

Super Contributions on Overtime Earnings

The ATO has reversed a previous draft ruling about overtime and whether an Employer must pay Superannuation contributions on overtime.

The ATO has reversed a previous draft ruling that, if implemented, would have required employers to pay the 9% superannuation contribution on an employee's overtime earning.

For some years there has been an argument that overtime earnings should be included in an employee's 'ordinary time earnings' where that overtime was worked on a regular basis. A draft ruling was due to be implemented at some time this year to this effect. This draft ruling has been vigorously opposed by employer groups.

The ATO's Ruling, SGR 2009/2 makes it clear that employers should not include overtime when calculating ordinary time earnings.

Ordinary Times Earnings

In determining whether there is an obligation to make superannuation payments the Ruling explains the definition of 'ordinary time earnings' and a definition for 'salary or wages'.

Ordinary time earnings are defined as the total of:

1. earnings in respect of ordinary hours of work other than earnings consisting of a lump sum payment of any of the following kinds made to the employee on the termination of his or her employment:
 - (a) a payment in lieu of unused sick leave;
 - (b) an unused annual leave payment, or unused long service leave payment, within the meaning of the Income Tax Assessment Act 1997; and
2. earnings consisting of over-award payments, shift-loading or commission; or
3. if the total ascertained in accordance with paragraph (a) would be greater than the maximum contribution base for the quarter – the maximum contribution base.

Ordinary Hours of Work

The Ruling also defines the meaning of 'ordinary hours of work':

1. An employee's 'ordinary hours of work' are the hours specified as his or her ordinary hours of work under the relevant award or agreement, or under the combination of such industrial instruments, that governs the employee's conditions of employment.
2. The industrial instrument need not use the exact expression 'ordinary hours of work', but it needs to draw a genuine distinction, for the purposes of the award or agreement, between ordinary hours and other hours. In particular, it would be expected that the other hours are remunerated at a higher rate (typically described as overtime) than the ordinary hours, or otherwise identifiable as a separate component of the total pay in respect of non-ordinary hours.
3. Any hours worked in excess of, or outside the span (if any) of those specified ordinary hours of work are not part of the employee's 'ordinary hours of work'.



4. If the ordinary hours of work are not specified in the relevant award or agreement, the 'ordinary hours of work' are the normal, regular, usual or customary hours worked by the employee, as determined in all the circumstances of the case. This is not necessarily the minimum or maximum number of hours worked or required to be worked.
5. In such cases, it may often not be possible or practicable to determine the normal, regular, usual or customary hours of an employee's work. If so, the actual hours worked should be taken to be the ordinary hours of work.
6. 'Ordinary hours of work' are not necessarily limited to hours to be worked between 9:00 am and 5:00 pm, Monday to Friday. They may (depending on the provision in the relevant award or agreement, if any) include hours to be worked at other times, including at night, on weekends or on public holidays.

Payments included in Ordinary Times Earnings

The Ruling defines allowances and payments that qualify as 'ordinary time earnings' for the purposes of payment of superannuation as follows:

- Allowances and loadings including 'site allowances'
- Casual loadings
- Additional earnings received as a reward for good performance, and other like 'bonus' payments
- Piece-rates
- Paid leave and holiday pay
- Wages otherwise than on termination of employment
- Top-up payments
- Payments in lieu of notice

The Ruling defines 'salary or wages' as remuneration paid to an employee for their services as an employee. Payments to an employee which have not been given as a reward for their services (for example a meal allowance payment) that the employee may spend as they wish would not be viewed as a 'salary or wage' and therefore would not attract payment for superannuation purposes.

Payments that are considered as 'salary or wages' are:

- Allowances, except expense allowances
- Bonuses if paid by reason of their service as an employee
- Leave payments
- Workers compensation payment – where the employee works
- Unused leave (eg annual leave, long service leave)
- Payments in settlement of a dispute relating to wages owed to an employee
- Sign-on bonuses

Payments that are not considered to be 'salary or wages' are:

- Expense allowances and reimbursement
- Redundancy payments
- Unfair dismissal payments
- Workers compensation – where employee is not required to work

Below are some examples of 'OTE' and 'salary or wages' situations.

Examples:

Example 1: Overtime Situation – Award Based

Bill is employed under an award which stipulates that ordinary hours shall not exceed 38 hours per week. The award also states that all time worked in excess of the ordinary hours for the week are overtime and are paid at a rate of time-and-a-half for the first three hours and double time thereafter.

Bill's employer requires him to work one particular Saturday morning for three additional hours resulting in him completing 41 hours work for that particular week.

- The payment to Bill for the 41 hours worked is paid as a reward for the services he is providing and is therefore 'salary or wages'.
- The 38 hours Bill works during the weekdays are his 'ordinary hours of work' because that is what the award provides.
- The three additional hours worked on the Saturday are not 'ordinary hours of work'.
- The wage payment to Bill for 38 hours of work is 'earnings in respect of ordinary hours of work' and is OTE.
- The wage payment for the additional 3 hours overtime is not 'earnings in respect of ordinary hours of work' and is therefore not included in OTE.
- It would make no difference how frequently or regularly Bill works overtime hours. Payments of salary or wages for all such work cannot be OTE because they are not in respect of ordinary hours as defined by the relevant award.

Example 2: Ordinary Hours of Work & Overtime Hours determined by Agreement prevailing over Award

Ennio is employed under a collective agreement which incorporates by reference terms from an award. To the extent of any inconsistency between the agreement and the award, the agreement prevails.

The award provides that the ordinary hours are an average of 38 hours per week and gives an employer the right to require an employee to work reasonable overtime.

However, the agreement provides for a shift roster which requires that employees work an average of 44 hours per week and identifies on the roster the ordinary hours of work as 38 hours (all paid at a particular hourly rate) and the overtime hours as 6 hours (to attract a penalty rate of pay in addition to the ordinary hourly rate).

- The payment for Ennio's 44 hours of work is a reward for services provided as an employee of the company and is therefore 'salary or wages'.
- As the agreement requires Ennio to work an average of 38 'ordinary' hours per week, these are his 'ordinary hours of work'. Therefore, the payment to Ennio for 38 hours of work is 'earnings in respect of ordinary hours of work' and is OTE.
- The payment for the additional 6 hours of rostered overtime is not 'earnings in respect of ordinary hours of work' and is therefore not included in OTE.

Example 3: Agreement displacing Award removes distinction between Ordinary Hours and other Hours

Miriam is employed under an award which stipulates that ordinary hours shall not exceed a maximum of 38 hours per week. The award also states that all time worked in excess of the ordinary hours shall be deemed to be overtime and paid at a rate of time-and-a-half for the first three hours and double time thereafter.

However, Miriam and her employer agree under a workplace agreement that she will work 50 hours each week which will be paid at the same hourly rate for all of the 50 hours worked. That rate is inclusive of all allowances and penalties. No lesser amount of hours is identified in the agreement as 'ordinary', nor is a separate provision made for any overtime rate of pay.

Miriam duly works her 50 hours per week and is paid at the appropriate single rate under the agreement.

- The payment to Miriam for the 50 hours worked is a reward for the services she is providing and is therefore 'salary or wages'.
- Under the terms of the agreement (which overrides the terms of the award), no distinction is made between any of the hours Miriam works, nor is any component of her pay separately identifiable as overtime. Therefore Miriam's ordinary hours of work for superannuation guarantee purposes are 50 hours per week.
- Therefore each payment to Miriam for 50 hours of work is 'earnings in respect of ordinary hours of work' and is OTE.

Example 4: No Ordinary Hours of Work Stipulated

Kim is employed under a contract of employment requiring her to work a minimum number of hours per week in a call centre. By agreement between her and the employer, she may work additional shifts as is mutually convenient. She often does so, though there is no clear and consistent pattern to this.

There is no award or agreement governing Kim's employment that specifies her ordinary hours of work, nor do the extra shifts worked attract any overtime penalties or other higher payments. The payments are made at the same rate of pay:

- All wage payments made to Kim are a reward for services she provides as an employee and are therefore 'salary or wages'.
- As there are no stipulated ordinary hours of work, and no readily discernible pattern of customary, regular, normal or usual hours, all of Kim's hours worked are ordinary hours of work. Therefore all of her wages are OTE.

What date will the changes take effect from?

This Ruling applies to payments made to employees in the quarter beginning on 1 July 2009 and all quarters thereafter.

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