, they are not.

Example 1 Telecommunications worker

This Telecommunications worker has formally agreed in writing with their employer to be paid an annual salary, in compensation for all Award entitlements that can be included in an annual salary.

The employee is covered by the Telecommunications Services Award 2010, which includes one of the new annual salary clauses.

The employee's annual salary for the calendar year of 2020 was \$95,000.

The employer kept time and attendance records and details of what allowances would have been payable to the employee under the Award. In January 2021, the employer did a reconciliation to check what the employee would have earned under the Award during 2020, versus what the employee was paid under the annual salary.



Award		Annual Salary
Award rate for classification:	\$65,000	
Allowances:	\$5,000	
Penalty rates:	\$10,000	
Overtime:	\$10,000	
TOTAL:	\$90,000	\$95,000



The employer has done everything right. It has:

1. Created an annual salary agreement in writing;
2. Ensured the employee has kept accurate and detailed timesheets, and;
3. Has compared what the employee would have earned under the Award against the annual salary paid.



Examples: Correctly applying an annual salary agreement

Example 2 Accounts Payable Officer

This Accountants Payable Officer has formally agreed in writing with their employee to be paid an annual salary, which the employer deemed to be 'above the market rate.'

The employee is covered by the Clerks – Private Sector Award 2020, which includes one of the new annual salary clauses. However, the employer is unaware that the award covers this employee.

For calendar year 2020, they were paid an annual salary of \$75,000.

However, if the employee had been paid pursuant to the Award, they would have earned:

Award: 0	
Award rate for classification:	\$60,000
Allowances:	\$3,000
Penalty rates:	\$5,000
Overtime:	\$12,000
TOTAL:	\$80,000



This employee has therefore been underpaid compared to what they would have earned under the Award.

The employer is in breach of its annual salary agreement obligations because the employee would have been paid more under the Award. In addition, the employer didn't identify the underpayment and reconcile the shortfall within 14 days.





What entitlements can be included in an annual salary?

Each annual salary clause outlines the Award entitlements that can be included in an annual salary.

When considering the entitlements you are to provide an employee, it's critical that you check the particular annual salary clause attached to their award.

For example, the Banking, Finance and Insurance Award 2010 and Clerks – Private Sector Award 2010 stipulate that any or all the following entitlements can be included in an annual salary:

- Minimum weekly wages;
- Allowances;
- Overtime penalty rates;
- Weekend and other penalty rates; and
- Annual leave loading.

It should be noted that an employer can choose whether or not to include some or all of the above in the annual salary. For example, you may wish to continue to pay annual leave loading separately – not include it in the annual salary.

“Just because you can compensate for all of the entitlements listed in the clause doesn't mean you have to. For example, an employer may choose to compensate for everything except overtime, which they instead pay on top of the annual salary,” says Athena Koelmeyer.

“There's some flexibility with regard to the entitlements, but what you can't do is try to compensate in an annual salary for entitlements that are not in the list.”





What do the model clauses require from employers?

The annual salary clauses outline how an employer can come to an annual salary agreement with an employee. Once again, it's important to check which **particular annual salary clause is attached to an employee's award.**

For example Model Clause 1 can be implemented without the agreement of the employee, while Model Clause 2 requires written agreement with the employee before the agreement commences.

In both cases, this agreement can be terminated by either party giving 12 months' written notice to the other, or by mutual agreement at any time.

If an employee doesn't agree to the annual salary agreement, they must be paid in accordance with their award.

Under both clauses, the employer must advise the employee in writing and keep a record of:

- The annual salary that is payable
- The specific provisions of the award that will be compensated by the annual salary
- How the annual salary was calculated, including details of:
 - How each part of the annual salary was calculated; and
 - Any assumptions of overtime or penalty rates that were made in calculating the annual salary.
- The outer limit of ordinary hours and the outer limit of overtime hours that an employer requires the employee to work that are compensated by the annual salary (and where no additional payment will apply).





What are the outer limits?

The annual salary clauses require the employer to specify the maximum number of:

- Ordinary hours that attract penalty rates; and
- Overtime hours that the employee may be required to work, in the pay period or roster cycle.

Hours worked:

- Within the specified maximum number of hours will be compensated by the annual salary.
- In excess of the specified maximum number of hours will need to be separately paid in accordance with the award.

Athena Koelmeyer shares an example to help illustrate how the outer limits can work in practice.

“If for example an annual salary agreement specifies six hours per week as an employee’s outer limit overtime hours, and during a particular week they work ten hours of overtime, the employee has worked four hours which are not compensated by their annual salary,” she says.

“In this case, the employer must make an adjustment to their pay and compensate them accordingly.”





What are the ongoing obligations for employers?

The annual salary clauses are designed to ensure that salaried employees are not disadvantaged, specifically stating:

“The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases earlier over such lesser period as has been worked).”

Athena Koelmeyer says that the onus is now on employers to prove that they are paying employees correctly.

“It’s not enough anymore to simply assert that the annual salary that you pay is sufficient to compensate for all awarded entitlements,” she says.

“You must be able to show exactly what your annual salary compensates for and that the employee is not disadvantaged by it.”

“This obligation must be guaranteed by reconciliations that you conduct. It’s critical that you’re able to show your work in relation to employees not being disadvantaged by your annual salary, versus what they would have been paid under the award.”

To ensure an employee is not disadvantaged, the clauses have introduced new obligations for employers, including:

- Keeping time and attendance records, including start and finish times as well as unpaid breaks, for affected employees. This means affected salaried employees need to record their worked hours.
- Paying affected employees overtime and penalty rates for hours worked in excess of those prescribed within the annual salary agreement. Overtime hours deemed outside what is included in the annual salary contract may need to be paid.
- On an annual basis, comparing the salary paid against what an employee would have been paid under the award. If the salary paid is less than that under the award, the employer must pay the employee any shortfall within 14 days.

On the next few pages, we’ll outline the specific record keeping and reconciliation requirements employers must satisfy to ensure compliance.





What records do employers need to keep?

An employer must keep a record of:

1. **The annual salary that is payable**
2. **The specific provisions of the award that will be compensated by the annual salary**
3. **The method that was used to calculate the annual salary including:**
 - Details of how each part of the annual salary was calculated; and
 - Details of any assumptions of overtime or penalty rates that were made in calculating the annual salary.
4. **The outer limit of ordinary hours and the outer limit of overtime hours in the pay period or roster cycle.**
5. **The start and finish times of work and any unpaid breaks taken.**
 - With each pay period or roster cycle, the employee must either sign or acknowledge in writing that the record is correct. This can be done electronically, for instance via email or electronic timesheets.

As required by the Fair Work Act and the Fair Work Regulations 2009 (Cth) (FW Regulations), Employers must also keep the following records in relation to each employee:

Basic employment details

Leave entitlements

Averaging arrangements

Termination of employment

Individual flexibility arrangements

Pay

Superannuation contributions

Type of engagement

Guarantees of annual earnings

Overtime hours



What are the reconciliation requirements?

To ensure an employee hasn't been disadvantaged by their annual salary, the employer must calculate the remuneration the employee would have received under the award.

The reconciliation must be done annually from when the annual salary agreement commenced. It must also be performed:

- Upon termination of the employee's employment; or
- Within 12 months of the termination of the employee's employment or termination of the annual salary agreement (if applicable).

The amount calculated must then be compared to the annual salary that was paid to the employee. Any shortfall must be paid to the employee within 14 days. To perform this calculation, an employer is required to keep time and unpaid break records.

"The reconciliation obligation essentially requires keeping two sets of books," says Athena Koelmeyer.

"There's the annual salary that you pay the employee every pay period. But then you almost have to do that process completely again to work out what you should have paid them under the award."

"My suggestion is to have a system where you're running a parallel calculation of what should be paid under the award. That way you'll be able to identify and rectify any potential shortfalls as you go, instead of creating a lot of work at the end of the 12-month period, and potentially getting a nasty surprise."





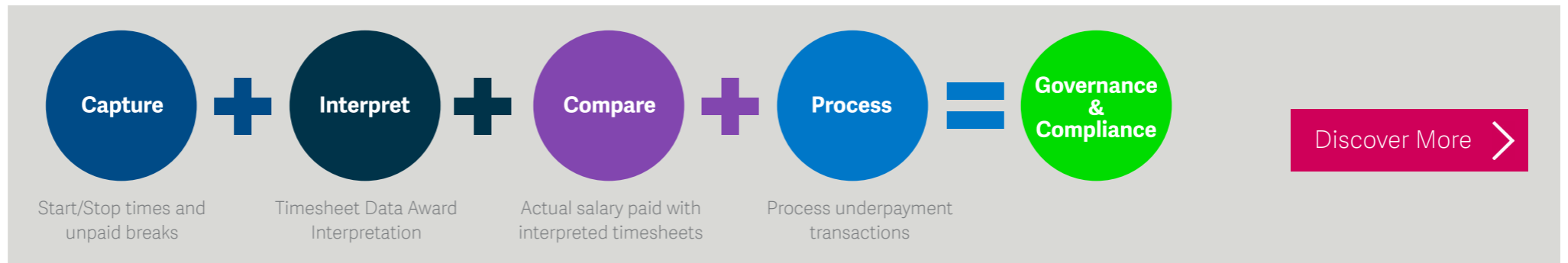
How can Sage help you comply with annual salary agreement requirements?

Protect your organisation, company directors, and employees from the risk of wage theft with Sage Employee Service. This cloud-based solution is specifically designed to help achieve compliance with the new annual salary award obligations.



Sage Employee Service can enable your organisation to:

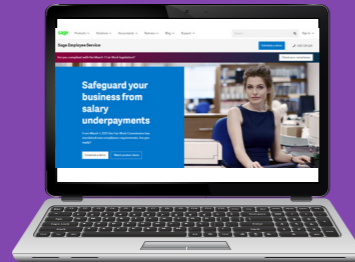
- Meet record keeping obligations with digital timesheets, ensuring accurate time capture for salaried employees impacted by the new legislation
- Deliver confidence to the business that salaried employees' time and attendance records are interpreted against modern awards
- Perform the analysis necessary to identify any underpayments that must be remitted to affected employees and proactively identify underpayments before they occur
- Deliver compliance without changing or updating your existing payroll system
- Adopt a cloud solution that delivers compliance at a low total cost of ownership
- Deploy a compliance solution in as little as 2 days*



*Deployment timeline is based on a non-integrated solution for a business with under 200 employees. For businesses with more than 200 employees, and/or have additional requirements including integration with an existing payroll system, implementation scope and timeline will need to be assessed. Staff training is not included in the implementation project timeline.

Discover more

Safeguard your business from salary underpayments



Visit the web page >

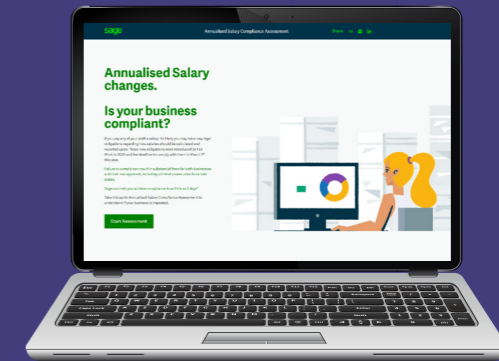
Webinar: The rising impact of wage underpayments

Join Tracy Angwin, CEO of the Australian Payroll Association as we discuss the rise of underpayments in Australia and how you can ensure your organisation meets the latest Salary Annualisation obligations.

Watch recording >

Are you compliant?

If you pay any of your staff a salary, it is likely you're impacted by the Fair Work Commission's new legislation. Take this quick Compliance Assessment to understand if your business is impacted.



Start assesment >

Sage Employee Service Brochure

The Sage Employee Service (SES) is an intuitive employee self-service that empowers employers to comply with complex Annualised Salary obligations.



Download brochure >

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