Edited version of administratively binding advice

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Advice

Subject

Definition of employee for the purposes of the superannuation guarantee (SG) 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 the workers who provide 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

- The Commissioner received a Private Ruling application in respect of SG for workers.
- Funding is received through a government body.
- The work provided to you by the workers is of a private and domestic nature.
- The workers are paid on a casual hourly rate.
- The workers provide you with a 'Statement by Supplier' declaration such that tax is not withheld on the payments made to them.

Relevant legislative provisions

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

Reasons for decision

Summary

The workers, when they are engaged in work of a domestic and private nature are not considered to be common law employees as defined in subsection 12(1) of the SGAA.

However under the extended definition provided by virtue of subsection 12(3) of the SGAA they are considered to be working under a 'contract' that is wholly or principally for the labour of the person and are considered to be employees under the SGAA.

Therefore SG contributions are payable to the workers who perform work that is wholly or principally of a domestic or private nature, and is performed for more than 30 hours per week and are paid $450 or more in a month.

Detailed reasoning

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

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, when they engage in work of a domestic and private nature are not considered to be common law employees as defined in subsection 12(1) of the SGAA.

Detailed reasoning
Common law employee

The relationship between an employer and employee is a contractual one. It is often referred to as a contract *of* service. Such a relationship is typically contrasted with the independent contractor relationship that is referred to as a contract *for* services. An independent contractor typically contracts to produce the contracted result in return for an agreed payment, whereas an employee contracts to provide their labour (typically to enable the employer to achieve a result).

The Courts have considered the common law contractual relationship between parties in a variety of legislative contexts. As a result, a substantial and well-established body of case law has developed on the issue. Consideration should be given to the various indicators identified in judicial decisions. No list of factors is to be regarded as exhaustive and the weight to be given to particular facts will vary according to the circumstances. The totality of the relationship between the parties must be considered to determine whether, on balance, the worker is an employee or independent contractor.

In deciding whether an individual is a common law employee, there are a number of common law factors to consider. The common law factors we have considered are discussed below.

Terms and circumstances of the formation of the contract

The fundamental task with respect to the terms of engagement test is to determine the nature of the contract between the parties. We must determine the nature of the contract between the parties, consider whether the contract is written or verbal, and whether the terms and conditions are expressed or implied. These factors are important in characterising the relationship between the parties.

When considering the intentions of the parties in forming the contract, the task is to decide what each party could reasonably conclude from the actions of the other. Simply defining someone as a contractor does not necessarily lead to the conclusion that the individual is providing services as part of an operation of their own independent business.

Control

The extent to which the engaging entity has the right to control the manner in which the work is performed is the classic test for determining the nature of a working relationship. A common law employee is told not only what work is to be done, but how and where it is to be done. With the increasing usage of skilled labour and consequential reduction in supervisory functions, the importance of control lays not so much in its actual exercise, but in the right of the employer to exercise it.

Does the worker operate on his or her own account or in the business of the payer?

If the worker's services are an integral and essential part of the business that engages them (under a contract of service), they are considered by the courts to be a common law employee. If the worker is providing services as an individual carrying on their own business (under a contract for services), they are an independent contractor. It is necessary to keep in mind the distinction between a worker operating their own business and a worker operating in the business of the payer.

'Results' contracts

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. Payment is often made for a negotiated contract price, as opposed to an hourly rate.

Whether the work can be delegated or subcontracted

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.

Risk

Generally speaking, employers are vicariously liable for negligence and injury caused by their employees, whereas a principal will not be liable for negligence or injury caused by an independent contractor.

Another consideration of risk is the liability for the cost of rectifying faulty work. That is, the key underlying consideration is whether the individual is exposed to commercial risk in terms of a liability to cover the cost of rectifying defective work.

This is consistent with the focus on the chance of profit and the risk of loss as a traditional indicator that a worker is an independent contractor conducting their own business.

Provision of tools and equipment and payment of business expenses

A worker/payee who has been integrated as an employee into the business is more likely to be provided with the tools and equipment required to complete their work by the employer. Furthermore, the employer is often also responsible for the business expenses incurred by the worker, since the worker has been integrated into the employer's business.

Independent contractors carrying on their own business often provide and pay for their own assets, tools, equipment, maintenance costs and other expenses. Usually, they will have factored these costs in their overall fee or they will seek separate payment for such expenses from the principal.

Application of the common law to your case

The workers are enlisted to work on an as needed basis.

There is no formal agreement with the workers and tasks are agreed to verbally. The number of hours within each week is minimal for each worker.

With respect to the control test, the verbal agreement covers the general guidelines on what is required with regards to the provision duties and daily requirements. The workers have flexibility in determining how the tasks are performed. The workers spend part of their time working within the home as well as some time away. The workers may also provide their skills and labour to others.

The engagement of the workers is not one which is consistent with running a business. There is no indication that you provide insurance for the workers which also indicates that they would be considered independent contractors rather than employees.

With regards to the provision of tools and equipment, the nature of the activities undertaken by the workers indicates that they do not require significant tools and equipment in order to carry out their duties.

In an employment contract it is usual to see the provision of sick or annual leave entitlements accruing for the employee. In this instance there is nothing to indicate that this is the case.

Having regard to all of the factors listed above, it is considered that the workers are not employees (according to its ordinary meaning) and that they better fit the description of independent contractors who are only providing a service.

Therefore when looking at the relationship as a whole, the workers when they are engaged in work of a domestic and private nature are not considered to be common law employees as defined in subsection 12(1) of the SGAA.

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

Question 2
Summary
The workers are considered to be employees by virtue of subsection 12(3) of the SGAA.

Employee under subsection 12(3) of the SGAA

The Commissioner's view, as expressed in SGR 2005/1, is that some contracts for service will be wholly or principally for labour of the individual contracted even though the individual is not a common law employee.

The expanded definition of employee within section 12(3) of the SGAA, 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.

To determine whether the contract is wholly or principally for the labour of the person, we examine the terms of the contract, in light of the subsequent conduct of the parties. We consider whether:

- 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.

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.

Delegation is generally implied in a contract for services where the emphasis is on the result rather than the person. However, delegation clauses are considered in the context of the contract as a whole, to determine if they are consistent with the apparent essence of the contract or are merely self-serving statements.

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 his/her own means to achieve the contractually specified outcome. The essence of the contract has to be to achieve a result and not to do work.

Application of the expanded definition in your case

The number of hours for the workers is minimal and is currently only a few hours per week.

There is no formal agreement and tasks are agreed to verbally. These tasks may change given the nature of the work and other requirements on any given day.

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

The workers are paid by the hour at a casual 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 workers are not professional workers. They are remunerated for their labour and skills for work. The substance of the agreement with workers is that it is important that a long term relationship is built with them as it is intended that the same workers will be used for an extended duration. This indicates that the workers in providing their services direct with the intent of building up such a relationship and would not have the right to delegate their services to others.

Therefore 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.

The tasks to be done by the workers and the time required to perform them vary according to the situation. The workers are paid according to an hourly rate for their time spent and labour performing the duties as required, and not to produce a specific outcome for which they are entitled to payment when and only when this outcome is achieved. We therefore consider that the facts and evidence indicate that the support 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 do satisfy all three components of the expanded definition under subsection 12(3) of the SGAA, they do meet 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, 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 there is an obligation to pay superannuation contributions for the benefit of the workers who perform work that is wholly or principally of a domestic or private nature under the SGAA, and this work is performed for more than 30 hours per week.

Question 3
Summary

SG contributions are to be made to a complying superannuation fund or retirement savings account on behalf of the workers who provide domestic support services if they work more than 30 hours per week and are paid $450 or more in a month.

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.

Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: Who is an employee?* 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.
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> 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.
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> 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'.
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> 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:
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> > ... 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.
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> 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 or by your family.

Application to your circumstances

As stated above the ATO view 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.

The workers are paid an hourly rate for their respective roles. Based on the facts as discussed above the workers are considered to be employees 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 the engagement of these workers.

Consequently, SG contributions are required to be made to a complying superannuation fund or retirement savings account on behalf of the workers who provide domestic support services 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.

Subsection 12(11) provides that the support 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 be employees for SG purposes at any time in the month.