Australia

New Australian Taxation Office guidance on superannuation guarantee treatment of leave loading a welcome relief for employers

Executive summary
The Australian Taxation Office (ATO) has released new guidance in relation to the treatment of annual leave loading for superannuation purposes. The guidance provides clarity for employers that pay leave loading to their employees.

Any employer that pays annual leave loading will need to carefully review their position to determine if this new concessional approach applies to them.

Employers will need to determine their employees’ entitlement to overtime, assess for any historic shortfalls and put documentation in place to mitigate future exposures.

Key issues
Following consultation and lobbying by EY, the ATO has released new guidance on the superannuation guarantee treatment of leave loading payments to assist employers in understanding their obligations and provide a practical go-forward approach.

The genesis of most leave loading payments was to compensate employees who would lose the ability to do overtime shifts when they took annual leave. However, over the years, the use of these payments has broadened. In some cases, employers are now paying leave loading to all employees, not just those that are otherwise entitled to overtime payments.

According to Superannuation Guarantee Ruling SGR 2009/2, leave loading payments are subject to superannuation, except to the extent the payments are demonstrably referable to the notional loss of ability to work overtime. Whilst this position hasn’t changed in nearly a decade, there has been confusion and uncertainty among many employers.

The guidance provided by the ATO is a welcome relief. It provides a concession for employers that have self-assessed their superannuation obligations with respect to leave loading. The guidance confirms that ATO resources will not be dedicated to scrutinising historic quarters where employers have taken a reasonable position that their annual leave loading payments were for the notional loss of opportunity to work overtime.

However, employers that find themselves in this position will still need to act to ensure they remain compliant going forward. The ATO’s guidance requires employers to obtain written evidence as soon as practicable that shows a mutual understanding between the employer and their employees that clarifies the reason for the entitlement, being the loss of opportunity to work overtime. This can be in the form of amending the current Award or Enterprise Agreement, or other written evidence such as a documented policy.

It is important to note that employers are not required to assess on an employee by employee basis whether
the individual has worked overtime. Rather, an assessment is made based on an employee’s entitlement to work overtime, usually based on the category of employee. For example, most shift and casual workers may fall within this category.

However, for those employers that have paid leave loading to employees with no entitlement to overtime, this new guidance will not provide any relief, either historically, or on a go forward basis. In these cases, employers are likely to have an exposure and may need to make internal system changes to ensure they are compliant in the future as well as taking remedial action for historical shortfalls.

**Action required**

Any employer that pays annual leave loading will now need to carefully review their position to determine if this new concessional approach applies to them. They should:

- determine their employees’ entitlements to overtime;
- assess for any historic shortfalls; and
- put documentation in place to mitigate future exposures.

EY recommends that any historical shortfalls of superannuation guarantee be immediately voluntarily disclosed to the ATO. With the introduction of Single Touch Payroll and greater ATO audit activity in this space, there is a much higher risk associated with non-compliance.

The penalties for getting superannuation wrong can be significant. When combined with Directors being personally liable for any unpaid superannuation guarantee and the potential for reputational damage, employers need to be aware of their obligations and ensure they have correctly assessed historic periods, as well as ensuring future compliance.

Where voluntary disclosures are lodged with the ATO, prior to any action being instigated by the ATO, EY has been very successful in negotiating greatly reduced penalties for our clients.

If you require assistance or would like further information, please contact your local EY advisor or one of the contacts listed below.

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