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Superannuation: employees with multiple employers

Terri Bradford

Legislation has passed allowing employees with multiple employers to opt out of receiving Superannuation Guarantee (SG) payments to avoid unintentionally breaching their concessional contributions cap. This paper examines how to avoid exceeding your annual concessional contributions cap.

Summary of the new rules

The SG rules were established to ensure employees receive a minimum level of superannuation contributions in respect of their employment. Where an employer fails in their obligations to pay the SG, that employer will incur SG interest charges.

The SG rules include a 'maximum contribution base' beyond which an employer no longer needs to make superannuation contributions for an employee to avoid liability for the SG charge.

This operates as a ceiling, limiting the amount of superannuation support an employer is obliged to provide for an employee for a quarter. This means salary or wages that exceed the maximum contribution base can be excluded from the calculation of SG contributions.

The problem is that the maximum contribution base for an employee applies to each employer. If an employee has multiple employers, each employer must make superannuation contributions on the earnings they pay to the employee up to the maximum contribution base in order to avoid incurring an SG liability. This occurs even where the employee earns less than the maximum contribution base for each of their employers, but their income in total exceeds the maximum contribution base.

Accordingly, individuals with multiple employers may inadvertently exceed their annual concessional contributions cap. Where an individual's total concessional contributions (including those made by their employer) exceed their annual concessional contributions cap (currently $25,000), the excess is their 'excess concessional contributions' for the financial year.

An individual's excess concessional contributions are included in their assessable income for the year and taxed at marginal rates less a 15% tax offset (representing the tax paid in the superannuation fund). The individual is also subject to an interest charge, based on the shortfall interest rate to cover the resultant late payment of tax.

The amended rules will now allow the individual to nominate to opt out of the SG system in respect of their wages from certain employers. The opt-out means that eligible individuals can avoid breaching their annual concessional contributions cap as a result of multiple employers making contributions into superannuation on their behalf.

The amendments provide a framework for individuals to apply to the Commissioner of Taxation (Commissioner) for an employer shortfall exemption certificate, which prevents their employer from having a SG shortfall if they do not make superannuation contributions for a period.

About the employer shortfall exemption certificate

Where the Australian Taxation Office (ATO) issues a shortfall exemption certificate to an employer, the employer's maximum contribution base for that employee becomes nil for that relevant quarter. The Explanatory Memorandum to the Treasury Laws Amendment (2018 Superannuation Measures No.1) Bill 2019 explains that the employer shortfall exemption certificate does not prevent an employer from making contributions into superannuation on behalf of the employee. Rather, the effect of the certificate is only to remove the consequences of failing to make any contributions for the quarter covered by the certificate.

This means an employer may choose to disregard a certificate and continue to make contributions if, for example, where an employee and employer do not reach agreement on the terms of an alternative remuneration package for the relevant quarter, or if there has not been enough time for an employer to adjust payroll or other business software to discontinue contributions for the employee.

Conditions

The ATO may issue an employer shortfall exemption certificate in relation to an individual who has made an application to the ATO (using the approved form) and their employer for a quarter if all of the following conditions are satisfied:

- The person is likely to exceed their concessional contributions cap for the financial year that includes the relevant quarter if an exemption certificate is not issued.
- The Commissioner is satisfied after issuing the certificate, the employee will have at least one employer that would either have an individual SG shortfall in relation to the employee, and
- The Commissioner considers that it is appropriate to issue the certificate in the circumstances.

The Commissioner can only issue an employer shortfall exemption certificate at the request of the person who is the employee to be covered by the certificate.

The Commissioner cannot issue an employer shortfall exemption certificate at the request of the individual's employer or on the Commissioner's own initiative.

Evidence is not required to prove "foregone contributions have been substituted for higher wages". This is on the basis that employees with higher incomes (that is, those who are likely to breach their concessional contributions cap through employer contributions) are likely to be in a strong bargaining position with their employers and have voluntarily opted out of SG payments.

The employee must still be receiving contributions from at least one employer

Multiple certificates may be issued in relation to a single employee, with each certificate covering a different employer. However, at least one employer must still be required to make contributions for the benefit of the employee. This ensures that an employee will still receive a minimum level of contributions for the financial year.

An application for an exemption certificate may be refused

It may be appropriate for the Commissioner to deny an application for an employer shortfall exemption certificate where a person has applied for a certificate that would reduce their contributions by a substantially larger amount than is necessary, relative to another possible certificate or where the Commissioner has already issued a certificate for another quarter in the same financial year.

The Commissioner would also have regard to any circumstances in which an individual has engaged in behaviour that artificially enables them to apply for a certificate.

It should be noted that applications cannot be made for prospective employers.

Once accepted, the Commissioner will issue a notice in writing both to the employee who made the application, and to the employer covered by the certificate. If the application is refused, the Commissioner will notify the employee but not the employer.

The due date for lodging an application is 60 days before the first day of the quarter to which the application relates. **FS**

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The quote

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