Raiding your super too early or for a loan can land you in big trouble, Martin Murden explains.

The introduction of tax-free superannuation benefits for people aged over 60 and transition to retirement income streams (TRIS) for those aged over 55 has added to the level of confusion about when and how much superannuants can access from their accumulated super. In some circumstances it has resulted in people drawing on their super prematurely or drawing more than they are legally entitled to.

In a nutshell, the implementation of tax-free benefits means that if you are aged over 60 and are drawing a super pension, you no longer have to declare these withdrawals in your personal taxation return. The TRIS provisions mean that if you are aged 55 plus, you are entitled to draw a maximum of 10 per cent of your balance each year as an income stream. Unfortunately, it seems many erroneously believe that these changes have given those aged between 55 and 65 the green light to withdraw whatever they want from their super, irrespective of their circumstances.

To add to the confusion, some superannuants are also under the misapprehension that they can ‘borrow’ from their super. This tends to happen with people buying a home before finalising the sale of their existing home: they find they have a shortfall and decide to take from their super with the intention of paying it back later. The thinking is: the money’s mine, so why the heck not? But this thinking is wrong, wrong, wrong. You cannot borrow from your superannuation fund. To do so is a breach of the legislation governing superannuation.

Perhaps unsurprisingly, the majority of confusion around access arises among people who are members of self managed super funds (SMSFs), rather than those who are members of public offer or managed funds. If you run your own SMSF, now could be the time to bone up on the Conditions of Release (withdrawal) rules, because the penalties for illegally accessing super are severe. They can include:

- prosecution of trustees for contravening the super law
- your SMSF being made non-complying, which has serious taxation consequences: the tax rate could be increased from 15 per cent to 46.5 per cent
- your disqualification from being a trustee of a superannuation fund, with you having to transfer your entitlements to another fund or appoint a professional trustee: either outcome could involve significant expenses
- taxing beneficiaries at their marginal rate for the amount withdrawn: this can push people into a higher tax bracket with tax at the rate of up to 46.5 per cent becoming payable

What is ‘gainful employment’?

To qualify as being gainfully employed, superannuants must work more than 10 hours a week.

Closure of a partnership or resignation as a director does not constitute termination if the superannuant continues working in the same business for more than 10 hours a week (even if in a different capacity) as the person is still an employee.

If the person was working for a family trust for more than 10 hours per week and received a salary, terminating working for the trust is considered to be termination of gainful employment.
Conditions of Release rules

The following very strict Conditions of Release rules spell out precisely when and in what circumstances you can gain access to your super.

1. If you are aged 55–59, you must have retired from gainful employment (see box) or have no intention of being gainfully employed again. In some cases, you will have to sign a statutory declaration to that effect.

Declaring permanent retirement does not restrict you from returning to the workforce at a later stage. However, avoid declaring permanent retirement, cashing in on super and then returning to gainful employment in the same week. This will not be viewed kindly by the Australian Taxation Office!

2. If you are aged 60–64 and leave gainful employment, there are no cashing restrictions on accumulated super when you cease employment. However, if you return to gainful employment while still in this age group and make further contributions to super, the resulting super is ‘preserved’ until you terminate the employment or turn 65.

Note: Those who are aged 60–64 and self-employed may find it difficult to satisfy a Condition of Release prior to reaching 65. This is because they usually have no intention of commencing other employment or terminating their business until they actually retire.

3. People aged 65 or more can withdraw benefits at any time, regardless of their employment status.

→ MORE

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For information on running a self managed super fund, including understanding compliance and penalties, see the Australian Taxation Office website at http://tinyurl.com/o9pbts.