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Employment Law e-alert

Super contributions changes – new ATO ruling

The Australian Taxation Office released a new ruling on 13 May 2009 (SGR 2009/2) which makes some significant alterations in relation to employer's requirements to pay superannuation guarantee contributions on certain components of the wage bill.

This ruling comes into effect for payments made to employees in the quarter beginning 1 July 2009.

Superannuation guarantee contributions are required to be made on ordinary time earnings ("OTE"). The ruling alters what is considered to be part of OTE in two important respects and clarifies a third.

Overtime payments

Overtime payments are excluded from the definition of OTE.

The overtime ruling reverses a previous draft ruling that, if implemented, would have required employers to make substantial additional superannuation payments. It has been welcomed by employer groups.

However, employers need to be careful that ordinary hours of work are stipulated in either the award applicable to the employee's employment or in their employment contract. Where no ordinary hours of work are stipulated, then all salary or wage payments for hours worked form part of OTE.

Payments in lieu of notice

The bad news for employers relates to pay in lieu of notice. Until now, superannuation guarantee contributions have not been required to be made where an employer dismisses an employee and pays them in lieu of notice. This will no longer be the case. The ATO's reasoning behind this is that a payment in lieu of notice is a payment to a dismissed employee equivalent to the ordinary time rate of salary or wages that the employee would have earned during the notice period. Accordingly, it is now deemed to be part of OTE.

Bonuses

Further clarification has been provided in relation to the issue of bonuses. If a bonus for good performance is at least partly referable to work performed in ordinary hours of work, then the whole payment is OTE and superannuation guarantee contributions are payable on it. Contributions are not payable only where there is clear evidence that the bonus payment relates solely to work performed entirely outside ordinary hours.

The new ruling does not deal with the status of payments to be made to employees who are on parental leave. This is a matter still being investigated and clarified by the Government. In our e-alert on 14 May 2009, we confirmed the government's announcement that superannuation guarantee contributions are not required to be made on payments in respect of the government's own paid parental leave scheme. However, where an employer has its own paid parental leave scheme, the issue of superannuation guarantee contributions on those payments remains a grey area.

Employers should ensure that their payroll department is familiar with these changes. The pay in lieu of notice requirements should also be factored into the picture, when consideration is being given to paying dismissed employees an amount in lieu of notice that is greater than the amount the employee is legally entitled to.

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