

# Record Keeping Requirements under the Fair Work Act 2009 (Cth) and the Fair Work Regulations 2009 (Cth)

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## 1. Introduction

As the number of employees of National Systems Employers (“**Employers**”), being employers who come within the meaning of section 14 of the *Fair Work Act 2009 (Cth)* (“**Act**”), who are covered by a Modern Award increases, the necessity for Employers to be aware of the record keeping requirements of the Act and the *Fair Work Regulations 2009 (Cth)* (“**Regulations**”) is increasingly apparent.

Many of the record keeping requirements contained in the Act and the Regulations are mandatory, and failure to comply with certain of them may attract a civil penalty.

It is also important for Employers to be aware of their obligations in respect of making and maintaining Employee Records, both to ensure that an employee receives his or her proper entitlement under an applicable Modern Award, and to ensure that an employee who is subject to an arrangement for the payment of an annual salary in satisfaction of all Award entitlements is not disadvantaged. Employee Records are defined in part 3 of this article.

While proceedings for contravention of the Act or the Regulations solely in respect of record keeping requirements may be rare, actions commenced for non-compliance may be more likely to be brought concurrently with proceedings relating to unfair dismissal or general protection matters, or in actions brought by more than one applicant for the underpayment of wages or withholding of minimum entitlements.

This article intends to be an instructive guide in respect of the particular requirements Employers must be aware of in respect of preparing and retaining Employee Records.

For ease of reference, this article has been divided into the following parts:

- [Record Keeping Requirements under the Act](#)
- [What are Employee Records?](#)
- [Requirements under the Regulations](#)
- [Penalties under the Regulations](#)
- [Pay Slips](#)
- [Compliance Powers of Fair Work Inspectors](#)
- [Infringement Notices](#)
- [Who may commence proceedings for non-compliance with record keeping requirements?](#)
- [Conclusion](#)

## 2. Record Keeping Requirements under the Act

Part 3.6 of the Act deals with the responsibilities of Employers in respect of making and maintaining Employee Records and providing employees with pay slips. Pursuant to

section 535 of the Act, an Employer is required to make and keep for seven years 'Employee Records' of the kind prescribed by the Regulations. Section 536 of the Act further provides that an Employer must provide a pay slip to an employee within one working day of paying the employee in respect of his or her work.

The sections of the Act referred to above are civil remedy provisions and the requirement to comply with the provisions of those sections is mandatory. A failure to comply with the requirements of either section may expose an Employer to a penalty of up to thirty penalty units (this is equivalent to a fine of \$3,300 for an individual or \$33,000 for a corporation) for each contravention.

Both Employee Records and pay slips must be made in accordance with a form, and include information, prescribed by the Regulations. Non-compliance with certain of the requirements of the Regulations is a separate civil remedy provision. Accordingly, if Employee Records are not kept or pay slips not provided, Employers may risk being fined for both failing to maintain Employee Records or to provide pay slips, as well as failing to keep them in the proper form.

### **3. What are Employee Records?**

An 'Employee Record' has the meaning given by section 12 the *Privacy Act 1988 (Cth)* ("**Privacy Act**"). For the purposes of the Act and the Regulations, an Employee Record is further detailed in the Regulations, as set out in part 4 of this article.

The meaning given by the Privacy Act is extensive and includes any personal information relating to the employment of an employee in relation to a specified range of matters.

One of these relates to "hours of employment". However, the Privacy Act does not make it clear whether this pertains to an employee's ordinary hours of employment or the hours actually worked, which may include work outside of ordinary hours. For abundant caution, it is recommended that Employee Records indicate the actual hours of work worked, as this information is incidental to the further requirement to keep Employee Records relating to an employee's salary or wages (which may include calculations for overtime or hourly allowances).

### **4. Requirements under the Regulations**

The Regulations require Employee Records to be kept in legible English and in a form that is readily accessible to a Fair Work Inspector. Each discrete Employee Record must also specify the Employer's name, the employee's name and whether the employee's employment is full time or part time, permanent, temporary or casual. The record must indicate the employee's commencement date of employment and the Australian Business Number of the Employer.

As the Privacy Act definition of Employee Record is quite broad, Chapter 3, Part 3-6, Division 3 of the Regulations sets out the kind of Employee Record that Employers must keep with reference to specific sections of the Act. Generally, Employers must maintain an Employee Record in respect of each of the following:

- (a) the rate of remuneration, the gross and net amount paid and any deductions made from the gross amount paid to the employee;<sup>1</sup>
- (b) if the employee is a casual or irregular part time employee who is guaranteed a rate of pay set by reference to a period of time worked, the hours worked by the employee;<sup>2</sup>
- (c) if the employee is entitled to be paid an incentive based payment, bonus, loading, penalty rate, or other monetary allowance or separately identifiable entitlement, the details of same;<sup>3</sup>
- (d) if a penalty rate or loading must be paid for overtime hours actually worked by an employee, the number of overtime hours worked by the employee during each day or when the employee started and ceased working overtime hours;<sup>4</sup> and
- (e) if the employee is entitled to leave, any leave the employee takes and the balance (if any) of the employee's entitlement to that leave from time to time.<sup>5</sup>

Additionally, if an Employer and employee agree to an individual arrangement in respect of the averaging of hours, the cashing out of an accrued amount of leave, the entering into of an Individual Flexibility Arrangement under the Act, or the entering into of a Guarantee of Annual Earnings, Employers must make and keep a copy of the written agreement as an Employee Record. In respect of cashing out annual leave, Employers must also keep a record of the rate of pay for the amount of leave that was cashed out and when the payment was made.<sup>6</sup>

If an Employer is required to make superannuation contributions for the benefit of an employee, the Regulations provide that the Employer must hold records detailing the following information:

- (a) the amount of the contributions made;
- (b) the period over which the contributions were made;
- (c) the date on which each contribution was made;
- (d) the name of any fund to which a contribution was made;
- (e) the basis on which the Employer became liable to make the contribution, including:
  - (i) a record of any election made by the employee in respect of the fund to which contributions are to be made; and

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<sup>1</sup> Regulation 3.3 (1)

<sup>2</sup> Regulation 3.3 (2)

<sup>3</sup> Regulation 3.33 (3)

<sup>4</sup> Regulation 3.34

<sup>5</sup> Regulation 3.36

<sup>6</sup> Regulation 3.35; Regulation 3.36 (2); Regulation 3.38; Regulation 3.39

- (ii) the date of any relevant election.<sup>7</sup>

This obligation compliments the entitlement of employees who are:

- (a) employed under a federal award or a former state award (NAPSA);
- (b) employed under another award or agreement that doesn't require superannuation support; or
- (c) or not employed under any state award or industrial agreement,

to choose their super fund.

If an employee's employment is terminated, an Employee Record must be made and kept detailing whether the employment was terminated by consent, by notice, summarily, or in some other manner (specifying the manner) and the name of the person who acted to terminate the employment.<sup>8</sup>

This particular requirement compliments the inclination shown by the Act to regulate termination of employment processes (in particular, through the Small Business Fair Dismissal Code), including by requiring an Employer to give written notice of termination and the grounds for termination. As a consequence of this trend, cases involving unfair dismissal or adverse action may be increasingly commenced concurrently with an action for failure to comply with Section 535(1) of the Act and/or a failure to comply with specific requirements of the Regulations which are civil remedy provisions.

## 5. Penalties under the Regulations

It follows that it is important for Employers to be aware of which rules under the Regulations are civil penalty provisions. While the fine for contravention of a Regulation (up to 20 penalty units) is less than a fine for a contravention of the Act, fines levied for multiple breaches of the Regulations may be significant. The following are requirements under the Regulations, which, if not complied with, may give rise to a civil penalty being imposed on the Employer:

- (a) an Employee Record must be kept in legible form and in a form that is readily accessible to a Fair Work Inspector;<sup>9</sup>
- (b) Employee Records maintained by an old Employer must be transferred to the new Employer in a transfer of employment situation at the time that the transfer of employment takes effect or at such other time as determined by the Regulations, and the new Employer must keep those records as if they had been made by the new Employer;<sup>10</sup>

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<sup>7</sup> Regulation 3.37 (1)

<sup>8</sup> Regulation 3.40

<sup>9</sup> Regulation 3.31 (2)

<sup>10</sup> Regulation 3.41

- (c) the Employer must make a copy of an Employee Record available for inspection and copying on request by an employee or former employee to whom the record relates. The Employee Record must be in a legible form and, in certain circumstances, must be provided to the employee to whom it relates within a prescribed period of time (which varies, depending on the location of the Employee Record;<sup>11</sup>
- (d) the Employer must advise an employee or former employee whom has requested an Employee Record where that Employee Record is kept;<sup>12</sup>
- (e) the Employer must ensure that an Employee Record is not false or misleading to the Employer's knowledge, and must correct any Employee Record that the Employer becomes aware contains an error, but must not otherwise alter an Employee Record or permit any other person to alter the Employee Record;<sup>13</sup> and
- (f) a person must not make use of an entry in an Employee Record if the person does so knowing the entry is false or misleading.<sup>14</sup>

It is clear from these civil remedy provisions that the Regulations are designed to ensure right of access by employees to material confirming their wage or leave entitlements, which may in turn ensure that Employers pay the correct rates of pay and allowances and allow employees the benefit of their accrued leave entitlements.

## 6. Pay Slips

The requirements for form and content in respect of pay slips are governed exclusively by the Regulations. Under the Regulations, the following information is required to be disclosed by an Employers in an employee's pay slip:

- (a) the Employer's name;
- (b) the employee's name;
- (c) the period to which the pay slip relates;
- (d) the date on which the payment to which the pay slip relates was made;
- (e) the gross amount of the payment;
- (f) the net amount of the payment;
- (g) any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive-based payment or other separately identifiable entitlement; and

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<sup>11</sup> Regulation 3.42

<sup>12</sup> Regulation 3.43 (1)

<sup>13</sup> Regulation 3.44

<sup>14</sup> Regulation 3.44 (6)

- (h) as of 1 January 2010, if applicable, the Australian Business Number of the Employer.<sup>15</sup>

Under the Regulations an Employer must also disclose information relating to deductions, information relating to hourly and annual rates of pay, and information relating to superannuation contributions.<sup>16</sup>

The Federal Magistrates Court has recently justified these requirements, arguing that if Employers pay cash in hand and do not keep records or provide pay slips, “not only are they depriving employees of their entitlements, they are minimising the risk of detection and the proper calculation of compensation when their conduct is detected.”<sup>17</sup>

## 7. Compliance Powers of Fair Work Inspectors

Section 700 of the Act allows the Fair Work Ombudsman to appoint Fair Work Inspectors and to confer on them compliance powers subject to conditions and restrictions specified in their instrument of appointment<sup>18</sup>. Fair Work Inspectors may exercise the compliance powers specified in their instrument of appointment to determine whether or not an Employer has complied with:

- (a) a provision of the National Employment Standards;
- (b) a term of a modern award;
- (c) a term of an enterprise agreement;
- (d) a term of a workplace determination;
- (e) a term of a national minimum wage order;
- (f) a term of an equal remuneration order.

The Act does not expressly state that a Fair Work Inspector may exercise its compliance powers in respect of apparent contraventions of the Act’s record keeping requirements (or the Act generally). Accordingly, contraventions of record keeping requirements will only be investigated by a Fair Work Inspector incidental to a complaint (or a reasonably held belief by the Fair Work Ombudsman) that there has been a contravention of one of the instruments referred to above.

It follows that an order in respect of contravention of the Act’s record keeping requirements will usually be sought in addition to an order in respect of contravention of, for example, one of the National Employment Standards.

The compliance powers available to Fair Work Australia are broad. Further to sections 708 and 709 of the Act, amongst other powers, a Fair Work Inspector may enter business premises and inspect any work, process or object, require records or documents to be

<sup>15</sup> Regulation 3.46 (1)

<sup>16</sup> Regulation 3.46 (2); Regulation 3.46 (3); 3.46 (4), Regulation 3.46 (5)

<sup>17</sup> *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [42] per Driver FM.

<sup>18</sup> Section 703 of the Act.

produced, or inspect and make copies of any document. The powers of a Fair Work Inspector may be exercised at any time during work hours or at any other time if the Inspector believes that it is necessary to do so for compliance purposes.<sup>19</sup>

The powers which may be exercised by a Fair Work Inspector to require the production of Employee Records may be exercised by the Fair Work Inspector giving written notice to the Employer that the Employee Records must be produced within a specified period.<sup>20</sup> A notice to produce records must be complied with as failure to do so may attract a civil penalty.

If, upon inspecting or requesting inspection of Employee Records, the Fair Work Ombudsman reasonably believes that the record keeping requirements of the Act and Regulations have not been complied with, the Fair Work Ombudsman may accept a written undertaking from the Employer that it will comply with the relevant sections, in which case an Fair Work Inspector may not apply for an order in respect of contravention of a civil remedy provision.<sup>21</sup> A person other than a Fair Work Inspector (see part 9 below) who is otherwise entitled to apply for an order may still do so.

If an Employer fails to comply with an undertaking the Fair Work Ombudsman may apply to the Federal Court or Federal Magistrates Court or an eligible State or Territory Court for an order directing the Employer to comply with the undertaking, or awarding compensation for loss suffered by a person due to the Employer's contravention, or any other order the relevant Court considers appropriate.<sup>22</sup>

## **8. Infringement Notices**

If a Fair Work Inspector reasonably believes that an Employer has failed to comply with the record keeping requirements of the Act or the Regulations, notwithstanding having had the opportunity to remedy any area of non-compliance, the Fair Work Inspector may issue the Employer with an infringement notice. An infringement notice is similar to an on the spot fine and may be issued within twelve months of the day on which the contravention is alleged to have occurred.

The maximum fines payable for an infringement notice are \$330 per contravention for an individual, and \$1,650 per contravention for a body corporate. If an Employer's contraventions of the Act or the Regulation are serious, willful or persistent, the Fair Work Inspector may refuse to issue an infringement notice and recommend that the matter proceed directly to Court.

## **9. Who may commence proceedings for non-compliance with record keeping requirements?**

Standing to commence proceedings for non-compliance with record keeping requirements is extended to an employee, a registered employee organisation (such as a union) or a Fair Work Inspector. It is reasonable to assume that the majority of cases commenced for contraventions of the Act or the Regulations in respect of record keeping

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<sup>19</sup> Section 707 of the Act.

<sup>20</sup> Section 712 of the Act.

<sup>21</sup> Section 715 (4) of the Act

<sup>22</sup> Section 715 (7) of the Act

will arise as ancillary claims to claims for, for example, underpayment of wages or withholding of leave entitlements.

However, as noted above, additional actions for contraventions of the Act or the Regulations in respect of Employee Records may be brought by individuals in the course of proceedings for a remedy for unfair dismissal, or where the employee is alleging the Employer has taken an adverse action against them. As contravention of the Act or the Regulations may attract a civil penalty, such claims may be relied on as an incentive to adduce early settlement of an employee's claim.

## 10. Conclusion

It is worth keeping in mind which record keeping rules will, if not complied with, result in civil penalties. For example, the entitlement of an employee to request an Employee Record which pertains to their employment read in conjunction with the requirement to keep an Employee Record pertaining to termination, lends itself to creating a mandatory obligation to provide written notice of termination and information pertaining to the grounds for termination. This obligation may be contrary to many Employers' practice of advising orally of termination and simply providing the employee with a final pay slip.

Ultimately, it is in an Employer's interest to ensure that it establishes and maintains an organised record keeping system, as the present industrial relations landscape looks certain to increase the number of employees of Employers who are covered by a Modern Award and who are entitled to Award penalties and allowances. Accurate record keeping in respect of what is owing to an employee and what has been paid will be fundamental to preventing many future claims in that regard.

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