

# Leave Loading and Superannuation Guarantee

*An ATO update to the Ordinary Time Earnings (OTE) checklist on its website for leave loading has led to many of our clients asking about leave loading and SG.*

The Australian Taxation Office (ATO) updated its website recently (below) to align to its public ruling (issued in 2009) which noted that annual leave loading is only not OTE when demonstrably referable to a notional loss of opportunity to work overtime.

The website also clearly states that all other annual leave loading is OTE and, therefore, subject to SG - it is this outline that has caught the attention of many of our clients, querying the application of SG for their own leave loading payments.

Agreements covering your employees, including history as to the purpose of the payment, the practical operations of your business (for example, do employees have an entitlement to overtime and how often is overtime occurring in practice?) and other factors.

Based on our experience with pay code reviews, some employers are incorrectly not paying superannuation on leave loading, particularly where the loading is calculated on a projections basis based on penalty and loading rates (i.e. based on what your shift penalties and loadings would have been in your leave period).

Where leave loading is paid at a fixed rate (for example, 17.5%) with no explanation as to purpose evident in relevant documentation, there will generally be an added level of investigation required based on the factors noted.

Leave

Payment	Salary or wages	Ordinary time earnings (OTE)
Annual leave	Yes	Yes
Annual leave loading - demonstrably referable to a loss of opportunity to work overtime	Yes	No
Annual leave loading - all other	Yes	Yes

## *How should you assess your leave loading payments?*

The treatment of leave loading from a SG perspective is not as straightforward as other payments. From a review/assessment perspective, in our view, whether or not leave loading is OTE and therefore subject to SG depends on the wording of the Contracts, Awards and/or Enterprise

## *What if we think there might be an issue?*

We are operating in an environment where the policing of superannuation is as high as it has ever been. The inception of Single Touch Payroll (STP) reporting means that for the first time, employers have to report detailed superannuation data to both the ATO and to employees (through myGov).

Additionally, we are currently operating in an emotionally charged environment where underpayments, including with respect to superannuation, are receiving the a strong level of coverage and response from the press and unions. This means that, should an employer discover an underpayment issue on behalf of its workforce, the discovery deserves a high level of care around rectification, remediation and communication.

In potentially better news, the Federal Government has proposed an SG amnesty which, if passed by the Senate, will provide employers with coverage from SG penalties for any voluntary disclosure made up to 23 May 2019 for underpayments related to the period prior to 1 April 2018 (noting that this amnesty will not apply if an employer is under SG audit).

Given the current environment, the potential for penalty relief offered by the SG Amnesty, and also the rising noise on this issue, we are recommending that all employers, and particularly our clients and contacts, consider whether they have properly assessed whether the leave loading they are paying has been subjected to SG and, if not, that the basis on which it has been exempted is valid.

### ***Start a conversation***

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