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# Meaning of gainful employment

This article examines gainful employment in relation to contributing to super and accessing super benefits.

## Background

The concept of gainful employment is important for two purposes which are to determine:

- eligibility for personal contributions that an individual claims as a tax deduction where they are aged between 67 and 74<sup>1</sup> at the time of contribution, or
- if a person aged 60 to under 65 has 'retired' and can access their super benefits.

In this article, gainful employment is defined. The work test requirement is explained, and numerous circumstances are highlighted that demonstrate whether a person is gainfully employed or not for both contribution and accessing super purposes.

## Personal deductible contributions

### Meeting the work test

The work test is pertinent where an individual wishes to make a personal deductible contribution and is at least aged 67 at the time of making the contribution.

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There is no requirement that the member be gainfully employed at or before the time of making the contribution.

However, it is good practice to ensure the work test is met prior to making the personal contribution, otherwise the tax deduction cannot be claimed if the individual fails to satisfy the work test later in the financial year.

Since 1 July 2022, the ATO determines if the work test has been met by using information contained in the individual's tax return (previously super trustees were responsible for ascertaining whether a member had met the work test or not).

<sup>1</sup> Personal contributions must be received no later than 28 days following the end of the month in which the member turns age 75

The work test requires a person to be gainfully employed for at least 40 hours over of 30 consecutive days in a financial year. Gainfully employed means employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment (please refer to section 'What is gainful employment?').

The work test is not required to be met unless the client is claiming a tax deduction for personal contributions.

### **Work test exemption for recent retirees**

Recent retirees aged between 67 and 74<sup>2</sup> don't need to meet the work test to make personal deductible contributions if they are eligible for the work test exemption. To be eligible an individual must meet all the following:

- met the work test in the last financial year but not in the financial year of the contribution
- total super balance (TSB) is less than \$300,000 at 30 June prior, and
- the work exemption has not been used in a prior financial year.

To contribute in a future financial year after the exemption has been utilised, the person would again need to meet the work test requirements.

## **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 age 60 is considered to have 'retired' when:

- the member has ceased an arrangement of gainful employment, 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 aged between 60 and less than 65 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.

Any new contributions after ceasing that gainful employment arrangement will be preserved until the member meets another condition of release.

## **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.

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.

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<sup>2</sup> Personal contributions must be received no later than 28 days following the end of the month in which the member turns age 75

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 indicator by itself will not lead to the conclusion that the person engaged is an employee.

### Key indicators

A person is an employee when they satisfy a combination of the following:

- 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, and
- 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 self-employed person generally carries 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.

### Key indicators

Indicators that a person is self-employed include:

- 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 is 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, and
- the activity is not a hobby, recreation or sporting activity.

## **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 and of significance.

The employment or self-employment for a gain or reward refers to work performed in Australia or overseas.

### Expense reimbursements

The reimbursement of an expense does not constitute gain or reward as it compensates for expenditure incurred and is not a payment for personal exertion.

## **Common gainful employment scenarios**

### Domestic work for family or friends

Extra care is required when dealing with domestic employment or self-employment arrangements between family and friends. While it is possible to satisfy the gainful employment requirement, it is necessary that client is genuinely employed or self-employed, and to assess each situation based on its own facts.

For example, babysitting grandchildren is unlikely to meet the key indicators as an employee or self-employed person, unless the person had previously worked in the childcare industry.

### 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 ATC 158) was self-employed on the basis they were carrying on a business (and satisfying the definition of gainful employment).

Where investments are held in a company or trust, 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

APRA have previously expressed 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) 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.

### 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. This generally requires the director or trustee to be contracted and use their personal exertion on business activities. They should receive gain or reward connected to business activities performed.

### Payments in-kind

A payment received in-kind will in some circumstances constitute gain or reward (unless the payment is intended as an expense reimbursement). Insignificant payments in-kind such as complimentary morning tea would not constitute gain or reward.

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. Gain or reward 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, the individual is not employed or self-employed. 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.

## **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 your client appears to be conducting a business but the situation is unclear, you can refer the client on to a taxation specialist – the taxation specialist can assist with determining if the individual is conducting a business.

## Contact details

For further information, please contact TechConnect on **1800 645 597**

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