

# Taxation Update

## Leave Loading and the Superannuation Guarantee

March 2019

**The Australian Taxation Office (ATO) has recently updated guidance on its website concerning superannuation guarantee (SG) and in particular the application of SG to payments for leave loading. The update highlights the ATO's long held view that leave loading forms part of ordinary time earnings for SG contributions. In Superannuation Guarantee Ruling SGR 2009/2, the ATO adopted the view that the only time leave loading can be excluded from SG calculations is where it can be demonstrated that leave loading is specifically paid in respect of the lost ability to work overtime while the employee is on leave. In all other circumstances, leave loading will be ordinary time earnings and as such subject to SG.**

When SG was introduced, ATO guidance in SGR 94/4 clearly stated that annual leave loading was not ordinary time earnings and therefore was not subject to SG. However, when SGR 2009/2 issued the ATO had a change of view, notwithstanding there had been no change to the Law that would support a change in interpretation of an employer's obligations to make SG contributions on leave loading.

The ATO has seemingly adopted their current position on the basis that leave loading has evolved over time to the point where it has become difficult to demonstrate that leave loading is clearly referable to a notional loss of opportunity to work overtime and is in essence more of a holiday bonus for the employee.

We understand the ATO has also confirmed this updated guidance represents their current view in correspondence with an industry body representing certain employers. In summary, the correspondence confirms that the ATO believes:

1. Annual leave loading will be ordinary time earnings (OTE) unless it is clearly referable to a lost opportunity to work overtime;
2. The ATO will no longer accept that the historical reason for annual leave loading will be sufficient evidence that it is referable to a lost opportunity to work overtime.

### Assessing your Leave Loading Payments

In our view, whether or not leave loading is ordinary time earnings and therefore subject to SG depends on the wording of Employment Contracts, Awards and Enterprise Agreements covering your employees. You should also consider the history as to the purpose of the payment and in particular, whether or not employees have an entitlement to overtime and how often overtime actually occurs in practice.

In the correspondence referred to above the ATO has acknowledged the uncertainty around this area and as a consequence, has indicated that the following concessions may be provided. Where:

1. The employer has not treated annual leave loading as OTE, on the reasonable position that it was for a notional loss of opportunity to work overtime; and
2. There is no evidence that over the prior 5 years of record keeping that suggests it was for something other than overtime;

Then the Commissioner will not proactively review the employer's prior treatment for super purposes.

Accordingly, where leave loading is currently paid at the usual rate of 17.5% with no explanation as to purpose evident in any relevant employment documentation it should be critically looked at to determine whether or not it is ordinary time earnings under current ATO thinking and therefore subject to SG. We consider it would be very difficult to adopt a view different to the ATO where this was the position.

### Why This Matters

Employers not paying SG on leave loading need to consider a review to establish whether or not their superannuation obligations have been met.

The introduction of Single Touch Payroll (STP) reporting means that employers have to report detailed superannuation data to both the ATO and to employees, so scrutiny of whether an employer is meeting their obligations has never been higher. Underpayments of superannuation are treated very seriously by the ATO and where not rectified, can lead to the issuance of director penalty notices.

Should an employer discover an underpayment issue on behalf of its workforce, we recommend the discovery deserves a high level of care around rectification, remediation and communication.

The Federal Government introduced legislation to give effect to an SG amnesty for 12 months commencing from 24 May 2018 but this Bill has not been enacted as yet. The Legislation, if passed by the Senate, will allow employers to self-correct past SG non-compliance without penalty for any voluntary disclosure made up to 23 May 2019 for underpayments related to any period from 1 July, 1992 up to 31 March, 2018. The amnesty will not apply to any employers currently subject to an audit of their SG compliance.

Given the potential for penalty relief offered by the SG Amnesty we recommend that all employers consider whether or not they believe leave loading payments have been and or are subjected to SG and if not, that the basis on which they were or are exempted is valid.

If you have any questions or would like to discuss this issue further, please contact a Nexia Advisor.



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