

Cover sheet for: Superannuation Guarantee: understanding our compliance approach

Generated on: 18 November 2019, 07:32:16 PM

 This cover sheet is provided for information only. It does not form part of the underlying document.

 This document has changed over time.

Superannuation Guarantee: understanding our compliance approach history

Superannuation Guarantee: understanding our compliance approach

Meeting your super guarantee obligations. What you need to know.

This fact sheet explains the ATO's compliance and penalty approach in relation to employer superannuation guarantee (SG) obligations outlined under the *Superannuation Guarantee (Administration) Act 1992*.

This approach applies to employers who are unable or unwilling to meet their SG obligations, including non-payment, under-payment, or late payment of super contributions to an eligible employee's complying super fund.

Paying super contributions for your eligible employees

Paying super is an important part of being an employer and provides an income for workers in retirement. Super is money that belongs to the employee, not Government revenue, and safeguards the future of Australian workers. Generally, employers who pay an eligible employee \$450 or more (before tax) in a calendar month are required to pay super contributions for their employees on top of their wages. The minimum amount of super contributions that must be paid is called super guarantee.

Super contributions must be paid for eligible employees even if the employee:

- is full-time, part-time or casual
- receives a super pension or annuity while still working, including those who qualify for the transition-to-retirement measure
- is a temporary resident - when they leave Australia, they can claim the contributions you made through a 'departing Australia superannuation payment'
- is a company director
- is a family member working in the employer's business.

Contractors paid mainly for their labour are employees for SG purposes, even if the contractor quotes an Australian business number. Employers must make super contributions for these individuals if they are paid:

- under a verbal or written contract that is wholly or principally for their labour
- for their personal labour and skills, which may include physical labour, mental effort or artistic effort
- to perform the contract work personally.

You can use the employee/contractor decision tool to work out if a contractor is an employee for super purposes.

SG is currently 9.5% of an employee's ordinary time earnings and the super contributions must be paid to a complying super fund or retirement savings account (RSA) by the quarterly due dates, which are 28 days after the end of each quarter.

What if I don't meet my SG obligations?

Employers with eligible employees can meet their SG obligations by making super contributions on time, and to the correct fund. Employers who don't pay the minimum amount of super contributions for an employee into the correct fund by the due date are liable for the super guarantee charge (SGC). The SGC is made up of:

- (a) SG shortfall amounts (including any 'choice liability') calculated on an employee's salary or wages
- (b) interest on those amounts (currently 10%)
- (c) an administration fee (\$20 per employee, per quarter).

SGC is not a deductible expense.

You must report and rectify missed, late or underpaid super contributions by lodging an SGC statement by the due date and paying the SGC to the ATO. The Commissioner has no discretion to waive the requirement to lodge the SGC statement, or to remit the application of the administrative fee or nominal interest charged.

If we determine that you have not complied with your SG obligations (or reasonably suspect that you have not we may disclose their individual SG shortfall to each affected employee and former employee as well as any actions we have taken.

More information

For more information see:

- [Working out if you have to pay super](#)
- [The super guarantee charge \(SGC\)](#)
- [Employee/contractor decision tool](#)

Or call the ATO Superannuation enquiry line on **13 10 20**.

Operating hours are 8am to 6pm Monday to Friday, except national public holidays.

➤ For a callback from an ATO officer, email TaxAdvice@ato.gov.au

Our compliance approach

Our compliance approach supports employers who engage with us and want to get things right. We do take firmer action for those unwilling to meet their SG obligations. We base our approach on the relevant facts and circumstances of each case.

In deciding what action to take, we apply a differentiated approach to consider the individual circumstances of an employer and their history of engagement with us. We tailor our approaches for:

- employers who actively engage with us
- employers experiencing difficulty meeting their SG obligations
- employers who are unwilling to meet their SG obligations.

Employers who actively engage with us are those who maintain regular contact, provide all information requested and take any required corrective action requested by us. Any additional penalties will be lower for employers who engage with us and have a compliance history that demonstrates they have been generally compliant with their SG obligations.

Employers who are experiencing difficulty meeting their SG obligations are encouraged to contact us as soon as possible if they need assistance to lodge an SGC statement or to discuss payment of the SGC.

- The Commissioner has discretion to consider partial or full remission of the [Part 7 penalty](#), to ensure that employers are treated appropriately.
- Remission will be considered based on the circumstances of the case, the degree that an employer has attempted to comply and the employer's compliance history. For further information see [PS LA 2011/28](#).

We may direct an employer to undertake an approved course of education if we reasonably believe they have failed to comply with certain obligations arising under super or taxation laws.

Employers who are unwilling to meet their SG obligations are breaking the law. We will take firm compliance action if an employer fails to engage with us by not replying promptly to our correspondence or not actively taking steps to resolve an SG discrepancy. This includes employers who:

- repeatedly fail to pay the correct amount of super contributions
- attempt to obstruct our ability to determine an SGC liability
- repeatedly fail to keep appointments
- repeatedly fail to supply information without an acceptable reason
- deliberately supply information that is irrelevant, inadequate or misleading
- engage in any culpable behaviour to delay the provision of information.

We consider the compliance history of an employer to determine the action we will take and penalties to be applied. Action may include:

- issuing a direction to pay SGC (non-compliance with the direction can incur court enforced penalties, imprisonment or both)
- collecting amounts owed directly from their bank or other third parties that owe them money
- collecting amounts owed directly from company directors
- action that may result in bankruptcy or liquidation

Our penalties and charges

In addition to the SGC, [penalties](#) may be imposed if employers fail to meet their SG obligations.

- A **Part 7 penalty** is applied if an employer lodges their SGC statement late, or fails to provide a statement or information when requested. This penalty may be up to 200% of the amount of the charge payable.
- A **general interest charge (GIC)** is applied when an SGC is not paid by the due date and accrues from the date that the SGC is due, up to the date that the SGC account is paid in full. The GIC is calculated on a daily compounding basis and is tax-deductible in the year it is incurred.
- An **administrative penalty** may be imposed upon an employer who makes a false or misleading statement in order to pay less SGC than they should. The base penalty amount can be up to 75% of the shortfall and varied according to the employer's circumstances.
- **Additional penalties** may also be imposed if an employer fails to keep adequate records, fails to pass on an eligible employee's TFN to their super fund/RSA within required timeframes, or enters into arrangements to avoid their SG obligations, such as liability for the SGC.
- A **choice liability** is a penalty imposed when an employer does not give an eligible employee a choice of super fund. This penalty may be imposed on employers who:
 - fail to provide their employee with a standard choice form within the required timeframes
 - pay super contributions into a fund which was not the fund nominated by the employee
 - impose a fee upon their employee for implementing their choice of fund

A director of a company that fails to meet an SGC liability in full by the due date automatically becomes personally liable for a penalty equal to the unpaid amount.

- A **director penalty notice** may be issued if an SGC liability remains outstanding. This may occur prior to legal proceedings being commenced to recover unpaid liabilities.
- Even if a director penalty notice is not issued, action to recover the penalty can also occur through other means including withholding of a tax refund.

In some cases, **legal action** may be taken to recover outstanding tax and super debts. The action that the ATO takes will depend on whether the debt is owed by an individual (or sole trader), partnership, trust, super fund or company, and may include:

- [Claim or summons](#)
- [Bankruptcy notice](#)
- [Creditor's petition](#)
- [Statutory demand](#)
- [Wind-up action](#)

Help and assistance

Help and support is provided to enable employers to get it right and understand their SG obligations. We provide information through our website (ato.gov.au) and social media accounts including:

- easy to access [employer super](#) information that includes interactive short videos to assist employers to understand their SG obligations
- [employer super health check](#) that enables employers to run a quick health check of their super obligations
- downloadable [employer super obligations brochure](#)
- [employer checklist](#) and guide to using SuperStream
- [key tax topics for super](#)
- tailored advice and support for small business including provision of a [small business newsroom](#)

Free online super tools are available 24/7 on our website (and regularly reviewed and enhanced) which include:

- [Super guarantee eligibility decision tool](#)
- [Super guarantee contribution calculator](#)
- [Super guarantee charge statement and calculator tool](#)

We administer the [Small Business Superannuation Clearing House \(SBSCH\)](#) which provides a free online super payments service that helps eligible Australian small businesses, and eligible withholding payer number holders to meet their SG obligations.

Eligible employers can send their employees' super contributions to a single destination, the SBSCH; which distributes the payments and payment details on their behalf to the employees' nominated super funds.

Our reviews and campaigns

The ATO receives data from a range of sources and validates this against our own information to identify where businesses may not be fully up to date with their SG obligations. Information received from third parties and intelligence obtained through print and social media is considered and factored into our compliance approach.

Sophisticated data analytical models are applied to identify employers considered at high risk of not meeting their superannuation guarantee obligations or suspected of having not met their SG obligations.

- Our risk differentiated approach takes into account factors like an employer's industry, size and prior compliance history.
- We base assessments on a comparison of salary and wage data from pay as you go withholding or Single Touch Payroll reports, individual income tax returns and super guarantee payments reported by super funds.

We follow up all reported complaints from employees about potential unpaid super guarantee entitlements. This includes examining every employee notification made to us. We follow up with employers and if necessary, undertake audits and apply penalties against employers who do not pay super contributions on behalf of their employees.

Our compliance partnerships

We have established relationships with other regulators including: the Treasury; Australian Prudential Regulation Authority; Australian Securities and Investments Commission; Fair Work Ombudsman; and the Department of Jobs and Small Business to promote conformance with, and performance of, the super guarantee system.

We draw on the respective roles, expertise and information holdings of each agency, regularly exchange information and develop collaborative strategies.

Compliance examples

Example 1

On 2 October 2016, employer Big Books reviewed their SG obligations and identified that due to a payroll anomaly, some eligible employees had not been paid all of their SG entitlements for the last three quarters. Big Books is usually up to date with all their SG obligations and took action to immediately rectify the situation by lodging SGC statements with payment in full to the ATO. The ATO will consider Big Books to be an example of an engaged employer and will consider fully remitting any penalties to \$0 in this circumstance.

Example 2

Employer Beck Tools has been experiencing cash flow problems due to non-payment of invoices by several of their customers. As a result, Beck Tools is struggling to meet their SG obligations and pay all of their eligible employee's super contributions for the quarter ending 31 December 2016. Beck Tools takes steps to rectify the situation and lodges an SGC statement, but still experiences difficulty in paying the resulting debt by the due date. The ATO contacts Beck Tools to follow-up the outstanding liability and an arrangement is negotiated for Beck Tools to pay their debt in instalments.

The ATO will consider Beck Tool's circumstances and compliance history. In this example, Beck Tools generally has a good compliance history, cooperated with the ATO once contacted, met their payment arrangement conditions and voluntarily took action to rectify their non-compliance prior to the ATO commencing an audit. The ATO will consider fully remitting any penalties to \$0 in this circumstance.

Example 3

Employer Robopen has been experiencing cash flow problems due to unexpected changes in seasonal demand for their products. As a result, Robopen hasn't met their SG obligations for their eligible employees for the quarter ending 31 December 2016. Robopen decides to do nothing for the time being, hoping

to be able to rectify the situation once their cash flow improves. The ATO receives a notification from an employee of Robopen reporting that their super appears to have been unpaid for a period. The ATO investigates the notification and commences an employer audit. Robopen is found to be non-compliant with their SG obligations and is advised to lodge an SGC statement.

Robopen lodges the required SGC statement and after discussing their cash flow concerns with the ATO, they negotiate an appropriate payment arrangement. Although Robopen did co-operate with the ATO audit, they should have voluntarily disclosed that they had not met their SG obligations by lodging an SGC statement by the due date. As such, penalties are considered by the ATO for their non-compliance, but are reduced based on Robopen's circumstances and willingness to co-operate during the audit process.

Example 4

Employer Paper Jam has not paid their employees SG entitlements for the quarter ending 31 December 2016. They are aware that this is a failure to comply, but as they already have debts to both the ATO and other creditors, they decide that payment of these debts is more important as they attempt to keep their business afloat. Paper Jam does not take any action to rectify the situation or discuss their circumstances with the ATO. The ATO receives a notification from an employee of Paper Jam reporting that their super appears to have been unpaid for a period. The ATO investigates the notification and notes that Paper Jam has a history of non-compliance and has previously been subject to an audit for an earlier period.

The ATO commences an employer audit. Paper Jam does not respond to the ATO's requests for contact or provision of information and does not lodge an SGC statement. The ATO raises a default assessment for the quarter ending 31 December 2016 and informs Paper Jam of the outcome in writing. The ATO will consider Paper Jam to be an example of a disengaged employer. In this example, heavy penalties will be imposed due to Paper Jam's failure to comply with their SG obligations, previous compliance history, and failure to engage with the ATO when requested to do so.

Our commitment to you

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations. If you feel that this publication does not fully cover your circumstances, or you are unsure how it applies to you, you can seek further assistance from us.

This publication was current as at April 2019.

© Australian Taxation Office for the
Commonwealth of Australia



Australian Government
Australian Taxation Office