

SGR 2009/2A1 - Addendum - Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'

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Addendum

Superannuation Guarantee Ruling

Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'

This Addendum amends Superannuation Guarantee Ruling SGR 2009/2 to reflect a recent amendment of the Superannuation Guarantee (Administration) Regulations 1993. The amendment of the Regulations ensures that employers do not have to make superannuation guarantee payments on paid parental leave and ancillary leave payments. The Government announced this measure in the 2009-10 Budget.

This Addendum also amends SGR 2009/2 so that, for consistency, it specifically mentions all of the other express legislative exclusions from the concept of salary or wages for superannuation guarantee purposes.

This Addendum also clarifies the status of workers' compensation payments in cases where employment is not terminated but the employee does not attend work due to his or her injuries. This Addendum does not represent a change to the Commissioner's view on these payments. However, comments received after the issue of SGR 2009/2 indicated that the wording of SGR 2009/2 was not entirely clear on that point.

SGR 2009/2 is amended as follows:

1. Paragraph 4

Omit the paragraph.

2. Paragraph 32

Omit the first sentence; substitute:

Subject to the exclusions mentioned at paragraph 34 of this Ruling, salary or wages that an employee receives, at or below his or her normal rate of pay for ordinary hours of work, in respect of periods of paid leave is simply a continuation of his or her ordinary time pay.

3. Paragraph 34

Omit the paragraph; substitute:

34. However, payments made while a worker is on paid parental leave or other kinds of ancillary leave are not OTE as these types of leave payments are excluded from being 'salary or wages' in the SGAA by Regulation 7AD of the Superannuation Guarantee (Administration) Regulations 1993 (SGAR): see paragraph 59B of this Ruling.

4. Paragraph 37

Omit the last sentence; substitute:

Top-up payments of this kind are not OTE as they are excluded from being 'salary or wages' in the SGAA by Regulation 7AD of the SGAR: see paragraph 59B of this Ruling.

5. Paragraph 46

After the second dot point; insert:

- payments specifically excluded by the SGAA from being salary or wages for the purposes of calculating superannuation guarantee shortfalls: see paragraphs 59A and 59B of this Ruling;

6. Paragraph 59

After the paragraph, insert:

Exclusions under sections 27 to 29

59A. Sections 27 to 29 of the SGAA specify salary or wages that are not to be taken into account for the purposes of calculating an individual superannuation guarantee shortfall under section 19 of the SGAA. The excluded salary or wages are:

- salary or wages paid to an employee who is 70 years of age or over (paragraph 27(1)(a));
- salary or wages paid to a non-resident employee for work done outside Australia (paragraph 27(1)(b));
- salary or wages paid by a non-resident employer to a resident employee for work done outside Australia (paragraph 27(1)(c));
- salary or wages paid by an employer to an employee who is not a resident of Australia for work done in the Joint Petroleum Development Area (within the meaning of the *Petroleum (Timor Sea Treaty) Act 2003*) (paragraph 27(1)(ca));

- salary or wages paid to an employee who is a prescribed employee for the purposes of paragraph 27(1)(d);^{5A}
- salary or wages prescribed for the purposes of paragraph 27(1)(e): see paragraphs 59B and 59C of this Ruling;
- salary or wages of less than \$450 paid to an employee in a month (subsection 27(2));
- salary or wages paid to a part-time employee who is under 18 years of age (section 28); and
- pay and allowances for members of the Australian Defence Reserve Forces for service other than continuous full-time service (section 29).

Prescribed salary or wages – parental leave and ancillary leave

59B. Salary or wages paid to an employee for a period of parental leave are prescribed for the purposes of paragraph 27(1)(e) by regulation 7AD of the SGAR. The regulation contains an inclusive definition of 'parental leave' for this purpose. Also prescribed are salary or wages paid to an employee who is engaged in an eligible community service activity and paid while absent from his or her usual employment; and salary or wages paid to an employee who is undertaking service with the Australian Defence Force and paid while absent from his or her usual employment.

Prescribed salary or wages – other payment types

59C. Payments of salary or wages under the Commonwealth program known as the Community Development Employment Program are prescribed for the purposes of paragraph 27(1)(e): see subregulation 7(2) of the SGAR. Payments of salary or wages are also prescribed if a scheduled international social security agreement provides that the employer to which the salary or wages relate is not subject to the Act in relation to the work for which the salary or wages were paid: see regulation 7AC of the SGAR.

^{5A} The only employees currently prescribed for this purpose are those who hold certain kinds of visas or entry permits under the Migration Regulations 1994 and who also meet certain other criteria relating to their employment: see regulation 7 of the SGAR.

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7. Paragraph 67

Omit the last sentence; substitute:

However, payments made to an employee while he or she is on parental leave or certain other kinds of ancillary leave are excluded from salary or wages; see paragraph 59B of this Ruling.

8. Paragraph 68

Omit the paragraph; substitute:

68. Any workers' compensation payments received by an injured employee for the hours the employee performs work or attends work as required form part of 'salary or wages'. In contrast, if the employment has been terminated, or if the employee is paid workers' compensation for hours not worked (or not attending work as required); the payment would not be 'salary or wages' as in these situations it cannot be said that the payment is a reward for the services of the employee to the employer.

9. Paragraph 229

Omit the paragraph.

10. Paragraph 236

Omit the paragraph; substitute:

236. However, as noted in paragraph 59B, payments made to an employee while on parental leave or other ancillary types of leave and 'top-up payments' made while an employee is on jury service, defence reserve service or the like are excluded from salary or wages for superannuation guarantee purposes. Therefore they are not OTE.

11. Paragraph 279

Insert:

<i>Exclusions under sections 27 to 29</i>	59A
<i>Prescribed salary or wages – parental leave and ancillary leave</i>	59B
<i>Prescribed salary or wages – other payment types</i>	59C

12. Legislative references

Insert:

- Petroleum (Timor Sea Treaty) Act 2003
- SGAA 1992 27(1)(a)
- SGAA 1992 27(1)(b)
- SGAA 1992 27(1)(c)
- SGAA 1992 27(1)(ca)
- SGAA 1992 27(1)(d)
- SGAA 1992 27(1)(e)
- SGAA 1992 27(2)
- SGAR 1993 7AC
- SGAR 1993 7AD
- SGAR 1993 7(2)
- Migration Regulations 1994

This Addendum applies to payments made to employees in the quarter beginning on 1 July 2009 and all later quarters.

Commissioner of Taxation

29 July 2009

ATO references

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