



Changes to state employment laws in WA

Additional employment record obligations

June 2022

Additional employment record keeping obligations have been introduced in the state industrial relations system.

These new provisions in the *Industrial Relations Act 1979* (IR Act) were introduced by the *Industrial Relations Legislation Amendment Act 2021* and commenced on 20 June 2022. The previous record keeping obligations for award free employers in the *Minimum Conditions of Employment Act 1993* (MCE Act) have been repealed.

This fact sheet outlines:

- the employment record keeping requirements for all employers;
- the retention of employment records;
- the increased penalties for contraventions of record keeping requirements including for making and keeping an employment record that the employer knows, or could be reasonably expected to know, is false or misleading;
- accessory liability provisions; and
- the employer burden to disprove certain allegations if they have failed to comply with the record keeping requirements.

There are also new requirements for employers to provide pay slips – See the **New pay slip requirements** fact sheet at www.dmirs.wa.gov.au/new-employment-laws.

State employment laws have changed

This fact sheet is part of a suite of information on the changes to state employment laws that commenced on 20 June 2022. For details on the changes visit www.dmirs.wa.gov.au/new-employment-laws.

Record keeping requirements

There are no longer separate record keeping requirements for employers covered by an industrial instrument and employers who are **not** covered by an industrial instrument.

It is compulsory for all state system employers to keep the following employment records:

- the employee's name and, if under 21 years of age, their date of birth;
- the employer's name and Australian Business Number (if any);
- any industrial instrument that applies (name of the WA award or industrial agreement);
- date the employee commenced employment with the employer;
- for each day of work:
 - the time at which the employee started and finished work;
 - period/s for which the employee was paid; and
 - details of work breaks including meal breaks;
- for each pay period:
 - the employee's designation (such as full time, part time, casual) and employee classification;
 - the gross and net amounts paid to the employee under an industrial instrument or the MCE Act;
 - any amount withheld as tax; and
 - all deductions from pay and the reasons for them;
- any incentive based payment, bonus, loading, penalty rates or other monetary allowance or entitlement;
- all leave taken, whether paid, partly paid or unpaid;
- any agreement under the MCE Act to cash out annual leave, including the amount of annual leave cashed out, and the benefit provided to the employee, and when it was paid (note - an employee covered by a WA award cannot cash out annual leave unless the WA award allows cashing out of annual leave, and most WA awards do not contain such a provision);
- the information necessary for the calculation of and payment of long service leave under the *Long Service Leave Act 1958* (LSL Act), the *Construction Industry Portable Paid Long Service Leave Act 1985* or an industrial instrument (a WA award or agreement);
- any other information required by a WA award, industrial agreement or other industrial instrument (such as the address of the employee, or hourly rate of pay) to be recorded;
- any other information that is necessary to show that the pay and benefits received by the employee comply with the relevant WA award and/or other legal obligations such as employee entitlements under the MCE Act or the LSL Act;
- the following matters relating to superannuation:
 - the amount of the superannuation contributions made;
 - the period over which the superannuation contributions were made;
 - the date on which each superannuation contribution was made;
 - the name of any fund to which a superannuation contribution was made;
 - how the employer worked out the amount of superannuation owed; and
 - any choice made by the employee as to which fund their contributions are to be made and the date on which the choice was made; and
- termination related matters, including:
 - whether the employee's employment was terminated by consent, notice, without notice by the employer ('summarily'), or in some other specified manner; and
 - the name of the person who terminated the employee's employment.

State system employers also need to ensure that the following are kept as employment records:

- if an employer makes a payment to an employee in cash, the employer must provide a record of the payment to the employee and ensure that a copy of the record of payment is kept as an employment record;
- if an employer and employee enter into an agreement under the MCE Act to cash out some of the employee's annual leave, the employer must ensure that a copy of the signed, written agreement is kept as an employment record; and
- if the Supported Wage System (SWS) or a supported wage industrial instrument provision (SWIIP) applies to an employee with a disability, an employer must keep the following employment records in relation to the employee:
 - any agreement entered into under the SWS or SWIIP by the employer and employee; and
 - any other document required to be kept by the SWS or SWIIP relating to the determination of a wage for the employee.

An employer must, as soon as possible, lodge with the Registrar of the Western Australian Industrial Relations Commission (WAIRC) a copy of an agreement entered into under the SWS that is required to be kept by the employer.

Visit www.dmirs.wa.gov.au/employmentrecords for record keeping information, including employment record templates to assist employers meet record keeping requirements.

Employers are also be required to comply with the record keeping requirements in the LSL Act.

Retention of employment records

State system employers need to comply with the following requirements for retaining employment records:

- each entry in relation to annual leave and long service leave must be retained during the employee's period of employment and for not less than 7 years after the employment terminates;
- each other employment record must be retained for not less than 7 years after it is made.

Increased penalties

Employers face a penalty of up to \$13,000 (or up to \$130,000 in the case of a serious contravention) for individuals or a penalty of up to \$65,000 for bodies corporate (or up to \$650,000 in the case of a serious contravention) for:

- not keeping the specified employment records;
- not keeping the employment records in accordance with the Regulations or for the specified period of time;
- failing to lodge a copy of any SWS agreement with the Registrar of the WAIRC;
- making or keeping an employment record that the employer knows, or could reasonably be expected to know, is false or misleading; and
- failing to produce employment records relating to an employee or let a person inspect the employment records on written request by an employee, the employee's representative, a person authorised in writing by the employee or an officer authorised by the Registrar of the WAIRC.

A serious contravention is defined as a situation in which the person knowingly commits the contravention and this conduct is part of a systematic pattern of conduct relating to one or more other persons.

Accessorial liability

A penalty may also be imposed on a person who has been **involved in** a contravention, including a contravention of a record keeping requirement. This liability may extend to persons such as accountants and HR officers responsible for maintaining and keeping employment records for a business.

A person is involved in a contravention if the person intentionally participates in the contravention. This requires actual knowledge of the essential matters that make up the contravention. It can, however, also include 'wilful blindness' if a person deliberately shuts their eyes to what is going on and fails to make an inquiry of suspicious circumstances.

Employer burden to disprove an allegation

An employer has the burden of disproving an allegation made in proceedings to enforce an entitlement provision (such as an underpayment of wages matter) if the employer was required to:

- make or keep an employment record under the IR Act or the LSL Act in relation to the matter; or
- make available for inspection a record in relation to the matter;

and failed to comply with the requirement.

The burden of disproving an allegation does not apply, however, if the employer provides a reasonable excuse for the failure to comply with the requirement to make or keep a record, or make a record available for inspection.

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