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# That's *super*

K&L Gates' **Rebecca Bolton** and **Stephen Rostankovski** explain what type of employee payments are subject to superannuation.



**T**HE QUESTION OF superannuation payments is an important issue which often arises where a former disgruntled employee seeks additional payments, where an employer has to back-pay an employee or even where an employer is seeking to terminate an employee.

Generally, if you pay an employee \$450 or more in a calendar month, then you are required to pay super on top of their wages. This is regardless of whether the employee is full-time, part-time or casual.

**“The ATO is increasingly focused on employers who fail to comply with their super obligations.”**

The minimum superannuation amount you must pay is currently 9.5%. This is referred to as an employee's “ordinary time earnings” (OTE).

OTE is essentially what your employees earn for their “ordinary hours of work”. This is usually determined by the relevant award or contract of employment setting out the employee's conditions of employment. If ordinary hours are not specified, then OTE will be the normal or regular hours worked by the employee. OTE

goes beyond wages and can also include amounts such as commissions, shift loading and bonuses. It also includes paid annual leave and sick leave.

OTE does not include overtime, fringe benefits or other non-cash payments, redundancy payments and payments for unfair dismissal. It also does not include annual leave, long service leave or sick leave paid as a lump sum on the employee's termination.

To understand how superannuation applies, let's say your employee is employed under an award which states that ordinary hours of work are not to exceed 38 hours per week, and that any time worked in excess of the ordinary hours is overtime, to be paid at a rate of time-and-a-half. In a given week you require the employee to work an additional 4 hours on a Saturday, bringing their total hours worked for the week to 42 hours. In this case the 38 hours would be considered ordinary hours of work in respect of which superannuation is payable, but the 4 hours of overtime are not OTE and there is no requirement to pay super for these additional hours worked.

You are required to remit employees' superannuation contributions to the Aus-

tralian Taxation Office (ATO) at least four times a year. Superannuation must also be paid to a complying superannuation fund. Where applicable, an award may set out the super fund(s) that an employer can choose from to nominate as their default fund. In the retail industry for example, the default fund may be an industry-specific fund such as REST. Superannuation contributions are ordinarily tax deductible against your business income (subject to some limits).

If you do not pay your employees' superannuation contributions on time (or neglect to pay them altogether), you may have to pay the “super guarantee charge” or SGC. The ATO is increasingly focused on employers who fail to comply with their super obligations, and has estimated that in recent years employers have failed to pay their employees approximately \$2.85 billion in super they are entitled to.

The SGC is made up of a shortfall amount (essentially the amount of super that should have been paid to your employee) plus interest (currently at a rate of 10%) and an administration fee.

Where the SGC applies, you are required to lodge a superannuation guarantee statement with the ATO for the relevant quarter(s). Late payments should not be made to the relevant fund but should be paid to the ATO as part of the SGC. The SGC is not tax deductible.

The amount of superannuation payable to your employees requires close consideration, especially where overtime, loadings and bonuses are also paid. It is extremely common for employers to incur significant SGC liabilities as a result of systemic errors in their payroll system that only come to light when a terminated employee raises the issue or the company is subject to an ATO audit. ■

*For more information about issues relating to superannuation and tax issues please contact Rebecca Bolton, Special Counsel at K&L Gates (Rebecca.Bolton@klgates.com). This article is for informational purposes and does not contain or convey legal advice.*