SGR 93/2 - Independent agencies: service firms, labour hire firms and employment agencies

Australian Taxation Office

Superannuation Guarantee Ruling
Independent agencies: service firms, labour hire firms and employment agencies

Superannuation Guarantee Rulings do not have the force of law. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Rulings and Determinations.

contents para

What this Ruling is about

1. This Ruling explains the employment relationships involving:-

   (a) Service firms;

   (b) Labour hire firms; and

   (c) Employment agencies.

2. It provides general guidelines to assist in determining which party in the relationship is the employer for the *Superannuation Guarantee (Administration) Act 1992* (SGAA). Some variations to these typical arrangements are discussed also.

3. It considers the circumstances in which payments made to a superannuation fund on behalf of the principal, will satisfy the SGAA.

4. It clarifies what part of a payment is included in an earnings base.

5. In this Ruling a reference to a 'contract wholly or principally for labour' refers only to a contract for the labour of an individual (worker) and not to a contract with a company, trustee or partnership.

6. It is not concerned with the definition of a common law employee or a contract wholly or principally for labour. These matters are covered in another Ruling; 'Who is an employee?'. However, this Ruling assumes some familiarity with the basic principles discussed in that Ruling.

Ruling

Employment arrangements

7. Situations where people find work through an independent agency fall into three general categories. An explanation of these categories can be found at paragraph 17 and following.

a) Service firms

8. The service firm is generally the employer of the worker for Superannuation Guarantee purposes.

9. The service firm is typically the common law employer of the worker because the firm determines when, where and how the worker provides the labour. In some other circumstances, the service firm's contract with the worker is wholly or principally for the labour of the worker.

b) Labour hire firms

10. The labour hire firm is usually the employer for Superannuation Guarantee purposes.

11. In a typical labour hire firm arrangement, the worker is employed under a contract wholly or principally for labour and so is an employee under subsection 12(3) of the SGAA. (The labour hire firm could be the common law employer of the worker, although this would be rare.)

c) Employment agencies

12. In the typical employment agency situation, the 'user' is the employer of the worker.

13. The worker can be the common law employee of the user because of the control exercised by the user over the worker. If the user is in business the integration test may also be relevant in establishing a common law relationship. (The control and integration tests are discussed in Taxation Ruling IT 2129 and Superannuation Guarantee Ruling SGR 93/1.)

14. Where there is no common law relationship, the worker is the employee of the user for Superannuation Guarantee purposes if the worker is engaged under a contract wholly or principally for labour.

15. The agency in these cases is not an employer for common law purposes because it has no control over the performance of the work. It is also unlikely to have a contract for labour with the worker and so would not be an employer under that definition either.

Date of effect

16. This Ruling sets out the current practice of the Australian Taxation Office and is not concerned with a change in interpretation.

Explanations

Introduction

17. Some people assume that there is a distinction for 'Pay As You Earn' (PAYE) and Superannuation Guarantee purposes between 'employees' and 'independent contractors'. There is no such distinction. Both in income tax law and in the Superannuation Guarantee legislation, there is a specific statutory definition of the term, 'employee'. Those definitions cover a significantly broader range than the common law employee.

18. In many cases, people who regard themselves as independent contractors for business purposes are employees, by definition, under the PAYE provisions and under the Superannuation Guarantee law because they work under contracts wholly or principally for their own labour.

19. In each of the three general categories covered by this Ruling, it is conceivable that the worker is a common law employee. If so, the worker is the employee of the common law employer for Superannuation Guarantee purposes.

20. If the person is not a common law employee, it is necessary to determine if that person is an employee under any of the other parts of the legislative definition; in particular, whether the person has a contract wholly or principally for their labour with one of the other parties.

21. If a person enters into a contract that is wholly or principally for their labour as an individual, the other party to the contract is the employer.

22. Where the worker enters into a contract wholly or principally for labour, not as an individual but through a family company, trust, or partnership, there is no 'employee' for the purposes of the SGAA and

therefore no Superannuation Guarantee application. (However, the worker may be the employee of the family company.)

a) Service firms

23. The first instance is the service firm. This firm agrees to provide a particular service for its client (the 'user'). An example is the security firm which undertakes to secure a building by providing a security guard.

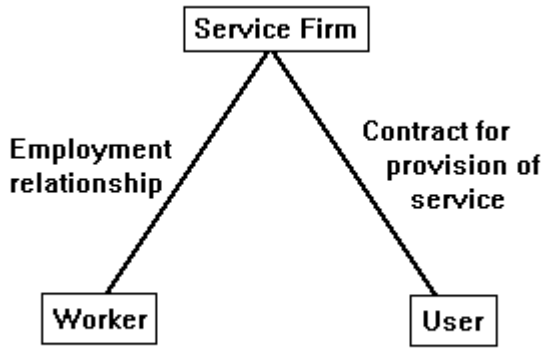

Diagram 1

24. In such cases, there are typically two contracts. There is a contract between the service firm and the user in which the firm agrees to provide a service involving the provision of labour. There is also a contract between the service firm and the worker, which might be either a long term or a short term contract of employment. There is no contract between the actual worker and the user.

25. The user's remedy in the event of the work not being carried out at all, or not to the appropriate standard, is against the service firm, not the worker.

26. The lack of control over the worker by the user means that the user is not an employer under the common law. The user is not an 'employer' under the contract for labour test because it is not a party to any contract with the worker.

27. The worker may be the common law employee of the service firm because the firm determines when, where and how the worker provides the labour. Alternatively, the service firm's contract with the worker may be one wholly or principally for the labour of the worker. Therefore, in these situations the worker is an 'employee' of the service firm for Superannuation Guarantee purposes.

b) Labour hire firms

28. The second case is the labour hire firm. This is different to the service firm in that the labour hire firm agrees to provide labour rather than to perform a service. An example is the administrative support firm which supplies typists to meet a client's peak need. (It is different from the firm which agrees to do some typing for the user - such a firm is the service firm discussed above.)

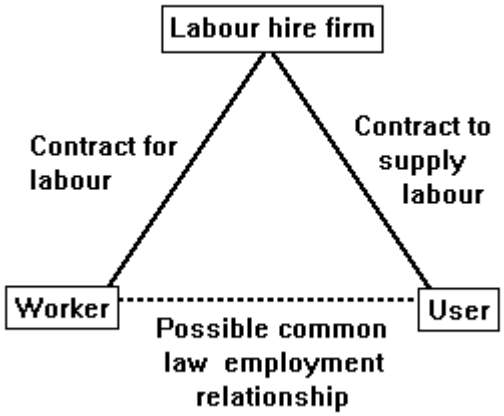

Diagram 2

29. There are (at least) two contracts. There is a contract between the labour hire firm and the user in which the firm agrees to provide workers for the user. There is also a contract between the labour hire firm and the worker, which might be a long term contract of employment, but is usually short term or casual.

30. If the work is not carried out properly the user has a remedy against the labour hire firm.

31. The labour hire firm could be the common law employer of the worker, although this would be rare.

32. The labour hire firm's contract with the worker is usually wholly or principally for the labour of the worker, making the worker the employee of the labour hire firm.

Variations

33. It is possible to have variations to the usual arrangements. For example the user may be the common law employer of the worker. A relevant matter in testing for this is whether the user has an obligation to pay the worker. In cases where it has no such obligation (even if the labour hire firm fails to meet any obligation it has to pay the worker), then the user is not the employer of the worker (*Building Workers' Industrial Union of Australia v. Odco Pty Ltd (1991) 29 FCR 104).*

34. If there is a contract of employment between the worker and the user, the user would be the employer for Superannuation Guarantee purposes and would have a remedy against the worker in the event that the work is not carried out properly. The usual effect of this relationship would be to sever the employment contract between the labour hire firm and the worker.

c) Employment agencies

35. The third situation is the employment agency. The employment agency's role is to bring the worker and the user together; it is an intermediary. It is an agent either of the user or of the worker and may even execute the contract on behalf of one of the parties. An example is the film agent who keeps books of actors and suggests a particular actor when a film producer is seeking to fill a role. The film agent generally acts as agent of the actor and may sign the contract with the producer on the actor's behalf.

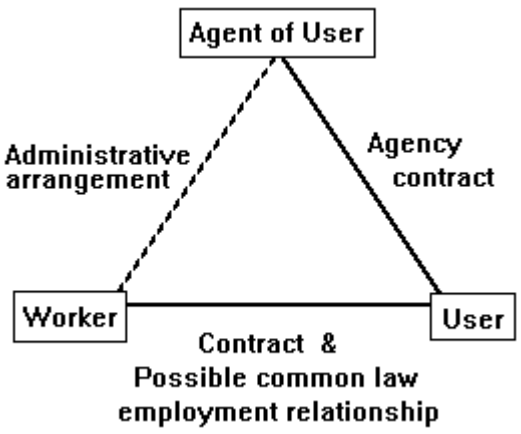

Diagram 3

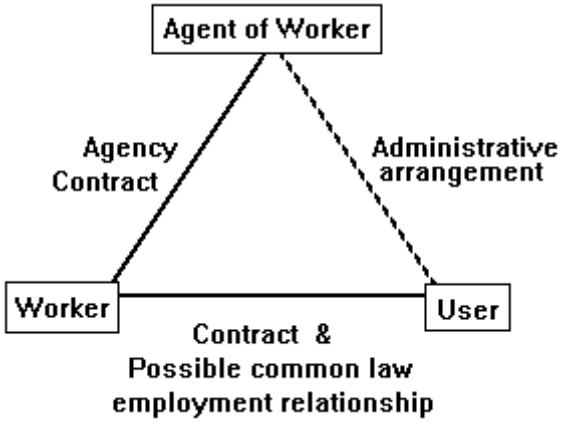

Diagram 4

36. The diagrams above demonstrate that there is a contract to perform work between the user and the worker, although often entered into by the agency on behalf of one of the parties.

37. There is also an agency contract between the agency and its principal (either the user [Diagram 3] or the worker [Diagram 4].

38. The user's remedy, if the work is not performed properly, is against the worker.

39. The user will be the employer for Superannuation Guarantee purposes if the contract with the worker is wholly or principally for the worker's labour. The user is sometimes a common law employer, because of the control it exercises over the performance of the worker's labour or because the worker is integrated into the user's business. Refer to paragraph 13.

Payment arrangements

Individuals

40. Typically, the service firm, labour hire firm, or employment agency is paid by the user and then forwards payment to the worker. In employment agency cases in particular, it is possible for the user to pay the worker directly; with either the worker paying a commission to the agency, or the user making a separate commission payment to the agency.

41. The way the payment arrangements are structured is not usually relevant for Superannuation Guarantee purposes

Companies and trusts

42. Sometimes a worker is not employed directly but via another entity. Typically, this is a family company, trust or partnership. The company, trustee or partnership enters into a contract instead of the worker, although the worker still provides the labour.

43. In this situation neither the user, nor the agency, labour hire firm, or service firm, will be an employer because they would not be party to any contract with the worker as an individual.

44. Instead, there is every likelihood that the worker is the common law employee of the family company or trustee, or at least an employee under the contract wholly or principally for labour test.

45. The situation will be similar in a partnership arrangement except that a partner who does the work would never be an employee of the other partners.

Business names

46. Where a worker operating under a business name, enters into a contract wholly or principally for his/her labour, the result for Superannuation Guarantee purposes will be the same as for any other individual contractor. Such cases are not treated in the same way as arrangements entered into through a vehicle such as a family company, trust or partnership.

Contributions on what?

47. To avoid a liability for the Superannuation Guarantee charge, the employer must contribute the specified percentage of the employee's earnings base to a complying superannuation fund. The Commissioner of Taxation will release a Ruling explaining the meaning of earnings bases.

48. Earnings bases only include the amounts paid for labour. Those parts of the payment which are for the provision of materials, machinery, etc. do not form part of the employee's earnings and, therefore, cannot form part of the earnings base.

How to determine how much the employee was paid.

49. Some employers in contractor situations have mentioned a difficulty in not being able to find out how much is paid to the worker. An employer requires this information to be able to calculate the minimum level of superannuation contributions to be made and to calculate the employee shortfall, if any.

50. If the intermediary is a service firm, it will be an employer and will know how much the worker is paid.

51. If the intermediary is a labour hire firm, then it will typically have an obligation to pay the worker. If it does have an obligation to pay the worker, then the amount of that obligation is how much the worker is paid for the labour component of the contract. Where there is no such obligation, it is not an employer, and will not need to know how much the worker is paid.

52. If the intermediary is an employment agency, it is acting as agent either for the user or for the worker. If acting as agent for the user, the agent would have a duty to account to the user. This duty to account, imposed on an agent at common law, includes an obligation to keep proper accounts and to be ready to produce them on demand to the principal. It follows, that the user would be able to ascertain

how much the worker is paid. If acting as agent for the worker, the full amount paid by the user is the amount paid to the worker (since the worker, not the user, legally 'pays' the agent's commission in such cases).

Who can pay?

53. The Commissioner does not require the employer to actually make the superannuation contributions necessary to avoid the charge. The legislation quite clearly permits contributions to be made *on behalf of* the employer (subsection 6(2) of the SGAA).

54. Where an employment agency (for example) makes a payment for the benefit of the worker, it is important to ensure that it does so *on behalf of* the employer. If it does not, the contributions amount to no more than a gift to the worker. There would still be a liability remaining on the employer.

55. Where the payment is made on behalf of the employer, it is necessary for the body making the payment to ensure that the contributions are based on the employer's annual national payroll.

56. The easiest way to ensure that a payment is made on behalf of another party is to include that obligation in the contract between them. Where someone has a contractual obligation to make a contribution on behalf of the employer but does not do so, the liability for the charge remains with the employer. In such cases, the employer should seek independent legal advice about its position.

Is it possible to pay once to cover both potential liabilities?

57. In some cases, it might not be clear whether the intermediary is an employment agency or a service or labour hire firm. It may also not be clear whether it or the user is the employer. Short of seeking a ruling from the Commissioner or obtaining independent advice, the easiest way of handling this situation is to have the intermediary make the payment *on behalf of* both itself and the user. If this approach is taken, the contribution will have been made on behalf of the employer whether the employer is the user or the intermediary.

58. If the user turns out to be the employer, then contributions have been made on its behalf, satisfying any liability it has. If, on the other hand, the intermediary turns out to be the employer, it has satisfied any liability it has because it has made a contribution to a fund, as required by paragraphs 23(2)(c), 23(3)(c), 23(4)(a) and 23(5)(a) of the SGAA.

59. Where it is not clear which of the two parties has the liability, and they have different minimum contribution rates, the contributions would have to be made at the higher of the two contribution rates to ensure that the potential liability of each of them has been covered.

Commissioner of Taxation

1 April 1993

ISSN 1038 - 7463

ATO references
NO 92/7846-0
BO

Previously released to the public in draft form SGR 92/D5

Price $1.00

FOI index detail
reference number
I 1013627

subject references
- contractors
- contracts for labour
- contracts on behalf of
- employees
- employers
- employment agencies
- labour hire firms
- services firms

legislative references
- SGAA 6(2)
- SGAA 23

case references
- Building Workers' Industrial Union of Australia v. Odco Pty Ltd (1991) 29 FCR 104