GILSHENAN & LUTON
LEGAL PRACTICE



Employer record keeping and pay slip obligations

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Both the *Fair Work Act 2009* ('FWA') and the *Industrial Relations Act 2016* ('IRA') contain similar provisions in relation to the employee records that employers are required by law to make and keep. It is important that employers are aware of their record keeping obligations. Failure to keep appropriate records may have a number of adverse consequences for employers, including enforcement action.

At the same time, it is useful for employees to be familiar with their rights of access to records, particularly in the event that they become concerned that they have not been paid the correct entitlements.

As a general rule, the FWA applies to national system employees and employers (that is, employers and employees in the private sector). The IRA largely applies to Queensland government employees.

What are the record keeping obligations for employers?

For private sector employers, the FWA provides that an employer must make, and keep for 7 years, employee records and pay slips of the kind prescribed by the regulations in relation to each of its employees.

The *Fair Work Regulations 2009* ('FWR') prescribe the form and content of a wide range of records which are to be made and kept for each employee.

This includes records relating to:

- pay;
- hours of work;

- leave (including annual leave, sick/carer’s leave, parental leave, long service leave etc); and
- superannuation contributions.

In what form should employee records be kept

The regulations require employee records to be in the following form:

- readily accessible to an inspector;
- legible form and in the English language;
- kept for seven years;
- not be altered unless for the purposes of correcting an error;
- not be false or misleading to the employer's knowledge.

What employee records must be kept by an employer?

There is a wide variety of employee records that must be maintained by employers. Below, we look at the categories of records which need to be kept and the specific requirements for each.

General records

General employment records must include all of the following:

- The employer's name;
- The employer's Australian Business Number (if any);
- The employee's name;
- The employee's commencement date;
- The basis of the employee's employment (full or part-time and permanent, temporary or casual).

Pay records

Records of pay must include all of the following:

- The rate of pay paid to the employee;
- The gross and net amounts paid and any deductions from the gross amount;
- The details of any incentive-based payment, bonus, loading, penalty rate, or other monetary allowance or separately identifiable entitlement paid.

Pay slips must be issued to each employee:

- within one working day of pay day, even if an employee is on leave;
- in electronic form or hard copy.

Hours of work records

Records relating to hours worked by employees are to include the following:

- In the case of a casual or irregular part-time employee who is guaranteed a pay rate set by reference to time worked, a record of the hours worked by that employee;
- For any other type of employee, the record must specify the number of overtime hours worked each day, or when the employee started and finished working overtime hours (but only if a penalty rate or loading must be paid for overtime hours actually worked);
- A copy of the written agreement if the employer and employee have agreed to the employee taking time off instead of being paid for overtime worked;
- A copy of the written agreement if the employer and employee have agreed to an averaging of the employee's work hours.

Leave records

If an employee is entitled to leave, the record must include both:

- leave taken; and
- the balance of the employee's entitlement to that leave from time to time.

Superannuation contributions records

If the employer is required to make superannuation contributions for the benefit of the employee, the record must include all of the following:

- The amount of the contributions made;
- The dates on which each contribution was made;
- The period over which the contributions were made;
- The name of any fund to which a contribution was made;
- The basis on which the employer became liable to make the contribution, including a record of any election made by the employee (including the date) to have their superannuation contributions paid into a particular fund.

Employers who contribute a defined benefit interest in a defined benefit fund do not have to include these contributions in the record.

Other records

Employers must all make and keep records in relation to the following matters:

- Individual flexibility arrangements;
- Annualised wage arrangements;
- Guarantee of annual earnings;
- Termination of employment;
- Transfer of business.

Who can access employee records?

Employee records are private and confidential.

Generally, (for those in the private sector), no one can access employee records other than:

- the employee;
- their employer; and
- relevant payroll staff.

Fair Work inspectors and organisation officials may also inspect the records in certain circumstances (eg. to find out what an employee is entitled to and whether they have been paid correctly).

Under the legislation, an employee or former employee has a right to request their employee records. Upon request, employers must then make copies of an employee's records available. This includes after an employee has ceased employment.

However, an employer is only obliged to keep and allow inspection of those types of employee records which are prescribed in the regulations (as set out above).

The right of access does not necessarily extend to the employee's full personnel file. At common law, employee personnel files are the property of the employer, not the employee.

It is not entirely settled to what extent an employee has a right to inspect the contents of their own personnel files. The right to inspect a personnel file is assessed on a case-by-case basis against the standard of reasonableness. It has generally been considered fair for employees to have access to information kept by employers about them.

Employee records may be accessed in a number of other ways, including by subpoena and in the disclosure process in legal proceedings, as well as under any access granted by a company policy.

What are the consequences for a business not keeping the required records?

In the private sector, there are a number of consequences to employers for failing to make and keep the appropriate employee records.

Firstly, the Fair Work Ombudsman may pursue a number of enforcement actions in relation to contraventions of record keeping and pay slip obligations.

- The Fair Work Ombudsman may issue an employer with an infringement notice or commence proceedings for failing to meet their obligations.
- The Fair Work Ombudsman may also consider commencing proceedings for false or misleading records or information. The legislation prohibits employers from making or keeping employee records, or giving pay slips, which they know are false or misleading. It also prohibits a person from knowingly or recklessly providing false or misleading information or documents to the Fair Work Ombudsman or a Fair Work Inspector. This includes omitting something from information that makes it false or misleading.

Secondly, the legislation contains a presumption in favour of a person who makes wage-related allegations in a court proceeding, where the employer has:

- failed to meet their record-keeping and pay slip obligations; or
- failed to make records available for inspection.

If the person bringing the claim shows the employer did not comply with the record-keeping and/or pay slip requirement, the employer will be required to disprove the person's wage-related allegation in court.

What about record keeping obligations for Queensland State employers?

The IRA covers employers and employees to whom the FWA does not apply. Generally, this means employers and employees of the Queensland government and local councils are covered by the IRA.

Like the FWA, the IRA places an obligation on employers to also keep various records including, time and wages for both industrial instrument employees and non-industrial instrument employees. . Records must be kept in English and inspectors may be appointed and have powers to enter places of employment to inspect certain records.

How can an employment lawyer help?

We recommend that if you have any questions or concerns regarding employee record keeping obligations you should seek legal advice as soon as possible.

Our employment law team is able to assist you in obtaining comprehensive legal advice and protection.

Contacting Gilshenan &Luton

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