

# Superannuation Guarantee

## Employee, contractor – what's in a name?

Many business people are under the misconception that where they engage a person as a contractor – where the contractor quotes their ABN and provides an invoice for services rendered – that there is no Superannuation Guarantee, Workcover, payroll tax or other employer obligations in relation to that person. This may not be the case.

In relation to Superannuation Guarantee, there are a number of circumstances where a person should be included in the Super Guarantee obligations for the employer's business (I have included the expanded definition of 'employee' from section 12 of the *Superannuation Guarantee Act 1992* at the end of this article), and these include:

1. Where they are a 'common law' employee, or;
2. Where they provide wholly or principally their labour in return for the payment received.

It is the second section that we will review today.

'Provide wholly or principally their labour' includes physical, mental and artistic labour. The Australian Taxation Office (ATO) has issued many fact sheets dealing with this matter (and also has an on-line decision tool to assist in determining the status of an individual), and below is an extract from a fact sheet that explains their view on 'wholly or principally for labour':

### What is a contract wholly or principally for labour?

A contract for labour can be made either orally or in writing.

A contract may be considered wholly or principally for labour, if the contractor:

- is remunerated wholly or principally for their personal labour and skills,
- must perform the contract work personally, and
- is paid by reference to hours worked rather than completion of the contract.

The ATO also considers the exemptions to this general rule:

If you make a contract with someone other than the person who will actually be providing the labour, there is no employer-employee relationship.

The following two situations are examples of when the contract is **not** for the labour of the individual:

- if you make a contract with a company, trust or a partnership, or
- if the person you have the contract with is free to hire other people to perform the work, even if the person ends up performing the work themselves.

So, engaging someone to undertake work, where they perform that work on your premises, with your equipment, paid on an hourly rate and where they have no ability to have someone else

undertake that work on their behalf, it would appear, on the face of it, that you also have a superannuation guarantee obligation for that person.

Please do not confuse the Superannuation Guarantee rules with the Personal Services rules, where someone works for you for only part of the time (they have other sources of income in excess of 20% of their total income) – you can have a contractor who meets the requirements to be an independent contractor under the Personal Services Rules, but who is included under your Superannuation Guarantee obligation because they provide wholly or mainly their labour in contracting their services to you.

Where the contract is mainly for the labour of the individual, but not wholly for their labour, you can work out the labour component using the market value for the labour, based on common industry measures .

**Remember, it is the employers obligation to meet their superannuation guarantee requirements for every employee and contractor providing wholly or mainly their labour in satisfaction of their contract. Penalties for non compliance are much more expensive than simply paying the Superannuation Guarantee, and not tax deductible.**

In determining a rate to pay your contractors you would probably be paying a higher amount than to an employee to account for the fact that they were responsible for their own superannuation and Workcover obligations. You may have arrangements in place that will now need to be renegotiated to reduce the hourly rate that they are being paid to allow you (as the deemed employer) to make contributions to superannuation on their behalf.

You may have some contractors who would prefer to incorporate (form a company) or operate through a partnership or trust structure, or others where you need to ensure their contract is in writing and includes the ability for them to engage others to perform the work on their behalf (ideally, the contractor would be able to provide evidence that this did happen on occasion). For others who are paid on a 'results' basis, they may need to provide additional information on their invoices to show that the work performed was not wholly or principally for their labour (detailing materials and other disbursements would assist here).

We recommend that you undertake a review of all consultant/contractor and subcontractor arrangements immediately, as well as reviewing any past practices that may have created a liability for superannuation.

At the end of this article we have includes an extract from the ATO website – Checklist for Salary and Wages and Ordinary Time Earnings – Superannuation Guarantee is payable on Ordinary Times Earnings.

## Workcover Queensland

The definition of 'wages' for Workcover Queensland purposes is extensive – to assist you in meeting your obligations we have posted a copy of the Workcover Queensland Wages Definition Manual on the Chelle Corp website (see under Workcover) - below is an extract regarding contractor payments:

### 2.17 Contractor payments

'Wages' means the total amount paid, or provided by an employer to, or on account of, a worker as wages, salary or other earnings, by way of money or entitlements having monetary value.

Where the payment to the contractor (and the contractor is deemed to be a 'worker') is a total payment, inclusive of materials, plant and equipment, vehicle or other incidentals, **the total amount is assessable as wages**. Where the contract/invoice clearly identifies items as being reimbursement of specific costs, and itemises these separately, these costs would not be assessable.

Clearly, it is incumbent on every employer to ensure that each contractors invoice (where the contractor is included as a 'worker') clearly shows all costs incurred separate from the labour component to ensure that you minimise your Workcover obligation.

## Queensland Payroll Tax

Companies or groups of companies that pay \$1,000,000 or more in Australian wages each year must pay Payroll tax. Taxable wages can include both cash and non-cash wages, salaries, remuneration, third-party payments and salary sacrifice amounts (provision of work vehicles etc).

There are deductions, concessions and exemptions available to those that are eligible. **The current payroll tax rate is 4.75%.**

To add to the complexity for employers, Queensland Payroll tax uses a different definition of employee and contractor to both Workcover Queensland and the federal Superannuation Guarantee legislation, although the themes are consistent. For Queensland Payroll tax purposes, an independent contractor is an entity 'that agrees to produce a designated result for an agreed price'. Contractors can include:

- sub-contractors
- consultants
- sole traders
- companies
- partnerships
- trusts.

In most cases a contractor:

- is paid for results achieved
- provides all or most of the necessary materials and equipment to complete the work
- is free to delegate work to other entities
- has freedom in the way the work is done
- provides services to the general public and other businesses

- is free to accept or refuse work
- is in a position to make a profit or loss.

Where a contractor provides services to only one business, or to only a small number of businesses, the contractor payments will be included in the employer's Taxable Wages for the year.

Payroll Tax Queensland information can be found at [www.osr.qld.gov.au](http://www.osr.qld.gov.au). There is an extensive web page devoted to 'who is an employee' and also a detailed list of common payments and allowances and whether they are included in the calculation of payroll tax. We suggest you visit this site to familiarise yourself with the items to be included and excluded from the definition of Taxable Wages for Payroll Tax Queensland purposes.

## Superannuation Guarantee

### Checklist for salary or wages and ordinary time earnings

What should be included in the superannuation guarantee amount paid? From 1 July 2008, you must use ordinary time earnings (OTE), as defined in the superannuation guarantee law, to calculate the minimum super guarantee contributions required for your eligible employees. OTE can include over-award payments, bonuses, commissions and allowances. The following table will assist in determining OTE for Superannuation Guarantee purposes:

Payments to an employee in relation to ...	Salary or wages?	OTE?
<b>Awards and agreements</b>		
Overtime hours - award stipulates ordinary hours to be worked and employee works additional hours for which they are paid overtime rates	Yes	No
Overtime hours – agreement prevailing over award	Yes	No
Agreement supplanting award removes distinction between ordinary hours and other hours	Yes	Yes
No ordinary hours of work stipulated	Yes	Yes
Casual employee – shift-loadings overtime payments	Yes Yes	Yes No
Casual employee whose hours are paid at overtime rates due to a 'bandwidth' clause	Yes	No
Piece-rates – no ordinary hours of work stipulated	Yes	Yes
Overtime component of earnings based on 'hourly driving rate' formula stipulated in award	Yes	No
<b>Allowances</b>		
Allowance by way of unconditional extra payment	Yes	Yes
Expense allowance expected to be fully expended	No	No
Danger allowance	Yes	Yes
Retention allowance	Yes	Yes
Hourly on-call allowance in relation to ordinary hours of work for doctors	Yes	Yes
<b>Payment of expenses</b>		

Reimbursement	No	No
Petty cash	No	No
Reimbursement of travel costs	No	No
Payments for unfair dismissal	No	No
Workers' compensation – returned to work not working	Yes No	Yes No
<b>Leave payments</b>		
Annual leave	Yes	Yes
Parental Leave - maternity, paternity and adoption leave	No*	No
Ancillary leave – eg jury duty, defence forces reserves leave	No*	No
<b>Termination payments</b>		
Termination payments – in lieu of notice unused annual leave	Yes Yes	Yes No
<b>Bonuses</b>		
Performance bonus	Yes	Yes
Bonus labelled as ex-gratia but in respect of ordinary hours of work	Yes	Yes
Christmas bonus	Yes	Yes
Bonus in respect of overtime only	Yes	No

## **SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992 - SECT 12**

### **Interpretation: employee, employer**

(1) Subject to this section, in this Act, **employee** and **employer** have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons.

(2) A person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate is, in relation to those duties, an employee of the body corporate.

**(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.**

(4) A member of the Parliament of the Commonwealth is an employee of the Commonwealth.

(5) A member of the Parliament of a State is an employee of the State.

(6) A member of the Legislative Assembly for the Australian Capital Territory is an employee of the Australian Capital Territory.

(7) A member of the Legislative Assembly of the Northern Territory is an employee of the Northern Territory.

(8) The following are employees for the purposes of this Act:

(a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;

(b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.

(9) A person who:

(a) holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory; or

(b) is otherwise in the service of the Commonwealth, of a State or of a Territory (including service as a member of the Defence Force or as a member of a police force);

is an employee of the Commonwealth, the State or the Territory, as the case requires. However, this rule does not apply to a person in the capacity of the holder of an office as a member of a local government council.

(9A) Subject to subsection (10), a person who holds office as a member of a local government council is not an employee of the council.

(10) A person covered by paragraph 12-45(1)(e) in Schedule 1 to the *Taxation Administration Act 1953* (about members of local governing bodies subject to PAYG withholding) is an employee of the body mentioned in that paragraph.

(11) A person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work.

Chelle Corporation Pty Ltd  
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