SUPERANNUATION: MEANING OF GAINFUL EMPLOYMENT

The concept of gainful employment is important for two purposes:
1. To determine if superannuation contributions can be accepted for a person aged 65 or over; or
2. To determine if a person aged under 65 can access their superannuation benefits.

Contributions caps are not considered in this bulletin. Refer to Technical Bulletin 35 – Tax deductible superannuation contributions and Technical Bulletin 59 – Contributions for information regarding the contribution caps.

The relevance of gainful employment

Contributions

Generally, if a person is aged at least 65 but less than 75 they must meet a gainful employment test before voluntary contributions (contributions other than mandated contributions) can be accepted by the trustee. There is a window of opportunity after 75 where voluntary contributions can be accepted by the fund trustee on or before 28 days after the end of the month in which the person reaches age 75 (subject to satisfying the gainful employment test).

The gainful employment test requires a person to be gainfully employed for at least 40 hours in an unbroken period of 30 days in a financial year (commonly referred to as the work test).

Mandated employer contributions are those made for Superannuation Guarantee (SG) purposes or under an industrial award or certified agreement. They are not subject to a work test and can be made at any age.

Acceptance of contributions outside age/gainful employment test – trustee discretion

A trustee has discretion to accept a contribution if the trustee is reasonably satisfied that the contribution is in respect of a period during which the fund could have accepted the contribution, even though the contribution is made after that period.

The Australian Prudential Regulatory Authority’s (APRA) view in ‘Superannuation Prudential Practice Guide (SPG) 270 – Contribution and benefit accrual standards for regulated superannuation funds’ is a trustee may use this provision in very limited circumstances, specifically where:

• it is an employer contribution paid after the end of a period of gainful employment but clearly related to an earlier employment period that was a valid contribution period for the member; or
• it is a contribution that was erroneously allocated to another member during a valid contribution period for the correct member and the late contribution is merely a corrective transaction to reverse the original error.

The ability to accept contributions outside the age and gainful employment test is at the discretion of the trustee. Approval to accept such contributions should therefore be sought from the trustee of the fund.

Access to superannuation benefits

Anyone under age 65 who wishes to access their preserved benefits must have met a condition of release. Conditions of release such as ‘retirement’ or ‘permanent incapacity’ refer to ceasing gainful employment.

A member who has reached their preservation age is considered to have ‘retired’ when:

• the member has ceased an arrangement of gainful employment (at any time); and
• the trustee is reasonably satisfied (at the time of notification) that the member intends never again to become gainfully employed for 10 or more hours per week.

Once a person reaches age 60, ‘retirement’ is also taken to occur when they have ceased an arrangement of gainful employment on or after age 60. The gainful employment arrangement could be casual, part-time or full-time.

Where a member is employed under two or more arrangements, ceasing one arrangement is a valid condition of release for preserved and restricted non-preserved benefits accumulated up until that time.

What is gainful employment?

Gainful employment for superannuation purposes is defined as being employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment.
The definition is broken up into two elements:

1. Requirement to be employed or self-employed; and
2. Receipt of gain or reward in return for personal exertion.

Each of these elements is considered below.

1. Employed or self-employed

The terms employed or self-employed are not defined in superannuation legislation. However, there are factors which can be used to determine if an individual is employed or self-employed.

**Employed persons**

Compliance with Pay-As-You-Go (PAYG) and Superannuation Guarantee (SG) laws may assist in determining the extent of an employer/employee relationship, however, these factors alone are not conclusive.

The Australian Taxation Office (ATO) uses a variety of indicators to identify whether a person is an employee according to its ordinary meaning. These indicators have been sourced from numerous court cases and are listed in Tax Ruling 2005/16. They are not definitive and each fact by itself will not lead to the conclusion that the person engaged is an employee.

**Key indicators of whether a person is an employee (from Tax Ruling 2005/16):**

- The relationship between an employer and employee is a contractual one;
- The degree of control which the employer can exercise over the employee;
- An employee bears little or no commercial risk which is generally borne by the employer;
- An employee will generally perform the tasks on the employer's premises using the employer's assets and equipment;
- An employee is generally reimbursed for expenses incurred in the course of employment;
- Subject to legislation, an employer may reserve the right to suspend or dismiss an employee;
- An employer usually has the right to the exclusive services of the employee;
- An employee may be entitled to such benefits as annual, sick and long service leave and the provision of other benefits prescribed under an award or industrial instrument for employees.

**Self-employed persons**

A person who is self-employed must generally be carrying on a business. A business includes any profession, trade, employment, vocation or calling other than an occupation performed as an employee.

Once again, each case will be judged on its own particulars, with the outcome a function of all the relevant indicators. Tax Ruling 97/11 contains some useful indicators of carrying on a business which have also largely been based on a variety of court decisions. Here is a list of these indicators:

- A significant commercial activity exists;
- There is an intention to profit from the activity;
- There is a purpose and intention in engaging in the activity;
- The activity is or will be profitable;
- There exists repetition and regularity of the activity;
- The activity is carried on in a similar manner to that of the ordinary trade;
- The activity is organised and carried on in a business like manner;
- Business records are kept;
- There exists size and scale in the activity;
- A business plan exists;
- The product or services on offer are being commercially sold;
- The taxpayer has knowledge or skill with respect to the activity;
- The activity is not a hobby, recreation or sporting activity.

2. Gain or reward

A gain or reward envisages receipt of remuneration such as salary or wages, business income, bonuses, commissions, fees or gratuities, in return for personal exertion.

The concept of gain or reward is broad enough to encompass payments other than salary or wages. Therefore, an individual may receive a non-monetary gain or reward, provided the payment is directly related to their employment.

**Expense reimbursements**

An expense reimbursement does not constitute gain or reward as it is compensation for expenditure incurred and not a payment for personal exertion.
Useful scenarios

**Overseas work**
The act of being employed or self-employed for a gain or reward is not restricted to work performed in Australia. This means gainful employment could take place overseas.

**Domestic work for family or friends**
Extra care is required when dealing with domestic employment arrangements between family and friends. While it is possible to satisfy the gainful employment requirement, there are some important considerations. These include:

- Receiving an arm’s length gain or reward (other than as an expense reimbursement);
- Documenting the gain or reward received (such as a payment summary and employment letter outlining dates, pay and hours worked);
- Declaring the gain or reward for tax and social security purposes (as necessary);
- Being able to substantiate the work arrangement is a genuine one (a history of such paid work is preferred);
- Receiving the gain or reward as a primary motive for engaging in the activity (a history of such paid work can be of assistance).

Further, the activity for which the gain or reward is received should not be one that is reasonably expected of an individual in their capacity as a family member or friend. For example, an individual who pays their spouse to care for them in place of employing a carer would not qualify as a gainful employment arrangement. Caring for an ill spouse is a domestic activity and something one would expect a spouse to do.

It is necessary to assess each situation based on its own facts.

Take the example of a father who periodically assists with the gardening chores in his son’s home. The father receives an arm’s length remuneration in exchange for his gardening services. Based on the facts, it is possible the father satisfies the definition of gainful employment, particularly where there is a history of receiving gain or reward for such an activity and the father provides these services to the general public.

Also consider the example of a mother who lives with her daughter and son-in-law, and assists with the cleaning duties in the process. The mother is unlikely to satisfy the gainful employment definition irrespective of any pay she receives, as the activity is one which is reasonably expected given the domestic circumstances (living arrangements) of the family.

Babysitting for grandchildren is yet another common family arrangement. Once again, the question of gainful employment will depend on the case particulars. Being able to demonstrate gain or reward as a primary motive as well as being able to demonstrate a history of paid babysitting is beneficial. However it would be difficult to argue a gainful employment arrangement was in place where the individual had up until that point (or going forward) not been paid for babysitting their grandchild. This is because the primary motive for the arrangement is unlikely to be for a gain or reward. Instead, the arrangement would be more of a domestic one and not one of an employer/employee.

**Managing investments**
A person managing their own investments is in most circumstances receiving some gain or reward for their activities. Nonetheless, most fail the gainful employment definition because they are not employed or self-employed for the gain or reward.

For example, an individual who actively manages a portfolio of investment properties they own will not ordinarily be gainfully employed. In limited circumstances, the Administrative Appeals Tribunal (AAT) has concluded an individual investor managing property (Case G10 75 ATC 33, Case U55 87 ATC 363) or a share portfolio (Case F29 74 ATC158) was self-employed on the basis they were carrying on a business – thereby satisfying the definition of gainful employment. Also, where investments are held in a company or trust structure, satisfying the gainful employment definition could be achieved where the individual is employed by the company or trust on a bona fide basis.

**On leave or claiming Workers Compensation**
Based on a view previously expressed by APRA in in Prudential Practice Guide ‘SPG 270 – Contribution and benefit accrual standards for regulated superannuation funds’ (4 April 2012), periods of authorised leave (paid or unpaid) actually taken by the member are considered periods of gainful employment for the purposes of applying the work test.

Whilst not specifically stated in that guide, similar treatment should hold true for those still employed and on authorised workers compensation. See Technical Bulletin 69 Workers compensation – Financial planning aspects, for further information.

**Company directors or trustees of trust estates**
A director of a company or trustee of a trust is likely to be gainfully employed if there is a genuine employment arrangement in place.

However gainful employment requires an identifiable connection between the services rendered by the director or trustee, and the gain or reward received.

**Payments in-kind**
A payment received in-kind will in many circumstances constitute gain or reward (unless the payment is intended as an expense reimbursement).

The gainful employment definition can only be met if the individual was employed or self-employed for that gain or reward and there exists a clear association between the receipt of the payment and the work activity (this will ultimately depend on the facts of the case).
Volunteers
The vast majority of voluntary work will not be classed as gainful employment.

The provision of a payment in-kind, such as a meal voucher, could satisfy the gain or reward requirement provided the payment is not intended as an expense reimbursement.

Nonetheless, gain or reward in itself does not satisfy the gainful employment definition. In most volunteer situations, the first element (employed or self-employed) of the gainful employment definition is not met. This is because the volunteer is not contractually obligated to undertake the work activities.

Centrelink Carer Payment recipients
The receipt of Carer Payment from Centrelink will not constitute gainful employment.

While it may be argued that Carer Payment constitutes gain or reward in recognition of personal exertion, it remains that the individual is not employed or self-employed and therefore fails to satisfy the gainful employment definition. That is, an individual who is in receipt of Carer Payment is not engaged in an employment arrangement with the Australian government.

Hobbies
An activity conducted as a hobby will not constitute gainful employment.

While the second element (gain or reward) of the gainful employment definition could be achieved, the definition fails on account that the individual is not employed or self-employed in exchange for that gain or reward.

To help ascertain whether an activity is a hobby or a business, refer to the ATO publication ‘Are you in business’.

Foregoing salary for dividends or trust distributions
An individual who is at least 60 years of age but under age 65 and who foregoes salary in return for a higher dividend payment or trust distribution will not trigger the ‘retirement’ condition of release. In other words, this does not constitute a cessation of a gainful employment arrangement.

Merely rearranging how the individual is compensated for work performed will not alter the connection between work performed and the gain or reward received.

Jurors or prisoners
An individual’s engagement in jury duty will not constitute gainful employment. Both elements of the gainful employment definition fail here.

A juror is not considered to be an employee of the relevant government authority (state, territory or federal). Any payments made to the juror consist of expense reimbursements e.g. for travel and an allowance for lost income. These are not payments relating to employment.

A prisoner who is being compensated for certain activities undertaken while incarcerated will not constitute gainful employment for similar reasons.

Having difficulties ascertaining gainful employment?
Ideally, you should verify and explain whether the individual satisfies the gainful employment test. Diarising your reasons is a recommended approach.

If the situation is unclear, you can refer the client on to APRA (www.apra.gov.au) or a taxation specialist – the taxation specialist can assist with determining if the individual is conducting a business.

Concepts discussed in this document apply to both retail super and SMSFs, however the procedures may differ between these funds.