

IS SUPERANNUATION PAID ON OVERTIME?

The Superannuation Guarantee (SG) is the minimum amount of superannuation an employer must pay to avoid the superannuation guarantee charge

The SG rate is currently 10 percent of an employee's ordinary time earnings (OTE).

Generally, payments in respect of overtime are not OTE. However, the difficulty can be in identifying and distinguishing earnings in respect of ordinary hours of work which are included in OTE from payments expressly referable to overtime hours which are excluded from OTE.

Superannuation Guarantee Ruling

According to SGR2009/2 (Ruling), which is not legally binding but explains the meaning of OTE as defined in the Superannuation Guarantee (Administration) Act 1992 (SGAA):

Overtime payments

41. Payments for work performed during hours outside an employee's ordinary hours of work are not OTE.

42. This is so whether the payments are calculated at an hourly rate or the employee gets a specific loading, or an annualised or lump sum component of a total salary package, that is expressly referable to overtime hours as remuneration for overtime hours worked.

43. However, some employees, particularly some managers and professionals, receive a single undissected annual salary within a remuneration package that recognises in a non-specific way that the employee may often be expected to work more than the ordinary hours of work prescribed. The whole amount of salary payable under such a package is OTE, unless overtime amounts are distinctly identifiable as mentioned in paragraph 42 of this Ruling.

Meaning of "ordinary hours of work" and "overtime"

The SGAA does not define "ordinary hours of work." However, the Ruling explains that an employee's ordinary hours of work are the hours specified as their ordinary hours of work under the relevant award, agreement and/or contract.

Any hours worked in excess, or outside of the span, of the specified ordinary hours (i.e. overtime) are not part of the employee's ordinary hours of work.

In *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* [2019] FCAFC 84, Chief Justice Allsop found:

"The meaning that best reflects these considerations and the text, context, purpose and history of the provision is earnings in respects of ordinary or standard hours of work at ordinary rates of pay as provided for in a relevant industrial instrument, or contract of employment, but if such does not exist (and there is no distinction between ordinary or standard hours and other hours by reference to

rates of pay) earnings in respect of the hours that the employee has agreed to work or, if different, the hours usually or ordinarily worked."

The earnings in respect of ordinary hours of work need to be distinguished from the payments expressly referable to overtime hours. It is expected that the overtime hours are remunerated at a higher rate or otherwise identifiable as a separate component of the total pay.

An employer and employee may enter into an employment contract which includes an overtime payment as part of an annualised, or lump sum, salary package, or requires the employee to work more than the ordinary hours stipulated in an award (for example, 40 hours instead of 38 hours).

If, under the employment contract, the earnings in respect of ordinary hours of work and payments expressly referable to overtime hours are distinctly identifiable, then it is likely overtime hours worked outside of ordinary hours of work are not OTE.

Identifying payments expressly referable to overtime hours depends on the circumstances and may even vary between employees employed by a business.

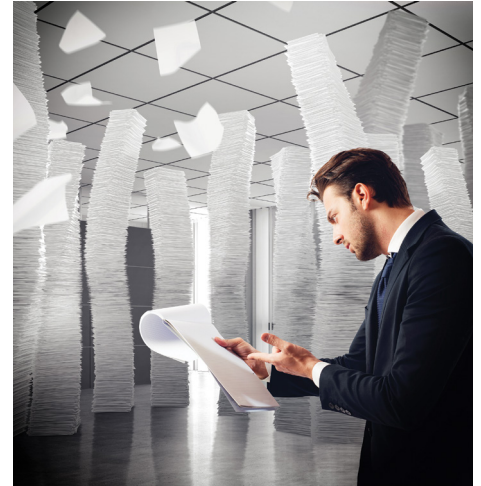
Examples

The examples provided below are adapted from the Ruling:

- Example One: An employee is employed under an award that stipulates that ordinary hours will not exceed 38 per week and hours exceeding this will be overtime paid at time-and-a-half for the first three hours, there is no employment contract. The employee worked 38 hours and is requested to work a further three additional hours on a Saturday. In these circumstances the 38 hours are ordinary hours included in OTE and the superannuation contribution is paid only on those earnings.

It is assumed for the following two examples that the relevant award provides that a full-time employee's ordinary hours of work will be an average of 38 hours per week:

- Example Two: The employment contract provides that the employee will work 42 hours per week, 40 of which are expressly identified as ordinary hours (paid at a certain rate) and two of which are expressly identified as overtime hours (paid at a higher rate). In these circumstances, the 40 hours are likely to be included in OTE and the superannuation contribution paid on those earnings. Payment in respect of the two overtime hours is not OTE.
- Example Three: The employment contract provides that the employee will work 42 hours



per week at the same hourly rate without any distinction between ordinary hours and overtime hours. In these circumstances, the 42 hours are likely to be included in OTE and the superannuation contribution paid on those earnings.

What does this mean for businesses?

If a business does have employment contracts in place for employees, the business should consider if there is a risk that they are paying incorrect superannuation contribution amounts or paying more superannuation contributions amounts than required.

Where annualised or lump sum payments are in place for employees under an employment contract, there is a risk that superannuation contributions will be payable on the entire annualised or lump sum amount if the earnings in respect of ordinary hours of work are not sufficiently distinguishable from payments expressly referable to overtime hours under the employment contract.

It is prudent for businesses to obtain relevant advice if they:

- are unsure they are making the correct superannuation contribution in relation to their employees; and/or
- would like to take steps to provide greater certainty around making superannuation contributions.

This article is intended for information purposes only and should not be regarded as legal advice. Please contact Employer Assist for advice.

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