

The Simple Facts about Ordinary Time Earnings

As anticipated by industry, the new calculation for Superannuation Guarantee Contributions – Ordinary Time Earnings – resulted in confusion among employers. Not least due to the multitude of idiosyncratic scenarios that were expected to (and did) arise. A year after its implementation, the Government has provided clarification on several definitions in a new ruling. This Special Edition of SuperFocus summarises the main points of this new ruling.

New Superannuation Guarantee Ruling (SGR) 2009/2

Since 1 July 2008, employers have been required to use Ordinary Time Earnings (OTE) as the basis to calculate their employees' 9% pa Superannuation Guarantee Contributions. For many employers, this replaced the "notional earnings base" used to determine this calculation.

However, from the outset, there was considerable confusion as to what constituted "Ordinary Time Earnings" and "salary or wages", with the Government advising that all queries would be assessed on a case by case basis.

On 13 May 2009, SGR 2009/2 titled "Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'" was released, with the aim of resolving the above ambiguities. As the title suggests, the Ruling further clarifies the definitions of Ordinary Time Earnings and salary or wages as stated in the Superannuation Guarantee (Administration) Act 1992 (SGAA). However, it does not cover parental leave payments or other ancillary kinds of leave. These issues will be clarified in a separate ruling.

This new ruling replaces previous rulings SGR 94/4 and SGR 94/5 and takes effect on 1 July 2009.

Key definitions

In line with the objectives of the Ruling, it's important to understand several key definitions from the outset:

- 1. Earnings** refers to the salary or wage paid to an employee as a reward for their services and includes certain lump sum payments (ie payments in lieu of annual leave, annual service leave and sick leave), bonuses and allowances.
- 2. Ordinary Time Earnings** is the amount of an employee's salary earned during their ordinary hours of work, including over-award payments, shift-loading and commission.

If the amount of an employee's OTE exceeds the quarterly maximum contribution base of \$38,180 (for 2008/09), then the maximum contribution base must be used.

- 3. Ordinary hours of work** refers to the hours that an employee is required to work and is usually specified within an employment contract, whether that be an industrial award/agreement, an Enterprise Bargaining Agreement or some other formal contract engaging the employee's services for financial reward. It's important to understand the terminology "ordinary hours of work" as referred to within the SGAA, as the SGAA does not actually define this terminology.

Therefore, for the purposes of SGC, the ATO interprets the term to mean "standard or norm" as in a fixed or stipulated quantity, as opposed to "regular, usual or customary".

An employment contract need not include the terminology "ordinary hours of work". However, it must clearly distinguish between the ordinary hours of work and those considered to be exceptional for the employee – the latter generally accepted as being overtime and attracting higher rates of pay.

If an employment contract does not specify the ordinary hours of work, then the **actual** hours worked should be used.

- 4. Earnings in respect of ordinary hours of work** refers to all salary paid for the employee's services, unless it is remuneration relating to overtime.

While an award/agreement may define OTE for SGC purposes, the definition of OTE in the SGAA refers to the amount of "earnings in respect of ordinary hours of work". In some cases, this could be a different amount from the specified OTE amount in the award/agreement.

5. Salary or wages includes the following payments:

- commission;
- payments for duties as a member of an executive body or body corporate;
- payments made to a person under contract for their labour;
- remuneration to Parliamentary, Commonwealth, State or Territory members;
- payments to persons referred to in SGAA sub-section 12(8);
- payments to persons holding an office or appointment under the Commonwealth, State or Territory; and
- payments to defence force and police force personnel.

- workers’ compensation where the employee is not required to work;
- certain sign-on bonuses;
- redundancy payments; and
- unfair dismissal payments.

¹These are generally performers in film, theatre, stage, etc.

What types of payments are included in OTE?

For brevity, we’ve listed those payments that fall within the definition of OTE. An explanation of each of these payments is contained within the Ruling.

- allowances (ie site, dirt and freezer) and loadings (ie casual loading);
- bonuses;
- piece-rates;
- paid leave and holiday pay;
- top-up payments;
- payments in lieu of notice;
- workers’ compensation, where employee continues working;
- directors’ fees.

What types of payments are not included in OTE?

- overtime payments;
- on-call allowances;
- certain payments that are not salary or wages:
 - certain private/domestic payments;
 - fringe benefits and other non-cash payments;

The relationship between OTE and salary/wages

The relationship between OTE and salary or wages has arguably been one of the main points creating confusion among employers.

In its simplest terms, an amount can only be part of an employee’s OTE if it constitutes salary or wages.

However, an employee’s salary or wage may include amounts that are not OTE (eg lump sum payments for unused annual leave).

If you haven’t already reviewed the list of payments that constitute salary or wages and OTE, turn to page 4 of this document or read the Ruling at www.law.ato.gov.au It’s important you have the most up-to-date listing of these payment types to meet your employer obligations.

The Ruling also provides relatively easy to follow examples of whether each payment constitutes salary/wage or OTE. We’ve included some examples below as a general guide.

Example 1 –

Ordinary hours of work and overtime hours determined by agreement prevailing over award

Mark 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 specifies 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 40 hours (all paid at a particular hourly rate) and the overtime hours as 4 hours (to attract a penalty rate of pay in addition to the ordinary hourly rate).

Salary or wages

The payment for Mark’s 44 hours of work is a financial reward for the services he provides as an employee of the company and is therefore salary or wages.

OTE

As the agreement requires that Mark works an average of 40 “ordinary” hours per week, these are his “ordinary hours of work”. Therefore, the payment to Mark for 40 hours of work is “earnings in respect of ordinary hours of work” and is OTE.

The payment for the additional 4 hours of rostered overtime is not “earnings in respect of ordinary hours of work” and is therefore not included in OTE.

Example 2 –

No “ordinary hours of work” stipulated

Kate is employed under a contract requiring her to work a minimum number of hours per week in a call centre. Upon agreement with her employer, she may work additional shifts as is mutually convenient. While she often works extra shifts, there is no clear and consistent pattern to this.

There is no award or agreement governing Kate’s employment that specifies her ordinary hours of work. Nor do the extra shifts worked attract any overtime penalties or other higher payments.

Salary or wages

All payments made to Kate are a financial reward for her services and are therefore salary or wages.

OTE

As there are no stipulated ordinary hours of work and no readily discernible pattern of customary, regular or usual hours, all of Kate’s hours **actually** worked are ordinary hours of work. Therefore, all of her wages are OTE.

Example 3 –

Expense allowance expected to be fully expended

Tom is an employee of JJ Investment Pty Ltd. In addition to his usual salary, he is paid \$300 per month to cover expenses he is expected to incur while visiting clients.

The expenses Tom incurs are for travel to client sites, maintenance of a mobile phone and internet access to remotely connect to the office. The allowance is a predetermined amount which has been calculated to cover the estimated expense and is given with the expectation that it will be fully expended in the course of the employee providing the services to the employer.

Salary or wages

As the allowance is not a reward for the services which he is providing as an employee of the company, the payment is not considered to be salary or wages.

OTE

A payment cannot be OTE unless it is salary or wages. As Tom’s allowance is not salary or wages, it is not OTE.

Example 4 –

Agreement supplanting award removes distinction between ordinary hours and other hours

George was 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, George and his employer agree under a workplace agreement that he 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 as “ordinary”, nor is separate provision made for any overtime rate of pay.

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

Salary or wages

The payment to George for the 50 hours worked is a reward for the services he is providing and is therefore salary or wages.

OTE

Under the terms of the agreement (which override the terms of the award to the extent of any inconsistency), no distinction is made between any of the hours George works. Nor is any component of his pay separately identifiable as overtime. Therefore, George’s ordinary hours of work for SGC purposes are 50 hours per week.

In short, each whole payment to George for 50 hours of work is “earnings in respect of ordinary hours of work” and is, therefore, OTE.

Ask AXIS Financial Group

Not all companies were affected by the change in legislation last year – specifically those already using OTE as their calculation basis.

If your company is affected by the OTE legislation and you need guidance or advice due to this new ruling, please contact our friendly Advisory Group or Technical Services team on **(08) 9426 5800** or **1800 111 299** or email us at: mail@axisfg.com.au

References used in compiling this document:

- www.comlaw.gov.au
- www.law.atto.gov.au

List of what constitutes salary/wage and OTE

Payments to an employee	Salary	OTE?	Paragraph references*
Awards and agreements			
1 A simple overtime situation	Yes	No	13-15, 41-43, 189-202
2 Overtime hours - agreement prevailing over award	Yes	No	13-15, 41-43, 189-202
3 Agreement supplanting award removes distinction between ordinary hours and other hours	Yes	Yes	13-15, 41-43, 189-202
4 No ordinary hours of work stipulated	Yes	Yes	13-18, 203-210
5 Casual employee - shift-loadings - overtime payments	Yes	Yes	13-18, 22, 189-210, 220-222
6 Casual employee whose hours are paid at overtime rates due to a 'bandwidth' clause	Yes	No	13-18, 189-210
7 Piece-rates - no ordinary hours of work stipulated	Yes	Yes	30-31, 230-234
8 Overtime component of earnings based on 'hourly driving rate' formula stipulated in award	Yes	No	30-31, 230-234
Allowances			
9 Allowance by way of unconditional extra payment	Yes	Yes	27, 65, 259-270
10 Expense allowance expected to be fully expended	No	No	27, 72, 266
11 Danger allowance	Yes	Yes	27, 65, 259-267
12 Retention allowance	Yes	Yes	27, 65 13
13 Hourly on-call allowance in relation to ordinary hours of work for doctors	Yes	Yes	44-45
Payment of expenses			
14 Reimbursement	No	No	46, 73 268-270
15 Petty cash	No	No	46, 73, 268-270
16 Reimbursement of travel costs	No	No	46, 73, 268-270
17 Payments for unfair dismissal	No	No	46, 75
18 Workers' compensation - returned to work - not working	Yes No	Yes No	39, 46, 68, 271-273
Leave Payments			
19 Annual leave	Yes	Yes	32, 67, 235-238
Termination payments			
20 Termination payments - in lieu of notice - unused annual leave	Yes Yes	Yes No	38, 46, 69 and 74
Bonuses			
21 Performance bonus	Yes	Yes	28-29, 274-278
22 Bonus labelled as ex-gratia but in respect of ordinary hours of work	Yes	Yes	28-29, 274-278
23 Christmas bonus	Yes	Yes	28-29, 274-278
24 Bonus in respect of overtime only	Yes	No	28-29, 41-43, 274-278

*Refers to the explanatory paragraph number within Superannuation Guarantee Ruling 2009/2.

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Feel free to contact your adviser with any questions about this bulletin



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