Q4 2015

BUSINESS MATTERS

Strategies for managing your business

INSIDE:

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Wage deductions can be risky business

Making lawful deductions from an employee's wage may not always be as straightforward as it seems.

Employers who wish to make deductions from their employees' wages should consider reviewing the framework that sets out how and when employers can lawfully make deductions first. Many employers are unaware of the specific circumstances that permit them to make deductions from an employee's wage, particularly in situations when they seek to recover money they believe is owed to them.

The Fair Work Act 2009 (Cth) outlines the specific provisions regarding the circumstances of when an employer can make deductions from an employee's pay. It is important that employers are aware of these provisions, as an unlawful deduction can result in severe civil penalties that range up to $10,200 for individuals, and up to $51,000 for businesses.

Section 323 of the Fair Work Act 2009 (Cth) requires an employer to pay their employees an amount owing to them in full in relation to their work performance. Exceptions to this obligation can be found in section 324 of the Act, which permits an employer to make deductions when:

- the employee authorises the deduction in writing
- the deduction is for an employee's benefit e.g. a salary sacrifice arrangement
- an employee authorises the deduction following an enterprise agreement
- a modern award or a Fair Work Commission order authorises the deduction
- the law of the Commonwealth, a State or a Territory, or an order of a court authorises the deduction

Before making a deduction, employers must obtain a written authorisation from the employee that specifies the amount of the deduction, (the authorisation can be withdrawn or varied by the employee at any time).

While it also may be common for employment contracts to include provisions that allow an employer to make deductions, it may be a good idea for employers to confirm if these provisions are indeed valid, as such terms may not comply with section 324 of the Fair Work Act 2009 (Cth).

Section 326 of the Fair Work Act 2009 (Cth) states that certain terms have no effect, however, this section only refers to a contract of employment. This reference may confuse some employers since the term 'contract of employment' is not referred to as an instrument from which deductions may be authorised in section 324.

Employers should be cautious when relying on general deduction wording in employment contracts. Whether or not a contract includes such contractual wording, it is the employee's written authorisation that is required, (unless the deduction is authorised by an industrial instrument, legislation or court order).

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Surviving the ATO crackdown

Business owners would do well to ensure they do the right thing over the next three months to avoid being caught out by the ATO.

The next three months will see the ATO targeting small businesses who fail to comply with their tax obligations. Even business owners who are compliant with their obligations may be subject to intense scrutiny. Therefore, all owners should prepare for tax office inquiries.

Businesses that accept cash as a common form of payment are often subject to high scrutiny. The risk of audit is even higher for those businesses that include information on their tax returns that falls outside industry benchmark ranges. To avoid a visit from the ATO, owners should first check their figures against those benchmarks before lodging a return.

Business Activity Statements (BAS) with unusually large refunds can also result in an inquiry from the ATO. Owners should retain valid tax invoices for all purchases before lodging their BAS. Those who are registered for GST on a cash basis should also check that payments are made during the BAS period.

For business owners that may have done the wrong thing, the earlier you make a disclosure, the better. Declaring mistakes or wrongdoings before the tax office finds them can completely remove penalties or have them significantly reduced.

Expanding your business overseas

Expanding your business to reach overseas markets is a strategic decision made to reach a broader, international customer base.

Researching the foreign landscape is crucial in understanding the hurdles you could potentially face. Here are some points to review before taking the step into international expansion.

Do you understand the local culture?

Cultural characteristics could mean the difference between the success and failure of your expansion. Product customisation may be necessary for customers' needs to be met.

Do you require an overseas partner?

An overseas business partner may be able to offer insight and support (financially and economically) whilst setting up and as your business settles. Successful partnerships require an investment of time to flourish and thrive.

Who is your competition?

Understanding your foreign competitors will go a long way in helping you expand successfully. Spend time in your new market to get an accurate picture of what it comprises of.

What are the legal implications?

Investigate the requirements you must satisfy prior to expansion. Failing to do so prior to making decisions could prove costly and slow the progress of development.

Is a company merger your ideal exit strategy?

With new business market saturation expected to occur over the next five years, businesses should consider whether a merger is their optimal exit strategy.

Company mergers differ according to the industry function, the purpose of the transaction and the existing relationship, if any, between the companies. Mergers often require a significant investment of time in the new business' future, meaning now is the time to investigate the available options. Below are five commonly-referred to types of business mergers:

Conglomerate

An amalgamation between firms that conduct unrelated business. This can be further separated into pure and mixed mergers. Pure mergers have no commonality and mixed mergers are firms who wish to expand upon their market regions or products.

Horizontal

A merger between companies within the same industry. These mergers are common in smaller, more competitive markets. The aim is to create a greater market share with lowered manufacturing costs.

Market extension mergers

This type of merger occurs between two firms that have the same products within separate markets. Amalgamating in this manner is to make a conscious effort to access a larger market.

Product extension mergers

Two firms that operate within the same market with similar products may look to product extension. This enables access to a larger set of consumers, ideally resulting in higher profits.

Vertical merger

Vertical mergers are commonly seen when two separate companies produce goods or services for a common product. The end goal is synergy, where the value and performance of the companies will increase as a result of the merge.

With growing concern that there will not be enough buyer demand to absorb the predicted volume of supply, businesses should begin to consider whether a merger is their most profitable move.

Signing a personal guarantee

For those who operate their business through a company or a trust, there may be times when you need to provide a personal guarantee.

A personal guarantee is a written commitment or promise from a business owner to make a payment or perform an act or duty that is owed to a third party when the business cannot.

Many lenders require a personal guarantee as a way of assuring that a business owner is committed to repaying a lease or loan. Personal guarantees can also demonstrate to third parties the responsibility of a business owner, and their intention to repay all leases or loans. Personal guarantees often arise when a business seeks finance from a bank or when it enters into a lease for business premises.

The parties involved in personal guarantees are the 'creditor', the 'principal debtor' and the 'guarantor'.

The creditor is the person who receives the benefit of the guarantee and is usually a bank, finance company, supplier or lender. The principal debtor is the business owner who is borrowing the money or obtaining the benefit of the contract. The party who provides the guarantee is called the guarantor. For a contract of personal guarantee to be enforceable, it must be in writing and signed by all of the above parties.

It is important for business owners to seek legal or financial advice if in doubt before providing or signing a personal guarantee. Owners should also have a thorough understanding of the following:

The limit of the guarantee

Personal guarantees come with specific obligations, such as repaying a loan or complying with a lease. It is essential for owners to review these terms before signing the guarantee. If the principal dealer breaches these terms, compliance with the guarantee will then become the owner's responsibility.

How the personal guarantee is released

The release date of a personal guarantee may vary depending on the parties involved. Some banks will not release a personal guarantee until the loan has been fully repaid, whereas some landlords will release a personal guarantee when a lease expires. Owners need to be aware of the release date in case they want or need to negotiate for an earlier release.

Who is being provided the personal guarantee

Investigate the person or entity you are providing the personal guarantee on behalf of. Your personal guarantee will only be called upon if the person or entity you have provided it on behalf of defaults in its obligations. You should investigate and make your own assessment as to the likelihood of this occurring before providing your personal guarantee.

Voluntarily registering for GST

When a person starts a small business from scratch, they face a number of inevitable decisions.

One of these decisions involves deciding whether or not to register for GST voluntarily if the owner believes the business is unlikely to make more than $75,000 in its first year of operation.

There are a number of factors that new business owners should consider when making this decision, with cash flow being the most important. Voluntarily registering for GST is a good idea for start-up owners who may spend a large amount of money in order to start up their business, as they may receive a GST refund for any items purchased. This may involve spending a considerable amount of money on tools or equipment that need to be in operation before the business opens.

If a business owner chooses not to register voluntarily for GST, the tax deduction for the amounts the business spends will be increased by the GST, and included in the overall cost.

The problem with not being registered for GST means business owners must be able to finance the GST component of their set-up costs. Additionally, until they lodge their income tax return, owners will not receive the cash flow benefit the tax deduction provides.

Owners who do not register voluntarily for GST are still required to lodge an instalment activity statement (IAS) each quarter to meet their taxation obligations. The ATO sends the IAS to owners, along with a PAYG instalment quarterly amount and information regarding the PAYG instalment rate.

Business owners who register for GST are required to complete business activity statements (BAS) on a quarterly or monthly basis. If the income a business receives in the first few months or quarters is less than what the owner has paid to set up the business, the owner will receive a refund of the GST included in the purchased items.

Business owners who register for GST voluntarily and do not notify the ATO that they intend to pay GST by instalments, can opt to report GST on an annual basis.

A final consideration for voluntarily registering for GST (when owners believe the first year's income will be less than $75,000) is the probability of the business's income increasing to the point where the business has to register for GST in its second year of operation.

What to consider before signing a contract

The mention of contracts elicits fear in the minds of many who are overwhelmed by the numerous hurdles involved in signing a legal document.

A contract is a formal agreement, either verbal or written that is enforceable by law. For the purposes of business, written contracts are the preferred method, and with them come a number of considerations to ensure that you are entering into a mutually agreeable arrangement.

There is a natural tendency to skip over details within a contract, particularly when the content is lengthy and filled with jargon. However, it is vital that you understand the terms so as not to land yourself in hot water in the event of a breach.

Here are some guidelines to follow prior to entering into a contractual agreement:

Read the document in its entirety

All parties to the agreement should be familiar with its contents. Ensure you are in agreeance with all clauses. If not, seek advice.

Take your time

Contracts involve important decisions and significant time should be spent reviewing the contract before signing. Do not be or feel pressured to sign before you are ready, and make sure you understand the consequences of non-compliance for both parties.

Enter into negotiations

Where a party does not agree with a clause within a contract, it is their right to negotiate. It is important that you propose changes that satisfy both parties in order for them to be considered.

Seek legal advice

Legal advice is readily available in order to help parties comprehend the specialised language that can be present in contracts. It is important that you remain aware of what it is you are signing at all times.

Sign the contract on the business' behalf

Separate yourself from the business and sign as a representative. You should clearly state, both verbally and through writing that you are acting on the business's behalf. This assists in the avoidance of personal liability.

What is appropriate online behaviour?

A recent case of online workplace bullying has highlighted the need for businesses to ensure that employees understand what is and what is not appropriate online behaviour.

With social media featuring in an increasing number of bullying and dismissal cases over the past few years, it is clear that the distinction between people's private lives and work lives is still not clear.

Social media takes on a new form when used for personal reasons in the workplace or as a representative of a business. Both uses entail different implications. Now, even online behaviour that is deemed inappropriate that takes place outside of the workplace can be included in the ruling of Australian courts.

For example, an employer could take action against an employee if the employee made comments on their private social media account that can be considered as damaging to the business's or the employer's reputation.

On September 23, the Fair Work Commission found that a Tasmanian real estate agent was bullied by her employer when the employer 'unfriended' her on Facebook and failed to say good morning to her.

The commission's decision highlights the fact that a range of behaviours now exist that can be considered as 'workplace bullying'. The decision also serves as a helpful reminder to employers of the importance of implementing a comprehensive anti-bullying policy in the workplace, as well as to ensure that employees understand their obligations in regards to their use of social media.

Important tax dates

November 2

Tax returns for all entities if one or more prior year returns were outstanding as at 30 June 2015.

21

October 2015 monthly activity statement – due date for lodging and paying.

28

Due date for lodging Superannuation guarantee charge statement – quarterly and paying the super guarantee charge for quarter 1, 2015–16, if the employer did not pay enough contributions on time.

December 1

Income tax for taxable large/medium taxpayers, companies and super funds – due date for payment.

Lodgment of return due 15 January 2016.

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