

SS-8 Determination—Determination for Public Inspection

Occupation 09-CME Crew Member	Determination: <input type="checkbox"/> Employee <input checked="" type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

The firm is an individual who operates a lobster boat. The worker was engaged as a part-time crew member. He received a 2016 Form 1099-MISC for his services. There was no written agreement.

The worker noted that the firm provided verbal training and instructions; the firm noted that none were provided. The firm would call the worker and provide him with his job assignment. Both parties agreed that the firm determined the methods by which the assignments were performed as the worker was a helper. Each party indicated that the other party would resolve any issues or problems that arose. There were no required reports. The firm noted that if the worker was needed, he would be called and would work if he was not busy. The worker noted that his routine consisted of arriving at the dock, assisting in loading bait, pulling-in traps, harvesting lobsters, etc. His services were performed mostly on the firm's boat. There were no meetings. Both parties agreed that the worker was to provide the services personally.

The firm provided the boat, traps, and all equipment. The worker provided his own boots. Both parties agreed that the worker was paid a percentage of the catch and that he had no other economic risk. The customer paid the firm. The worker did not establish the level of payment of services-it was dependent on day's catch.

Both the firm and the worker agreed that there were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The relationship has ended.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

However, wages paid to members of a crew on a fishing boat are not subject to federal income tax withholding, social security and Medicare taxes, and the federal unemployment tax [under IRC sections 3401(a)(17), 3121(b)(20), and 3306(c)(17) respectively], if all of the following conditions are met:

1. The members do not get and are not entitled to get any money for their work (other than as provided in condition #2 below);
2. The members get a share of the catch or a share of the proceeds from the sale of the catch;
3. Each member's share depends on the size of the catch; and,
4. The operating crew of the boat (or each boat from which a member gets a share for a fishing operation involving more than one boat) is normally fewer than ten persons (determined on the basis of the average size of the crew during the preceding four calendar quarters).

The earnings of these crew members are considered trade or business income. Gross income from fishing includes amounts received from the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish (for example, lobsters, crabs, and shrimp), sponges, seaweed, or other aquatic forms of animal and vegetable life.

Services performed in catching fish are exempt from federal unemployment taxes, except the operator of the boat may be subject to this tax on the earnings of crew members that perform services that come under the following exceptions:

1. Work related to catching salmon or halibut for commercial purposes; or,
2. Work performed on/in connection with a vessel of more than ten net tons.

Work that is not exempt under this rule may qualify as exempt if the four conditions discussed previously are met.

If any of the crew members work as self-employed individuals under the above provisions, the operator of a boat must file a completed Form 1099-MISC with the IRS and the crew members. The \$600 or more rule does not apply.

If the above provisions were not met, a worker would be considered an employee. Compensation to an individual classified as an employee is subject to federal income tax withholding, Federal Insurance Contributions Act tax (FICA), and Federal Unemployment Tax Act (FUTA) as provided by sections 3101, 3111, 3301 and 3401 of the Internal Revenue Code.

According to the information provided, the worker performed services under the above four conditions, indicating that he would be self-employed and not subject to federal income tax withholding, social security and Medicare taxes, and the federal unemployment tax.

For more information please see Publication 595, Tax Highlights for Commercial Fishermen.