SGD 94/4 - Is a person who provides home based child care an employee for the purposes of the Superannuation Guarantee (Administration) Act 1992 (SGAA)?

This document has changed over time. This is a consolidated version of the ruling which was published on *7 April 1994*

Australian Taxation Office

SG Determination SGD 94/4

Superannuation Guarantee Determination

Is a person who provides home based child care an employee for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (SGAA)?

1. Generally no, unless the carer provides the child care in the parent's own home.

2. Family day care schemes (schemes) consist of networks of individuals who care for children in their own homes (carers). The schemes are organised and supported by central non-profit co-ordinating units funded through operational grants from the Commonwealth Government. Many such schemes are run by local government councils. In addition to the operational grants the Commonwealth also provides means tested subsidies of the child care fees.

3. The schemes (or local government councils) are not generally the employers of the carers for Superannuation Guarantee purposes.

4. The carers are not the common law employees of the schemes unless an employment relationship exists between the parties. Such a relationship would be present if the schemes maintained the right to control the carers' activities. Although all schemes set guidelines for the carers to follow, as a rule these guidelines do not presently amount to control over the carers' activities. Instead, the schemes are groups which supervise government standards and set standards of their own and distribute any subsidies to those carers who satisfy these standards.

5. This view is supported by a decision of the Australian Industrial Relations Commission, No 37179 of 1989, which held that, in general, the carers it looked at were not the employees of the local government councils which ran the relevant schemes.

6. An employment relationship could also exist if the carers contracted wholly or principally for their labour with the scheme (subsection 12(3) of the SGAA). Few carers enter into such contracts with the schemes; so few are "deemed" to be the employees of the schemes. Although most carers enter into agreements with the schemes, the purpose of these agreements is to allow the carer to be registered, licensed or approved as a carer. They are not usually contracts for labour.

7. However, it is conceivable that, in particular cases, the schemes could be the employers of the carers. This would depend on the existence of a contractual arrangement between the carer and the scheme under which the carer agreed to provide child care services for parents nominated by the scheme in return for the scheme agreeing to pay the carer for providing that service.

8. In addition, in particular cases, a scheme could be the common law employer of the carer in circumstances where the scheme has the right to sufficiently control the carer's activities. For example:

- if the carer was required to care for any child allocated by the scheme and did not reserve the right to refuse to care for a particular child;
- the scheme paid the carer (even if the parent had not paid the scheme) and the parent made payments to the scheme;
- the scheme deducted tax instalments from the payment before paying the carer;
- the carer was entitled to sick leave, annual leave, etc.

As presently informed, the Commissioner believes such cases to be extremely rare, if there are any at all.

Parents of the child placed in care

9. The parents/guardians of the child placed in care generally are not the employers of the carer.

10. The parents are not the common law employers of the carers. There is no employer/employee relationship between the carers and the parents because of a lack of a right to control the carer's activities.

11. The carers are engaged by the parents under contracts. However, these are not usually contracts *principally* for the labour of the carer because the carer agrees to provide other things in addition to labour (for example; food, shelter, transport, equipment). These things would usually amount to more than 50% of the value of the contract.

12. Even in the rare case in which the parents were the employers of the carer, the SGAA would not apply if:

- the carer is paid less than $450 in any month by the parents; or
- the carer is engaged for no more than 30 hours per week (because family day care is private or domestic work for the parents).

13. The way in which any subsidy is paid to the carer, (for example, whether a subsidy is paid directly by the scheme or via the parent), does not affect the relationship between the parties.

Child care in the parent's home

14. When a carer provides child care services in the parent's home, the carer is the employee of the parent. However, as this is private or domestic work in relation to the parent, the parent is only required to comply with the SGAA if the carer is engaged for more than 30 hours per week and is paid $450 or more in a month.

Commissioner of Taxation
7/4/94

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