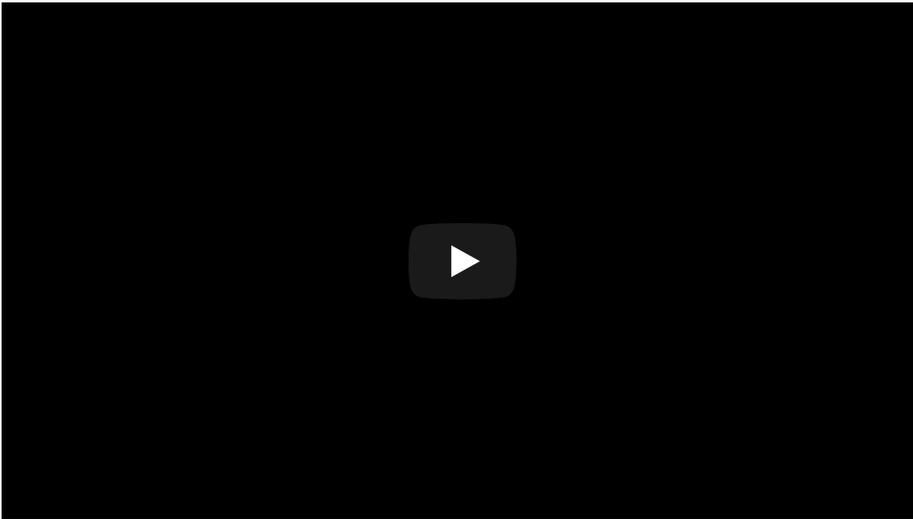


# Hiding in plain sight: identifying hidden employment risks in your business

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Here are five hidden risks common to many workplaces which employers should prioritise to save your business considerable time and expense in future claims:



## 1. Has this contract expired?

### The risk

Most employees will sign a contract of employment when their employment commences. This reflects their position and salary as at the day they start working.

Over time, key terms of the employee's employment may change, including position and duties. If an employee's employment contract has not been updated to reflect the employee's actual terms and conditions, the written contract may have been replaced by a contract consisting of implied or oral terms.

This exposes the employer to risks of a claim that the employee is entitled to reasonable notice of termination (likely to be a greater notice period than the written contract). The employer will also be denied the ability to rely on post-termination contractual restraints in any contract. There may be other provisions in the contract favourable to the employer which it can no longer rely on as the written contract has been replaced.

### The action

- **Conduct an audit of employment contracts.** Specifically look at the date of the contract, the position of the employee and other major terms to ensure that the contract is up to date and reflects the actual employment.
- **Issue a standard letter** whenever there is a change in the terms and conditions of employment, including

remuneration, which sets out the change to the employment terms and preserves the remaining terms in the written employment contract.

Tip: Remuneration reviews are a good time to issue new written contracts of employment if it has been a while since you've updated the written contract.

## 2. Casuals and contractors – is that really what's going on?

### The risk

If contracts of employment don't accurately reflect the employment type and conditions for casual workers and contractors, businesses face the risk of claims for underpayment. We are seeing an increase in these types of claims given the increased appetite for class actions and the influence of litigation funders prepared to fund underpayment claims for groups of workers and former workers.

### The action

- **Check the type of employment.** This can be done when reviewing contracts of employment and positions of employees. If the arrangement is labelled as casual or principal and contractor, does that label accurately reflect the nature of the relationship? A good starting point in answering that question is to check the period over which the employee or contractor has been providing services. If the contractor or casual has been with the business for a year or more it's worth looking more closely at the relationship including the regularity of hours worked and the consistency of duration and timing of shifts.
- **In the case of contractors,** examine the control over the contractor and the degree to which the contractor is integrated in the workplace. These factors may suggest that the reality of the relationship, rather than the label, is that the worker is a permanent employee. This exposes the employer to claims from the worker for entitlements not otherwise applicable to casual or contractors such as annual leave. Employees are entitled to bring claims up to six years after the entitlement fell due.
- **In the case of casual employees,** ensure contracts of employment contain a clause which enables the employer to set off any payments such as a casual loading against claims made by a casual employee to annual leave and other entitlements associated with permanent employment.

## 3. Poor Performance – are you putting off to tomorrow what should be done today?

### The risk

Few of us enjoy hearing criticism, which means many managers avoid difficult conversations where they have to deliver "bad news". This means issues with performance are often avoided until they can no longer be tolerated and termination of employment is being considered. This exposes the employer to a risk of claims, reputational issues and costs associated with staff turnover. Many a manager required to give evidence in an unfair dismissal claim by a former employee has realised that despite the clarity in the manager's mind of the performance issues, such issues were never properly communicated to the unsuspecting employee.

### The action

- **Use performance reviews to have an honest conversation about employee performance and employer expectations.** This should be done annually at a minimum, however employers should be directing managers to give feedback on a regular basis.
- **Train your managers to conduct performance conversations.** It's a good idea to train managers to have effective conversations about performance. This type of training will ensure managers can provide effective feedback and can minimise stress claims and other issues that may come about due to poorly delivered feedback.

## 4. Investigation infrastructure

### The risk

Employers wanting to minimise risk and exposure to litigation arising from whistleblower complaints, sexual harassment or other employee grievances must conduct investigations from time to time. When a matter must be investigated it can be harmful to all employees involved in the allegation, and therefore the employer, if the complaint is met with delay, silence or confusion while the employer figures out how to manage the investigation.

### The action

**Have a clear process for investigating complaints and grievances.** A clear process will ensure managers and other relevant parties know what to do and the process commences without delay. Timeliness and consistency is key, and will minimise the risks associated with a poorly managed investigation including workers compensation claims, employee turnover and enhanced damages claims. A consistent and fair process will also assist the employer to defend claims made by employees such as unfair dismissal. If persons entrusted with conducting internal investigations have been identified in advance this enables appropriate training to assist in more effective investigations.

## 5. Compliance with legislation and awards

### The risk

As Natalie James, the former Fair Work Ombudsman discussed recently in a speech to the Australian Industry Group, many issues are hidden in the payroll systems of large employers.

Employers may be at risk of not applying the correct wage rates or additional amounts to be paid for overtime or work outside of normal business hours. This is particularly relevant during current economic conditions when wage rates are stagnating.

### The action

**Review remuneration agreements.** Minimum rates of pay and award rates are reviewed by the Fair Work Commission each year and usually increased. Employers should review remuneration arrangements, particularly for non-professional or non-managerial employees who are more likely to be lower paid or covered by awards. Employers should also check that their systems are accurately recording time worked and that all entitlements under relevant legislation and industrial instruments are being paid.

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