

Leave Loading and Superannuation Guarantee

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Explore more insights 

The ATO has recently provided further insight into their approach to dealing with Superannuation Guarantee (SG) and when it should apply to leave loading payments

SG and leave loading – what you need to know

There has long been complexity faced by employers in determining and evidencing whether historic payments of leave loading constitute ordinary time earnings for SG purposes. This has created a concern for employers that they may have significant exposure for failing to meet their SG obligations.

In responding to this complexity, the ATO have announced that it does not intend to dedicate compliance resources to review historic leave loading payments made by an employer where:

1. There is a reasonable basis for the employer having concluded that payments of leave loading are attributable to the lost opportunity to earn overtime; and
2. There is no evidence over the preceding five years which indicates leave loading was paid for a reason other than overtime.

Importantly, the ATO has specifically noted that employers should not simply rely upon an opinion as to the basis for leave loading being introduced.

Prospectively, the ATO is advising employers who do not pay SG on leave loading to obtain sufficient documentary evidence in support of their position, or alternatively, to consider whether SG should be paid on leave loading payments going forward.

Employers who do not apply these guidelines risk the imposition of historic SG charge liabilities, lost deductibility of SG Charge (SGC) payments, and material penalties. Fortunately, the ATO guidelines offer several practical steps which can be undertaken to limit any such risk.

Background

Superannuation is payable on employees' 'ordinary time earnings' (OTE), which broadly includes salary and wages paid to an employee in relation to their ordinary hours of work. Generally, this means that employers are not required to pay SG on payments which are demonstrably referable to overtime worked by employees. We have observed that many employers do not pay SG on leave loading on this understanding.

Last year, the ATO updated its website to state that annual leave loading will not be ordinary time earnings only if it is demonstrably referable to a notional loss of opportunity to work overtime, and that

all other annual leave loading will be subject to SG. This view is consistent with the view expressed by the Commissioner in *Superannuation Guarantee Ruling SGR 2009/2*, however the update to the ATOs online guidance prompted questions from many of our clients who have since sought to understand whether this reflected a change in the ATO's interpretation.

The short answer is that there has been no change in interpretation. Rather, the ATO has become aware that in the modern environment, leave loading payments do not always have a clear or demonstrable link to overtime.

We have observed situations where it has been challenging, or in some cases impossible, to prove that annual leave loading was paid for the purpose of compensating the employee for the loss of opportunity to work overtime. This could be the result of ambiguity in documentation or use of leave loading to compensate for non-overtime related purposes (e.g. penalty rates).

Whilst the ATO has been considering how they will approach this challenging area, employers have been assessing the extent to which they may be affected by this issue.

The Takeaway

The updated ATO guidance provides employers with several tangible steps which can be undertaken to limit their organisation's exposure on this issue.

In relation to historic periods, employers should assess whether SG has been paid on leave loading payments over the last five years. Where this is not the case, it will be essential to assess the validity of this position - this should include consideration of any relevant documentary evidence such as contracts, awards / agreements and policies, and also work practices, which may clarify or support the basis for leave loading payments.

On a prospective basis, it will be critical to have documented clearly the purpose for paying leave loading – whether this be pursuant to employment contracts, awards or enterprise agreements, or under other documentation such as employee policies. In the absence of clarity in these documents, the ATO has indicated that annual leave loading should be treated as OTE, and accordingly subject to SG.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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