


PS LA 1999/7 - Prescribed employees, paragraph 27(1)(d) Superannuation Guarantee (Administration) Act 1992

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 This document has changed over time. This version was published on *2 August 1999*



ATO Practice Statement Law Administration

PS LA 1999/7

FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO Officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process for significant issues.

**SUBJECT: Prescribed employees, paragraph 27(1)(d)
*Superannuation Guarantee (Administration) Act 1992***

STATEMENT

1. It is the responsibility of the employer to self assess whether an executive will satisfy the requirements to be a prescribed employee for the purposes of paragraph 27(1)(d) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).
2. Whether an executive is a prescribed employee is a question of fact.
3. The exemption that applies to a prescribed employee does not extend to that person's family.

EXPLANATION

4. Section 27 of the SGAA sets out certain salary or wages paid to employees that are not to be taken into account when determining whether the employer has a Superannuation Guarantee shortfall. Employers are not required to make superannuation contributions on behalf of those employees.
5. Prior to 1 August 1996, employers of holders of Class 413 (executive (overseas)) visas did not have any obligation under the SGAA to make superannuation contributions on behalf of foreign executives and their families.
6. In 1996, the Migration (1993) Regulations were amended to introduce new visa classes for all business entrants. Visa classes 456 and 457 replaced the class 413 visa and several other classes of visas. These amendments took effect from 1 August 1996. Class 413 visas are no longer issued but all class 413 visas issued prior to 1 August 1996 remain valid for the period for which they were issued.
7. Amendments to subregulation 7(1) of the *Superannuation Guarantee (Administration) Regulations* have been passed that continue the exemption for employers of executives who meet the criteria for the former Class 413 visa.
8. An employer will not have an obligation to contribute superannuation under the SGAA for the following employees:

- 413 visa holders
 - certain 456 visa holders
 - certain 457 visa holders
9. As the SGAA is a self-assessment system, the employer will need to determine whether there is an SGAA obligation for an employee who is a class 456 or 457 visa holder. This process is not necessary for an employee who has a current 413 visa.

Class 456 visa holders

10. A class 456 visa is issued to an employee entering Australia who is sponsored by an employer. The visa is issued for a period of 4 months or less. The employee will be the primary applicant, which is indicated on the visa. The existence of work conditions will be indicated by a code on the visa.
11. An employer will not have a SGAA obligation for an employee who is a class 456 visa holder [or the holder of an Electronic Travel Authority equivalent (class 956 or 977 visas)] **and** who satisfies one of the following three conditions:
- the employee is a national managing executive, deputy national managing executive or state manager of the employer; or
 - the employee is a full-time senior executive carrying substantial executive responsibility and has qualifications that are appropriate for the position (which may include qualifications through prior demonstrated work experience and skills), or
 - the employee is establishing a business activity in Australia on behalf of his or her employer, the employee's position is a full-time position carrying substantial executive responsibility and the employee has qualifications that are appropriate for the position (which may include qualifications through prior demonstrated work experience and skills).
12. Not all employees entering Australia with a class 456 visa will be able to satisfy one of the three conditions. Employers continue to be required to make superannuation contributions for those employees who hold a 456 visa but do not satisfy one of the three conditions.

Class 457 visa holders

13. A class 457 visa is issued to a person entering Australia who is sponsored by an employer. The visa is issued for a period of greater than 4 months. The employee will be the primary applicant, which is indicated on the visa. The existence of work conditions will be indicated by a code on the visa.
14. An employer will not have a SGAA obligation for an employee who is a class 457 visa holder **and** who satisfies one of the following three conditions:

- the employee is a national managing executive, deputy national managing executive or state manager of the employer and was nominated for the purposes of the 457 visa application by the employer (including identified under a regional headquarters agreement or labour agreement); or
 - the employee is a full-time senior executive carrying substantial executive responsibility, has qualifications that are appropriate for the position (which may include qualifications through prior demonstrated work experience and skills) and was nominated for the purposes of the 457 visa application by the employer (including identified under a regional headquarters agreement or labour agreement); or
 - the employee is establishing a business activity in Australia on behalf the employer, the employee's position is a full-time position carrying substantial executive responsibility and the employee has qualifications that are appropriate for the position (which may include qualifications through prior demonstrated work experience and skills).
15. Not all employees entering Australia with a class 457 visa will be able to satisfy one of the three conditions. Employers continue to be required to make superannuation contributions for those employees who hold a 457 visa but do not satisfy one of the three conditions.

Documentary requirements

16. There are no specific methods or rules for determining whether an employee meets the necessary criteria. If requested by the Australian Taxation Office, an employer would need to demonstrate the rationale for arriving at the decision that the particular employee meets the necessary criteria for exemption from SGAA coverage. This assessment needs to be done for each individual senior foreign executive.
17. An employee, who disputes the employer's decision that he or she is a prescribed employee, should discuss the matter with their employer.

Family members

18. The dependants of the primary applicants for 456 and 457 visas can enter Australia as secondary applicants. Their status as secondary applicants is indicated on the visa. There is not likely to be any work restrictions on the secondary applicants. Family members who are secondary applicants are not prescribed employees. To be a prescribed employee the family member would need to become a primary applicant in his or her own right **and** satisfy one of the three conditions.
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Amendment history

Date of amendment	Part	Comment
11 June 2010	Contact details	Updated.
11 April 2008	Contact details	Updated.
11 February 2008	Contact details	Updated.

subject references: executive; prescribed employee; superannuation guarantee; visas

legislative references: SGAA 27(1)(d)
SGAA Reg 7

file references: NO 99/10787-1

FOI extraction number:	I 1020467
Date issued:	2 August 1999
Date of effect:	Ongoing
Other Business Lines consulted	No
