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*Practice Group:*

*Labour, Employment  
and Workplace Safety*

## Can I Get That in Writing?

*By Michaela Moloney and John Monroe*

As an employer, you may be faced with an employee claiming that they have not received their legal entitlements. They may be claiming they worked more hours, have not received relevant overtime or penalty rates, or they are entitled to more leave than your company has given them.

The first thing you will want to do when confronted with such a claim is confirm whether or not the allegation is true. Most employers intend to provide employees their legal entitlements, but mistakes can happen. However, when you go to check your employee's claim against your own records, you could run up against a wall - you don't have them.

A failure to keep records is in itself a contravention of the *Fair Work Act 2009 (the Act)*, and a new amendment to the Act may make this a much more costly mistake to make. The new *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* means there is more reason than ever for employers to make sure their records are up to date.

### They're only records, aren't they?

In a claim for unpaid entitlements, one of the first things that a well-advised employee will do is request an inspection of their employee records. Current and former employees, Fair Work Ombudsman inspectors, and union officials exercising a right of entry have the right to inspect relevant records under the *Fair Work Act 2009*.

However, you can't produce something for inspection if you don't have it to begin with, which is a situation more and more employers are finding themselves in. In 2016, the Fair Work Ombudsman identified an increase in record keeping failures, and 21% of audits conducted by the Fair Work Ombudsman in 2016 identified record keeping contraventions.

A failure to keep certain records, and produce them for inspection, is a contravention of the civil penalty provisions of the Act. Currently, such a breach can result in a penalty of AUD54,000 per breach for a corporation, and AUD10,800 for any individuals "knowingly involved in" the contravention, such as managers, payroll and HR staff.

However, the Federal Government's *Protecting Vulnerable Workers Bill* proposes to increase maximum penalties to AUD540,000 (ten times as much) for "serious contraventions". These would be contraventions which are:

- deliberate – meaning that the corporation expressly, tacitly or impliedly authorised it
- part of a systematic pattern of conduct – taking into account the number of contraventions, the period over which they occurred, and the number of people affected.

The Ombudsman identified in a recent speech that increasing penalties for record keeping contraventions is one of the purposes of this Bill. This suggests that widespread record keeping failures will be likely targets for these increased penalties.

The Bill will also make record keeping contraventions a factor the Courts must consider in determining whether other contraventions are "serious". This means that if an

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employer has failed to keep appropriate records, any other contravention may be considered to be "serious" by the Courts.

Keeping good records is also a vital tool for employers (and your lawyers) in defending against employee claims, ranging from claims of underpayment to general protections.

### What do I have to keep?

The majority of record keeping contraventions are the result of administrative errors. In our experience, where employers have an issue with their record keeping, it is usually because they are unaware that these obligations exist, or the extent of them. While employers cannot avoid all potential claims, this is one which is fairly simple to prevent. So what records are required to be kept, and for how long?

In summary, employers are required to keep records specifying the following, in regard to each employee:

If ...	You Have to Keep a Record of...
<b>You employ an employee</b>	<ul style="list-style-type: none"> <li>• employer's name and ABN</li> <li>• employee's name</li> <li>• employee's commencement date</li> <li>• whether the employment is temporary, part-time or casual</li> </ul>
<b>You make a payment to the employee</b>	<ul style="list-style-type: none"> <li>• rate of remuneration</li> <li>• gross and net amounts paid</li> <li>• any deductions from gross amount</li> </ul>
<b>The employee is entitled to any bonus, penalty etc.</b>	<p><b>Details of any:</b></p> <ul style="list-style-type: none"> <li>• incentive-based payment or bonus</li> <li>• loadings, penalty rates or monetary allowances</li> <li>• separately identifiable entitlements</li> </ul>
<p><b>The employee is:</b></p> <ul style="list-style-type: none"> <li>• casual, irregular part-time or piece worker</li> <li>• is paid based on time worked</li> </ul>	<ul style="list-style-type: none"> <li>• hours worked by the employee</li> </ul>
<b>The employee is entitled to a penalty rate or loading for overtime hours</b>	<ul style="list-style-type: none"> <li>• the amount of hours of overtime worked</li> <li>• the start and finish time of those hours</li> </ul>

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If ...	You Have to Keep a Record of...
<p><b>You have entered into any agreement under the Fair Work Act with the employee</b></p>	<p><b>Copies of, and records of any termination of:</b></p> <ul style="list-style-type: none"> <li>• individual flexibility arrangements</li> <li>• guarantees of annual earnings</li> <li>• agreements to average the employee's hours of work</li> </ul>
<p><b>The employee has taken any leave</b></p>	<ul style="list-style-type: none"> <li>• the amount of leave taken</li> <li>• the balance of their entitlement to leave</li> <li>• any agreement to cash out annual leave</li> </ul>
<p><b>You are required to make superannuation contributions for the benefit of the employee</b></p>	<ul style="list-style-type: none"> <li>• amount, date and period over which contributions were made</li> <li>• the name of the fund</li> <li>• how you are liable to make the contribution (e.g. the employee's election of superannuation fund)</li> </ul>
<p><b>The employee's employment is terminated</b></p>	<ul style="list-style-type: none"> <li>• how the employment was terminated (i.e. by consent, notice, summarily or otherwise)</li> <li>• who acted to terminate the employment</li> </ul>

These records must be:

- in a legible form
- in the English language
- readily accessible to an inspector
- be kept for 7 years.

You may not alter these records other than to correct an error.

In addition to the above documents, employers are also required to provide payslips to employees within a day of making a payment to an employee. These must set out the general information, pay, hours of work, hours of overtime and superannuation details set out above, for the period to which the payment relates.

The details that must be kept in respect of an individual's employment can vary depending on an employee's entitlements. Is an employee entitled to an overtime penalty rate or loading? Then you need to keep records of what overtime hours they work, even though you might not need to for another employee. Therefore, one of the keys to keeping good records is understanding what employees are entitled to in the first place.

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As a general rule, the more details kept the better position an employer will be in to meet their record keeping obligations, and defend any employee's claim for underpayment.

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