

RECORD KEEPING AND PAY SLIPS

WHAT ARE THE EMPLOYER'S OBLIGATIONS AND HOW WILL THESE OBLIGATIONS BE AFFECTED BY THE PROPOSAL TO CHANGE THE REGULATIONS?

INTRODUCTION

The Workplace Relations Act as amended by the Work Choices Legislation left many matters unsettled. These matters have now been dealt with, to some degree, by the Workplace Relations Regulations 2006 (“**the Regulations**”).

The Regulations were made on 17 March 2006 and commenced on Monday 27 March 2006.

One of the areas to be substantially affected by the introduction of the Regulations was employer record keeping and the content of employee pay slips.

The obligations for record keeping and pay slips are contained in Part 19 of the Regulations. They are onerous and include an obligation for an employer to record the starting and finishing time and other relevant details in relation to all employees irrespective of whether or not those employees are covered by an Award, Workplace Agreement or other industrial instrument.

The broad application of Part 19 of the Regulations has been the subject of recent criticism from employer groups who have lobbied the government to agree to amend the Regulations to remove the obligation that requires an employer to record the daily starting and finishing times for executive, professional and managerial level employees.

The Government has recently announced that it will amend the Regulations to an extent. The changes to the Regulations have not yet been enacted and no draft of the new Regulation changes has been issued.

This paper addresses two areas:

1. The current requirements of Part 19 of the Regulations; and
2. The scope of the proposed changes to the Regulations.

CURRENT REQUIREMENTS CONTAINED IN PART 19 OF THE REGULATIONS

RECORDS RELATING TO EMPLOYEES

- An employer must make and maintain a record in relation to each employee. The record must be kept for a continuous period of 7 years after the date upon which:
 - An entry in the employment record is changed; or
 - The employee's employment is terminated;

whichever happens first.

(Reg 19.4)

The record **must** contain the following:

Category of Information	Type of Information Required	Important Notes on the Information Required:
General Reg 19.8	Name of employer; Name of employee; Date of birth of employee as provided by the employee; Name of each instrument under which the employee derives entitlements of employment; Classification of the employee under each such instrument; Whether the employee's employment is: (i) Full time; or (ii) Part time. If the employee is full time or part time, a specification of the number of hours to be worked by the employee per week; Whether the employee's employment is: (iii) Permanent; (iv) Temporary; or (v) Casual. The date on which the employee's employment began.(Reg 19.8(i))	The Meaning of "industrial instrument": The Regulations do not define what is meant by "industrial instrument" and so the contents of the record must include each instrument which is relevant to the employee. This may be complicated where an employee is covered by a number of industrial instruments.
Hours Worked Reg 19.9	The employee's daily starting and finishing times; The total number of hours worked by the employee during each day;	Proposed Changes: This is the area in which the Federal Government proposes to make some changes so that these provisions will not

	<p>The employee's nominal hours and any variations to those hours.</p>	<p>apply to employees earning over a specified sum who are not paid for overtime worked (see below).</p> <p>The Meaning of "Nominal Hours": Depending of the type of employee and whether or not they have specified hours of work, nominal hours will have a different meaning.</p> <p>The definition of nominal hours is attached at the end of this paper.</p>
<p>Agreement to average hours Reg 19.10</p>	<p>If the employer and employee agree in writing to averaging employee's hours of work then the employer must keep a copy of that agreement</p>	
<p>Pay Records Reg 19.11</p>	<p>The basis upon which the employee's rate of pay is determined;</p> <p>The gross rate of pay expressed as an hourly rate;</p> <p>Details of any incentive base payment, bonus, loading monetary allowance, penalty rate or other separately identifiable entitlement the employee is entitled to;</p> <p>The period to which the payment relates;</p> <p>The total remuneration received by the employee during that period, including gross and net amounts;</p> <p>The dates upon which the employee was paid;</p> <p>Deductions, if any, from that remuneration and the name of the fund or account to which the deductions were made.</p>	<p>This requires that the employee's pay be expressed as an "hourly rate".</p> <p>Many employees are not paid on an hourly basis. They are paid a salary not referable to hours worked. However, there is no exclusion for in respect of these employees (either in the current Regulations or the proposed changes to those Regulations). So, it will be necessary to express the base salary of these employees as an hourly rate. To do so, an employer may need to divide the weekly salary by 38 hours.</p> <p>The record will separately need to set out any additional payments paid to employees including commissions, bonuses or other entitlements.</p>
<p>Annual Leave Reg 19.12</p>	<p>The rate of the employee's accrual of annual leave;</p> <p>Date upon which the employee was credited with annual leave;</p> <p>The balance of the employee's entitlement to annual leave from time to time;</p> <p>The amount of annual leave taken by the employee; and</p> <p>The amount paid to the employee while on annual leave.</p> <p>If the employee agrees to forgo some portion of annual leave:</p> <ul style="list-style-type: none"> • a copy of the employee's written 	<p>The Minimum Standard entitles shift workers to 5 weeks annual leave for full time workers.</p> <p>The Minimum Standard allows for up to 2 weeks annual leave to be cashed out subject to certain conditions being met.</p>

	<p>election to forgo an amount of annual leave; and</p> <ul style="list-style-type: none"> • the record of the rate of payment for the amount of annual leave which was forgone; and • details of when that payment was made to the employee <p>If the employee is a shift worker, the employer must keep a record of:</p> <ul style="list-style-type: none"> • The periods that the employee was a shift worker; • The date on which the employee was accredited with the additional annual leave. 	
Personal leave Reg 19.13	<p>The rate of the employee's accrual of personal leave;</p> <p>The date upon which the employee was credited with personal leave;</p> <p>The balance of the employee's entitlement to personal leave from time to time;</p> <p>The amount and type of personal leave taken by the employee; and</p> <p>The amount paid to the employee while on personal leave</p>	
Other leave Reg 19.14	<p>The amount and type of leave taken by the employee (including whether paid or unpaid);</p> <p>Details of the accrual of that leave;</p> <p>The date on which the employee was credited with that leave;</p> <p>The balance of the employee's entitlement to leave from time to time; and</p> <p>The amount paid to the employee while on leave.</p>	
Superannuation Reg 19.15	<p>The amount of contributions made;</p> <p>The period over which the contributions were made;</p> <p>The date on which the contributions were made;</p> <p>The name of any fund to which the contributions were made;</p>	

	<p>The basis upon which the employer became liable to make the contributions including:</p> <p>(i) Keeping of a record of any election made by the employee to a fund which contributions were made; and</p> <p>(ii) The date of any relevant election.</p>	
Termination of Employment Reg 19.16	<p>Whether the employment was terminated:</p> <p>(i) By consent; or</p> <p>(ii) By notice; or</p> <p>(iii) Summarily; or</p> <p>(iv) In some other manner specifying the manner;</p> <p>The person who acted to terminate the employment.</p>	

TRANSMISSION OF BUSINESS

Where the employer sells his or her business to a new employer and the new employer employs employees previously employed by the old employer then:

- the old employer must transfer to the new employer all records concerning the transferring employee that, at the time of succession, transmission or assignment, the old employer was required to keep.

In other words, the old employer must transfer all of the records referred to above to the new employer.

ALTERATION AND CORRECTION OF AN EMPLOYEE RECORD

There are strict requirements relating to whether or not records can be altered or corrected.

Generally, an employer must **not** alter a record or allow a record to be altered (Reg 19.18(i)).

There is an exception where an employer becomes aware of any error in the record, in which case the employer **must** correct the record and note the nature of any correction made (Reg 19.18(ii) and (iii)).

INSPECTION AND COPYING OF RECORDS

An employer must make a copy of a record available to:

- (a) An employee or former employee to whom the record relates; or
- (b) A workplace inspector (Reg 19.20(i)).

The copy of the record must be made available in legible form in English to the person making the request for inspection and copying.

There are limits for the period in which the employer must make the record or a copy of the record available.

Additionally, who is entitled to inspect a record may interview an employer or representative of the employer at any time during normal working hours about a record made (or to be made) by the employer.

PENALTIES

Failure to comply with each of the obligations set out above in relation to the content and maintenance of an employee record will result in serious civil penalties.

Strict liability applies in respect of any breaches of these regulations.

However, penalties will only be imposed for contraventions which occur after a grace period 6 months from the commencement of the Regulations (Reg 19.24)

PROPOSED AMENDMENTS TO RECORD KEEPING REQUIREMENTS

On 18 April 2006, the Minister for Employment and Workplace Relations announced that the record keeping obligations on employers will be amended to ensure that they do not apply more extensively than is necessary.

The proposed amendments are a response to complaints from employers that it would not be practicable (or indeed even possible) to record the actual working hours of certain executive and managerial level employees.

At this stage, the Federal Government has not released any proposed regulation changes nor have the proposed changes been introduced.

However, the scope of the proposed changes is set out in very general terms in the media release prepared by the Hon. Kevin Andrews.

The media release provides that employers will only be required to keep records relating to:

- (a) The total number of hours worked by an employee where **the employee earns an annual salary of less than \$55,000.00** (this amount is to be indexed annually); and

- (b) Daily start and finishing times **where overtime is payable** to the employee under an industrial instrument (for example an AWA) or a common law contract.

The following table has been extracted from the media release:

“Record Keeping Requirements for Starting and Finishing Time and Total Hours Worked

Employee Status	Record Keeping Requirements
Where an employee has provisions for overtime and is paid an annual salary of <u>less than \$55,000.00*</u> .	Employers would be required to keep records of the starting and finishing time and total hours worked.
Where an employee has provisions for overtime and is paid an annual salary of \$55,000.00* or more.	Employers would be required to keep records of starting and finishing times.
Where an employee has <u>no</u> provision for overtime and is paid an annual salary of <u>less than \$55,000.00*</u> .	Employers would be required to keep records of total hours worked.
Where an employee has <u>no</u> provisions for overtime and is paid an annual salary of \$55,000.00* or more.	There will be no record keeping requirements under Regulation 19.9.

* Indexed”

Important Points:

- The changes proposed by the Minister only relate to the records that are required to be kept by an employer of the hours that an employee works as contained in Regulation 19.9 (which is summarised above).
- The proposed changes do not relate to any of the other matters which must be contained in an employee record.
- The media release refers to the “annual salary” of an employee but does not specify whether this will be comprised of the base salary only or whether it will also include incentive and other payments. Accordingly, it is difficult to know the scope of proposed changes.
- Assuming that the proposed amendments to the Regulations are prepared in compliance with the matters set out in the media release, it is likely that the Regulations will be amended within the next few months, well within the 6 month grace period allowed for by clause 19.24 (as referred to above).

PAY SLIPS

The Regulations also prescribed the information which **must** be contained in pay slips given to employees.

The information to be included in pay slips is likely to be far more substantial than pay slips which have been issued to date by employers.

There are **no** proposals to amend the Regulations exclude the requirements relating to pay slips for certain classes of employees.

FORM OF A PAY SLIP

1. An employer must issue a written pay slip to each employee for each payment made to the employee as remuneration.
2. The pay slip must:
 - (a) be issued within one (1) day of payment; and
 - (b) include the particulars specified below.

(Reg 19.22)

CONTENTS OF A PAY SLIP

A pay slip must include the following particulars:

- (a) Name of employer;
- (b) Name of employee;
- (c) The classification of employee under each instrument under which the employee derives entitlements of employment**;
- (d) The date on which payment to which the pay slip relates is made;
- (e) The period to which the pay slip relates;
- (f) If the employee is paid an hourly rate of pay:
 - (i) The ordinary hourly rate; and
 - (ii) The number of hours within that period to which the employee was employed at that rate; and
 - (iii) The amount of the payment made at that date;
- (g) If the employee is not paid an hourly rate of pay – that rate as at the latest date to which the payment relates expressed as an hourly rate**;
- (h) The gross amount of the payment;

- (i) The net amount of the payment;
- (j) Any amount paid that is an incentive based payment, bonus, loading, monetary allowance, penalty rate or other separately identifiable entitlement the employee has;
- (k) Details in respect of each amount deducted from the gross amount including the name, or the name and number, of a fund or account into which the deduction was paid;
- (l) If the employer is required to make superannuation contributions for the benefit of the employee:
 - (i) The amount of each contribution made for the benefit of that employee during the period to which the pay slip relates; and
 - (ii) The name of any fund to which contribution was made.

****** As stated above, no definition is provided for the meaning of an “industrial instrument” and so the contents of the payslip may have to include each instrument which is relevant to the employee.

The requirement that an employee’s pay be expressed as an hourly rate will require an artificial calculation using a 38 hour week for employees who are paid a salary.

PENALTIES

Failure to comply with each of the obligations set out above in relation to the content of a pay slip will also result in serious civil penalties.

Strict liability applies in respect of any breaches of these regulations.

However, penalties will only be imposed for contraventions which occur after a grace period 6 month from the commencement of the Regulations (Reg 19.24).

APPLICATION OF THE PROVISION AWARD

There are additional requirements that deal with regulations and obligations which may be contained in awards which were in place prior to commencement of the Workplace Relations Act.

In summary, these obligations will continue to apply for the relevant period in so far as they impose any additional obligations on the employer.

PRACTICAL MATTERS TO BE CONSIDERED BY AN EMPLOYER

As stated above, the Regulations provide that prosecutions will only take place if a contravention of the Regulations occurs after the expiry of the period of 6 months from the starting of the reform commencement. In other words, there is a 6 month grace period before the Regulations will be enforced.

Nevertheless, given the substantial and onerous obligations for record keeping, it is important that employers take urgent steps to:

- (a) review of the information contained in pay slips issued to employees to ensure that all of the required content for pay slips is included;
- (b) create and maintain an employment record containing all of the required content for every employee who earns **less** than \$55,000.00 or who is paid for overtime worked; and
- (c) create and maintain an employment record containing all of the required content excluding the provisions that relate to hours worked for every employee who earns more than \$55,000.00 and who is not paid overtime worked.

Employers should also make themselves aware of any changes to the regulation which may affect the requirements to keep records of hours of work.

Other:

The definition of Nominal Hours appears on the next page.

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Definition of Nominal Hours

The following is an extract of Section 229 of the Workplace Relations Act:

229 Meaning of *nominal hours worked*

Employees employed to work a specified number of hours

- (1) For the purposes of this Division, if an employee is employed by an employer to work a specified number of hours per week, the number of ***nominal hours worked***, by the employee for the employer during a week, is to be worked out as follows:
 - (a) start with that specified number of hours;
 - (b) deduct all of the following:
 - (i) the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave which does not count as service;
 - (ii) the number of hours (if any) in the week (other than hours mentioned in subparagraph (i)) in relation to which the employer is prohibited by section 507 from making a payment to the employee.

Note: The actual hours worked from week to week by an employee who is employed to work a specified number of hours per week may vary, due to averaging as mentioned in section 226 or to some other kind of flexible working hours scheme that applies to the employee's employment.

- (2) If an employee is employed on a full-time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a week that is to constitute employment on a full-time basis for the employee, the employee is, for the purpose of subsection (1), taken to be employed to work 38 hours per week.
- (3) If an employee is employed to work a specified number (the ***number of non-week specified hours***) of hours over a period (the ***non-week period***) that is not a week (for example, a fortnight), then, for the purpose of subsection (1), the employee is taken to be employed to work the number of hours per week determined, subject to the regulations (if any), in accordance with the formula:

$$\bullet \quad \frac{\text{Number of non-week specified hours}}{\text{Number of days in non-week period}} \times \frac{7}{\text{Number of days in non-week period}}$$

Employees not employed to work a specified number of hours

- (4) For the purposes of this Division, if subsection (1) does not apply to the employment of an employee by an employer, the number of ***nominal hours worked***, by the employee for the employer during a week, is the lesser of the following:
 - (a) the number worked out as follows:
 - (i) start with the number of hours (if any) in the week that the employee both works, and is required or requested to work, for the employer;
 - (ii) add the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave that counts as service;
 - (iii) deduct the number of hours (if any) in the week in relation to which the employer is prohibited by section 507 from making a payment to the employee;

- (b) the number of nominal hours the employee would be taken to have worked for the employer under subsection (1) during the week if the employee were employed to work 38 hours per week.

Definition

- (5) In this section:

hour includes a part of an hour.

Note 1: The regulations may prescribe a different definition of **nominal hours worked** for piece rate employees (see section 231).

Note 2: An employee's hours of work may be varied (by number or time) in accordance with a workplace agreement, award or contract of employment that binds the employee and his or her employer.

Note 3: For whether leave guaranteed under this Part counts as service, see subsections 238(2) (annual leave), 260(2) (paid personal leave), 261(2) (unpaid carer's leave) and 316(2) (parental leave).

Note 4: Because of the definition of **hour** in subsection (5), an employee's nominal hours worked may be a number of hours and part of an hour.