

EMPLOYER'S OBLIGATION TO MAINTAIN, KEEP AND MAKE AVAILABLE EMPLOYEE RECORDS AND IN RELATION TO PAY SLIPS

The *Fair Work Act* ("FW Act") imposes numerous obligations on employers. These include the obligation to maintain certain records about employees and to provide employees with pay slips.

It is important that employers and their human resources staff are aware of those obligations.

In the event an employer is the subject of an investigation by a Fair Work Inspector, it is important to have records so as to establish compliance with the National Employment Standards, an Award or Enterprise Agreement.

Further to this, a failure by the employer to maintain the required records can result in significant penalties being applied.

Section 535 of the FW Act imposes obligations on employers to keep employee records. Section 536 imposes obligations on employers in regard to payslips.

The sections state:

535: Employer obligations in relation to employee records

- (1) *An employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees.*

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) *The records must:*
- (a) *if a form is prescribed by the regulations--be in that form; and*
- (b) *include any information prescribed by the regulations.*

Note: This subsection is a civil remedy provision (see Part 4-1).

- (3) *The regulations may provide for the inspection of those records.*

536: Employer obligations in relation to pay slips

- (1) *An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.*

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Section 80 of the Paid Parental Leave Act 2010 requires an employer to give information to an employee to whom the employer pays an instalment under that Act.

- (2) *The pay slip must:*
- (a) *if a form is prescribed by the regulations--be in that form; and*
- (b) *include any information prescribed by the regulations.*

Note: This subsection is a civil remedy provision (see Part 4-1).

As set out in section 535 and section 536 both of those provisions are civil remedy provisions.

Recent changes to the FW Act due to the passing of the *Fair Work Amendment (Protecting Vulnerable Workers) Bill*, have significantly increased the potential penalties an employer may face for breach of a civil remedy provision.

Further, section 550 of the FW Act also imposes liability on persons who are involved in a contravention of a civil remedy provision.

Recent changes to the FW Act due to the passing of the *Fair Work Amendment (Protecting Vulnerable Workers) Bill*, have significantly increased the potential penalties an employer may face for breach of a civil remedy provision.

Further, section 550 of the FW Act also imposes liability on persons who are involved in a contravention of a civil remedy provision.

The combined effect of section 535, 536 and section 550 means that if an employer fails to maintain and keep the appropriate employee records or provide its employees with pay slips in the timeframe and containing the required information, then not only may the employer face a civil remedy for the breach of section 535 and/or 536, but Directors of the employer and potentially human resources staff may also face a penalty for breach of section 535 and/or 536 by virtue of section 550 if they are involved in the contravention.

As such it is important for employers and their human resources staff to ensure that the appropriate records are maintained and pay slips provided, as a failure to do so may result in significant penalties being imposed.

What are the types of records the employer must maintain?

Division 3 of Part 3-6 of the *Fair Work Regulations* ("FW Regulations"), prescribes the form and content of the employee records that must be maintained by an employer.

Regulation 3.31 provides that the employee records must be in a legible form in the English language and in a form that is readily accessible to a Fair Work Inspector. A record is defined in section 2B of the *Acts Interpretation Act* as including information stored or recorded by means of a computer.

Regulation 3.32 provides:

Records--content

For subsection 535(1) of the Act, a kind of employee record that an employer must make and keep is a record that specifies:

- (a) the employer's name; and
- (b) the employee's name; and
- (c) whether the employee's employment is full-time or part-time; and
- (d) whether the employee's employment is permanent, temporary or casual; and
- (e) the date on which the employee's employment began; and
- (f) on and after 1 January 2010--the Australian Business Number (if any) of the employer.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

Regulations 3.33 to 3.40: prescribe the records that must be kept in regards to pay, overtime, annual and personal leave and other matters and the rights of an employee to be given access to the records and to inspect and copy the records.

Regulation 3.41: prescribes the transfer of the employee records from an old employer to a new employer for a transferring employee in a transfer of business.

Regulation 3.42: sets out the obligation on an employer to allow an employee or former employee to inspect and copy employment records relating to that employee.

Regulation 3.43: provides that an employer who is asked for a copy of an employee's record must inform the employee of where that record is kept and

the employee or former employee may interview the employer about that record.

Regulation 3.44: provides the records must not be false or misleading and must be corrected if an error is detected, with notation of the nature of the corrected error with the correction.

Payslips

Regulation 3, 45 and 3.46 relate to the obligation on an employer to provide an employee with a pay slip. Regulation 3.45 sets out how a pay slip is to be provided and regulation 3.46 sets out what must be included in a pay slip.

Summary

Given the provisions of the FW Act and the FW Regulations in relation to employee records and the potential significant penalties that maybe imposed for a breach of a those provisions it is extremely important for employers and their human resources staff to make themselves aware of the record keeping obligations in regard to its employees and the pay slip obligations.

If you would like any further information about your obligations as an Employer pursuant to the *Fair Work* Act please do not hesitate to contact De Silva Hebron on 08 8924 4944 for advice on your obligations.