Edited version of administratively binding advice

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Advice

Subject: Definition of employee for purposes of the superannuation guarantee legislation.

Question 1

Are the workers considered to be common law employees as defined in subsection 12(1) of the *Superannuation Guarantee Administration Act 1992* (SGAA)?

Advice

No. Please see 'Reasons for decision' below.

Question 2

Are the workers employees by virtue of subsection 12(3) of the SGAA?

Advice

Yes. Please see 'Reasons for decision' below.

Question 3

Is there an obligation to pay SG contributions for a worker who provides work of a domestic or private nature if they work more than 30 hours per week and are paid $450 or more in a month?

Advice

Yes. Please see 'Reasons for decision' below.

Relevant facts and circumstances

• The Commissioner received a Private Ruling application in respect of PAYG Withholding obligations and SG obligations for workers.

• You enlist the help of individuals to support you on an as needed basis.

• The workers' pay is based on an hourly rate.

• The number of hours where care may be required varies depending upon your situation.

• The work provided to you by the worker is of a private or domestic nature.

• The worker provides a 'Statement by Supplier' declaration such that tax is not withheld on the payments made to them.

• A variety of means are used by you to source workers.

• The workers are not professionals.

• On occasions multiple workers are utilised.

- We issued a private ruling in respect of your PAYG withholding obligations.

Contentions

You have given consideration to factors outlined in Taxation Ruling 2005/16 - *Income tax: Pay As You Go - withholding from payments to employees* to determine whether the individual is paid as an employee for the purpose of section 12-35 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). You have provided the following information in relation to the various factors identified as part of the ruling as follows:

- There is no formal agreement. Tasks are agreed verbally and they are provided on an ad-hoc basis, when required.

- The worker is provided with some general guidelines on what is required.

- The worker is not working as part of a business.

- The nature of the tasks undertaken by the worker is akin to private and domestic purposes. There is no formal role or job description and the tasks are undertaken on an as needed basis.

- The private nature of the worker's role allows the worker to request assistance when required.

- There is no commercial risk involved.

- The nature of the activities does not require the involvement of any tools.

- There is no sick or annual leave entitlement accruing from the worker's role.

You do not consider the worker to be providing services as an individual for the purposes of section 12-35 of Schedule 1 to the TAA 1953.

Likewise you do not consider the worker to be an employee for the purposes of section 12 of the SGAA

Relevant legislative provisions

Superannuation Guarantee (Administration) Act 1992 subsection 12(1)

Superannuation Guarantee (Administration) Act 1992 subsection 12(3*)*

Superannuation Guarantee (Administration) Act 1992 subsection 12(11)

Superannuation Guarantee (Administration) Act 1992 subsection 27(2).

Reasons for decision

Why we have made this decision

Summary

The workers are not considered to be common law employees as defined in subsection 12(1) of the SGAA. However, they are considered to be working under a contract that is wholly or principally for the labour of the person. Therefore they are your employee by virtue of subsection 12(3) of the SGAA. As the workers are employees under the SGAA there is a liability to pay SG for them.

Detailed reasoning

The SGAA states that an employer must provide the required minimum level of superannuation support for its employees (unless the employees are exempt employees) or pay the SGC.

While the term 'employee' which is defined in section 12 of the SGAA, includes common law employees, it also extends to include workers who are

engaged under a contract wholly or principally for their labour. This employment relationship is often referred to as a 'contract *of* service'. This relationship is distinguished in *Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee?* (SGR 2005/1) from a 'contract *for* service' which is typically a contractor and principal type of relationship and does not attract an SGC liability.

Therefore, it is necessary to consider not only whether there is a common law relationship of employer/employee between the parties, but also, if the common law test is not met or is inconclusive, whether the expanded definition of 'employee' in subsection 12(3) of the SGAA applies. If a worker is not an employee under subsections 12(1) or 12(3) of the SGAA, their status is described as an independent contractor and there is no SG obligation.

The task of defining the characteristics of the contract of service - the employment relationship - has been the subject of much judicial consideration. As a result, some general tests have been developed by the courts to assist in the determination of the nature of the relationship. However, defining the contractual relationship between the employer and employee can be difficult and will depend on the facts of each case.

Accordingly it is necessary to determine the true nature of the whole relationship between the principal and the workers, as to whether there was a common law employer and employee relationship, or whether the workers meet the expanded definition of employee under subsection 12(3) of the SGAA.

Question 1

Summary

The workers are not considered to be common law employees as defined in subsection 12(1) of the SGAA.

Detailed reasoning

In deciding whether an individual is a common law employee, there are a number of common law factors to consider. These factors were considered in our private ruling in respect of your PAYG withholding obligations.

The PAYG Withholding ruling that issued concluded that there was no common law employment relationship.

Our conclusion regarding the common law definition of employee

With respect to the relationship between you and the workers, the facts and evidence provided points to the conclusion that the workers are not your common law employees.

As the facts and evidence indicate that the workers are not your employees under common law, we are required to consider the expanded definition of employee under subsection 12(3) of the SGAA.

Question 2

Summary

A worker is your employee by virtue of subsection 12(3) of the SGAA.

Detailed reasoning

The expanded definition of employee within subsection 12(3) of the SGAA, which states:

> 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.

SGR 2005/1 explains when an individual is considered to be an 'employee' under section 12 of SGAA.

Paragraph 78 of SGR 2005/1 states that where the terms of the contract, in light of the subsequent conduct of the parties, indicate that:

- the individual is remunerated (either wholly or principally) for their personal labour and skills;

- the individual must perform the contractual work personally (there is no right to delegate); and

- the individual is not paid to achieve a result,

the contract is considered to be wholly and principally for the labour of the individual engaged, and he or she will be an employee under subsection 12(3) of the SGAA.

Remunerated wholly or principally for labour

In this context, the word "principally" assumes its commonly understood meaning, that is chiefly or mainly, and labour includes mental and artistic effort as well as physical toil.

A contract may be partly for labour and partly for something else, such as the supply of goods, materials or hire of plant or machinery. Subsection 12(3) of the SGAA only applies if the contract is wholly or principally for labour.

Application of the expanded definition to your case:

You enlist the help of individuals to provide work of a private or domestic nature on an as needed basis. The number of hours required from the worker varies.

The nature of the activities does not require the involvement of any tools.

The payments to the individual workers for their work are at an hourly rate.

Based on the available facts and evidence, we consider that the facts and evidence indicate that the workers are paid primarily for their own labour and skills. Therefore they do satisfy this component of the expanded definition of employee.

The individual must perform the duties themselves

The power to delegate or subcontract (in the sense of the capacity to engage others to do the work) is a significant factor in deciding whether a worker is an employee or independent contractor. If a person is contractually required to personally perform the work, this is an indication that the person is an employee.

If the contract does not expressly require the worker to personally perform the services, an independent contractor has the capacity to delegate or subcontract all (or some) of the work to others. Where the worker delegates, they are responsible for remunerating that worker.

In the case of *Neale (DFC of T) v. Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 425; 6 AITR 201 at 202, the High Court interpreted the words 'a contract which is wholly or substantially for the labour of the person to whom the payments are made' to decide that if a contract leaves a person completely free, if he or she chooses, to engage others to perform the work on his or her behalf means that the payments are not payments under a contract for labour. That is so even if the contractor actually does perform the work personally and had no intention of doing otherwise.

> If the contract leaves the contractor free to do the work himself or employ other persons to carry it out the contractual remuneration when paid is not a payment made wholly or at all for the labour of the person to whom the payments are made. It is a payment made under a contract whereby the contractor has undertaken to produce a result...

When an employee asks a colleague to take an additional shift or responsibility, the employee is not responsible for paying that replacement worker; rather the employee has merely substituted or shared the workload.

However, a clause in the contract may permit the worker to delegate the task to another worker subject to approval of the principal, as the principal may not want an unknown worker to be working on their site or who may not be suitably qualified.

In the case of *Bowerman v. Sinclair Halvorsen Pty Ltd* [1999] NSWIRComm 21, Bishop J said:

> The fact that any substitute driver had to be approved by the company does not give the respondent [the principal] control over that delegation… the company surely had the right to be confident that any substitute driver was competent to do the job and maintain the "integrity" of the company as Mr Coomb put it.

Therefore, under a contract for services, the emphasis is on the performance of the agreed services (achievement of the 'result'). A person who has a right to delegate work (whether or not that right is exercised in practice) does not work under a contract wholly or principally for their labour. Unless the contract expressly requires the service provider to personally perform the contracted services, the contractor is free to arrange for his or her employees to perform all or some of the work or may subcontract all or some of the work to another service provider.

Application of the expanded definition to your case:

The workers are not professionals. The length of time that a particular individual will be involved can vary.

The private nature of the worker's role, stepping in on an ad hoc basis, is an indication against the workers having the right to delegate.

The worker is remunerated for their labour by payments on an hourly basis. Multiple workers are sometimes utilised. If an individual worker is unable to provide their labour as and when needed, you may find another available worker using a variety of means.

We consider that the facts and evidence indicate that the workers do not have the right to delegate work to others. They must perform the duties themselves. Therefore they do satisfy this component of the expanded definition.

Not paid to achieve a result

Under a results based contract, payment is often made for a negotiated contract price, as opposed to an hourly rate. The meaning of the phrase 'producing a result' means the performance of a service by one party for another where the first mentioned party is free to employ their own means (that is, third party labour, plant and equipment) to achieve the contractually specified outcome. The essence of the contract has to be to achieve a result and not to do work.

Satisfactory completion of the specified services is the result for which the parties have bargained. That is, a payment becomes payable when, and only when, the contractual conditions have been fulfilled.

Where the substance of a contract is to achieve a specified result, there is a strong indication that the contract is one for services. In *World Book (Australia) Pty Ltd v. FC of T* 92 ATC 4327 (*World Book (Australia) Pty Ltd v. FC of T)* Sheller JA said:

> Undertaking the production of a given result has been considered to be a mark, if not the mark, of an independent contractor.

While the notion of 'payment for a result' is expected in a contract for services, it is not necessarily inconsistent with a contract of service. For example, the Full Court of the Supreme Court of South Australia in the decision of *Commissioner of State Taxation v. Roy Morgan Research Centre Pty Ltd* (2004) SASC 288 (*Commissioner of State Taxation v. Roy Morgan Research Centre Pty Ltd)*, found that interviewers who were only paid on the completion of each assignment not on an hourly basis, were employees and not independent contractors. It was found that the workers were paid for their time spent and labour, and not to produce a result.

Having regard to the true essence of the contract, the manner in which payment is structured will not of itself exclude genuine result based contracts. For example, there are results based contracts where the contract price is based on an estimate of the time and labour cost that is necessary to complete the task, or may even be calculated on that basis, subject to reasonable completion times. Generally, where a worker submits quotes or

issues invoices for each job to the principal, this would be consistent with operating their own business. Nonetheless, the issuing of invoices is not necessarily determinative of the nature of the relationship.

Accordingly, the contractual relationship as a whole must still be considered to determine the true character of the relationship between the parties.

Application of the expanded definition to your case:

There is no formal agreement between you and the workers. Tasks are agreed verbally and they are provided on an ad-hoc basis, when required. There is no formal role or job description.

The tasks to be done by the workers and the time required to perform them vary. The workers are paid according to an hourly rate for their time spent and labour performing the duties required, and not to produce a specific outcome for which they are entitled to payment when and only when this outcome is achieved. We consider that the facts and evidence indicate that the workers are not paid for a result. Therefore they do satisfy this component of the expanded definition.

Our conclusion regarding the expanded definition of employee

Accordingly, as the workers satisfy all three components of subsection 12(3) of the SGAA, they are considered employees under the expanded definition of employee as set out under subsection 12(3) of the SGAA.

Overall Conclusion - definition of employee

Upon considering all the available facts and evidence the Commissioner is satisfied that with respect to work performed for you, while the workers do not meet the definition of an employee for the purposes of the SGAA under the common law definition, they do meet the expanded definition provided under subsection 12(3) of the SGAA. Accordingly you do have an obligation to pay superannuation contributions for the benefit of the workers under the SGAA.

Question 3

Summary

SG contributions are payable for the worker whom performs work that is wholly or principally of a domestic or private nature, and which is performed for more than 30 hours per week.

Detailed reasoning

Superannuation Guarantee Ruling SGR 2009/2 *Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'* discusses payment of SG based on ordinary time earnings (OTE) and salary and wages (S&W). In relation to work that is wholly or principally of a private or domestic nature, paragraph 57 of SGR 2009/2 states:

> Remuneration under a contract for the employment of a person, for not more than 30 hours per week, in work that is wholly or principally of a private or domestic nature is excluded under subsection 11(2). Work of a private or domestic nature means work relating personally to the individual making payment for the work or work relating to the person's home, household affairs or family organisation.

Subsection 11(2) of the SGAA states:

> Remuneration under a contract for the employment of a person, for not more than 30 hours per week, in work that is wholly or principally of a domestic or private nature is not to be taken into account as salary or wages for the purposes of this Act.

SGR 2005/1 goes on to further define the meaning of work of a domestic or private nature in paragraphs 93 to 98:

> 93. Subsection 12(11) of the SGAA provides that 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 an employee in relation to that

work. A person who is paid to do work of this nature for more than 30 hours per week may or may not be an employee depending on whether they fall within the other provisions of section 12, as discussed above.

94. The terms 'private' and 'domestic' are not defined in the SGAA so it is necessary to refer to the ordinary meaning of the words.

95. The *Macquarie Dictionary* (third edition) defines 'domestic' to mean 'of or relating to the home, the household or household affairs' and 'private' to mean 'belonging to oneself', 'being one's own', 'individual or personal'.

96. In (1955) 5 CTBR (NS) *Case 50* at 332, the Board of Review defined 'private or domestic' expenditure (under subsection 51(1) of the ITAA 1936) as:

> ... losses or outgoings of a private nature we take to mean here losses or outgoings relating solely to the person incurring them ... e.g., travelling expenses incurred by a person to and from his place of employment.... Losses or outgoings of a domestic nature we take to mean here losses or outgoings which relate solely to the house, home or family organisation, of the person incurring them....

97. Although this case was about losses or outgoings of a private nature we think it also illustrates the similar concept of work of a domestic or private nature. In our view, work of a domestic or private nature ordinarily means work relating personally to the individual making payment for the work or to the person's home, household affairs or family organisation.

98. For example, people employed by someone to clean their home, to mind their children, to effect repairs or maintenance of their home, or to tend their home garden would be engaged in domestic or private work. If they worked for that person for not more than 30 hours a week, they would not be that person's employee under the SGAA.

The terms private and domestic are not defined in the SGAA. The ATO view is contained in paragraph 97 of SGR 2005/1 which states that work of a domestic or private nature ordinarily means work relating personally to the individual making payment for the work or to the person's home, household affairs or family organisation.

To be considered private or domestic in nature the wages would need to be paid by you as an individual.

Application to your circumstances

You engage individuals on an as needed basis on an hourly rate. The duties vary depending on the time of day but these duties typically include work of a private and domestic nature such as undertaking general household duties including washing clothes, ironing, cooking and cleaning etc.

Based on the facts as discussed above, the worker is considered to be your employee for SG purposes under subsection 12(3) of the SGAA. The workers are performing work of a private or domestic nature according to paragraph 97 of SGR 2005/1and therefore subsection 12(11) applies to your engagement of these workers.

Consequently, you would be required to make compulsory SG contributions to a complying superannuation fund or retirement savings account on behalf of the workers if they work more than 30 hours per week.

You have asked if you are obliged to pay SG contributions for a worker who provides work of a private or domestic nature if they work more than 30 hours per week and are paid $450 or more in a month. The $450 threshold is provided in subsection 27(2) of the SGAA which states:

> If an employer pays an employee less than $450 by way of salary or wages in a calendar month, the salary or wages so paid are not to be taken into account for the purpose of making a calculation, in relation to the employer and the employee, under section 19.

The $450 per month threshold for SG purposes will apply where the worker works more than 30 hours in a week. Where the worker is paid more than $15 per hour then in a week where they work more than 30 hours their pay will exceed the $450 per month threshold. Subsection 12(11) provides that workers are not employees for SG purposes in relation to that work unless they are performing over 30 hours of work per week. Where a worker earns more than $450 per month but never exceed 30 hours in any week in a month then they will not employees for SG purposes at any time in the month.