

**WORKPLACE AND
EMPLOYMENT LAW
ALERT**

SEPTEMBER 2006

**FOR FURTHER INFORMATION
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ATTENTION EMPLOYERS: REQUIREMENTS TO KEEP EMPLOYEE RECORDS

The *Workplace Relations Regulations 2006* (Cth) specify detailed requirements for employers to keep records relating to their employees' employment and entitlements.

The requirement to keep records in accordance with these regulations begins on **26 September 2006**. Following this date, an employer can face civil penalties for failing to keep the information required by these regulations.

The following is a simplified guide to complying with Part 19 of the legislation. Please contact us for a more in depth explanation.

1. Who must keep records?

In most cases, only employers that are constitutional corporations - i.e. an incorporated company, need to comply with the regulations.

This means employers whose business is that of a partnership, trust, sole trader, or unincorporated association need not comply.

Businesses employing flight crew officers, maritime or waterside workers, in the course of their trade or business do however have to keep the records detailed in the regulations, even if they are unincorporated.

Any employer incorporated or unincorporated in a territory of Australia, such as the Northern Territory or the ACT, also needs to comply with the record keeping regulations.

2. Who is an employee?

An employee is an individual - an employee cannot be a company.

Usually, employees do not include individuals taking part in a vocational placement or work experience with an employer.

3. How long must records be kept for?

Employee records generally need to be kept for 7 years from the day after they are made.

However, general employee records and records of superannuation need to be kept for 7 years from the day:

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- the record is changed; or
- the employment is terminated;

whichever happens first.

4. In what condition must the records be kept?

Records must be kept in legible English and be in a form readily accessible to a workplace inspector.

The way the information is recorded must allow a **workplace inspector** to determine:

- the employee's entitlements; and
- whether the employee is receiving those entitlements.

5. What records about employees must an employer keep?

The records are quite detailed and are summarised below in their respective categories.

General Records

Employee records need to contain the following information:

- Name of employer and employee,
- Date on which the employee's employment began,
- Employee's date of birth,
- The name of each instrument from which the employee derives employment entitlements (such as an award or an Act),
- The classification of the employee under each instrument,
- Whether the employee is full-time or part-time,
- How many hours are to be worked by the employee per week,
- Whether the employee's employment is permanent, temporary or casual.

Records relating to hours worked

Employers need to record the total number of hours worked each day by the employee only if the employee's base annual salary is less than \$55,000. This amount will be indexed with inflation each end of financial year.

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The base annual salary is the amount specified in the employment contract, workplace agreement etc, excluding any penalty rates, incentive bonus payments, superannuation contributions or loadings applicable to the employee.

If the employee is part-time, their base annual salary is the equivalent amount they would be earning if they were a full-time employee.

If the employee is paid at a rate of regular salary during a period but does not have an annual salary, i.e because the employment is temporary, then in respect of records to be kept, the base annual salary is the annual salary that the employee would earn at the regular rate.

If the employee is employed as a casual or piece-rate employee, their base annual salary needs to be reasonably estimated by the employer. A good guide for estimating earnings is using the previous year's base earnings.

Records relating to the employee's start and finishing times

If an overtime loading is payable to the employee, the employee's daily starting and finishing times also need to be recorded, regardless of whether the employee earns more than \$55,000.

Records relating to reasonable additional hours worked

Section 226 of the *Workplace Relations Act 1996* (Cth) allows an employer and employee to agree to average the employee's working hours over one year.

If there is such an agreement, it must be in writing and the employer must keep a copy. Failure to keep such an agreement leaves the employer liable to face payment of a fine.

Pay records

The employer must keep records of:

- The basis on which the employee's rate of pay is determined,
- Their gross hourly rate of pay,
- Details of any penalty rates, loadings, bonuses etc,
- The period to which the payment relates,
- The total pay received by the employee during that period, both gross and net amounts,
- The dates on which the employee was paid,
- Superannuation deductions (if any) and details into which fund and

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account they were paid.

A failure to keep these records will leave the employer liable to pay a fine.

Pay Slips

A pay slip must be issued for each payment to the employee. It must be issued within 1 day of the payment having been made.

Pay slips must contain the following information:

- The names of the employee and employer,
- The classification of the employee under each instrument from which the employee derives employment entitlements,
- The date on which the relevant payment was made,
- If the employee is paid hourly, then
 - ⇒ The hourly rate,
 - ⇒ The number of hours for which the employee was employed at that rate, and
 - ⇒ The amount of payment made at that rate.
- If the employee is not paid hourly the salary must be expressed as an hourly rate,
- The gross and net amounts of the payment,
- Any amount paid for penalty rates, loadings, bonuses etc,
- The details of any superannuation deducted from the gross payment, including the name and account of the fund the deduction was paid into,
- If the employer is required to make superannuation contributions for the employee:
 - ⇒ The amount of each contribution, and
 - ⇒ The name of the fund the contribution was paid into.

Annual leave records

The employer must keep records about:

- The employee's nominal hours worked within the meaning of section 229 of the Act,
- The rate at which the employee's annual leave accrues,
- The dates when the employee was credited with annual leave,
- The balance of the employee's annual leave,

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- The amount of annual leave taken by the employee,
- The amount paid to the employee while on annual leave.

If the employee elects to forgo any annual leave, the employer must keep records of:

- A copy of the employee's written election to forgo an amount of annual leave, and
- The rate of payment for the forgone annual leave and when the payment was made.

For shift workers, the employer needs to keep records of the periods for when an employee was a shift worker and when they were credited with additional annual leave.

Personal leave

Regarding personal leave, an employer needs to keep records of:

- The employee's nominal hours worked within the meaning of section 241 of the Act,
- The employee's rate of accrual of personal leave,
- The date on which the employee was credited with personal leave,
- The employee's balance of personal leave,
- The amount and type of personal leave taken by the employee,
- The amount paid to the employee while on personal leave.

Other leave

If the employee is entitled to leave other than annual or personal leave, the employer must keep records of:

- The amount and type of leave taken and whether it is paid or unpaid leave,
- Details of the accrual of other leave,
- The balance of the employee's entitlement to other leave,
- The amount paid to the employee (if any) while on other leave.

Superannuation contributions

If the employer is required to make superannuation contributions for the employee, the employer must keep records of:

- The amount of contributions made,

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- The period over which they were made,
- The dates on which the contributions were made,
- The name of the fund to which contributions were made,
- The basis on which the employer became liable to make the contributions, including a record of any election the employee made as to the superannuation fund they want contributions paid into.

The above requirements do not apply for contributions made to a defined benefit superannuation fund, within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth).

Termination of employment

If an employee's employment is terminated, the employer needs to record:

- Whether the employment was terminated by consent, by notice, summarily, or in some other manner,
- The name of the person who terminated the employment of the employee.

6. Altering and Correcting Records

Employers must not alter or allow records to be altered. The only exception is to correct an error in a record as soon as the employer becomes aware of it. The nature of the error must also be recorded with the correction.

7. False or Misleading Entries

A person must not make or use an entry in any record if the person knows the entry is false or misleading.

8. Inspection and Copying of Records

An employer must make records available to a workplace inspector. Employees or former employees are also to be given copies of or access to their records (as defined) if they so request.

Any copy provided must be in legible English. If the records are to be inspected at the employer's premises, they need to be available for inspection within 3 business days of the employer receiving the request. The employer must tell the person requesting the records where the records are kept. Also, the person may interview the employer or its representative at any time during ordinary working hours about the records. The employer must give reasonable assistance to the person during the interview.

If copies of records are to be posted, the employer needs to do this within 14 days of receipt of the request.

9. What happens when a business is sold?

If a business is sold and the new employer continues to employ an employee from the business before its sale, the old employer must transfer to the new employer all records concerning the transferred employee.

If an existing employee becomes an employee of the new employer *after* the business is transferred, the new employer needs to request that employee's records from the old employer. The old employer must comply with this request.

Relevant Section for Annual Leave Records:

Section 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

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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:

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

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

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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.

Relevant Section for Personal Leave Records:

241 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

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- 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.

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 - (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 243).

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.