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Guidelines for Determining Worker Status Tour Guide Industry

The following are guidelines used by the Unemployment Insurance Division, the Division of Labor Standards and the Division of Safety and Health to establish whether the relationship between tour guides and tour operators is an employment relationship or that of an independent contractor.

Independent contractors are excluded from coverage under the Unemployment Insurance Law and are not afforded the protections provided by Labor Standards and Safety and Health requirements. These are persons who are actually in business for themselves and hold themselves available to the general public to perform services. A person is an independent contractor only when free from control and direction in the performance of services.

Tour guides perform services for tour operators under a variety of conditions and purposes. An escorted journey may be on foot or on a vehicle such as a bus, boat or bicycle.

A tour guide may lead a regularly scheduled sightseeing trip that includes pre-determined points of interest to be visited. Several firms in larger cities and cultural areas throughout the state offer such bus and boat tours.

Tour operators may also customize a tour to a group's particular interests, allowing the group to identify in advance places to be visited, such as museums or cultural areas. The tour operator may then provide the tour guide with training or materials regarding the sites to be visited or the tour guide may rely on his or her own expertise and materials.

Other tour operators may offer a pre-scheduled time and point of departure and duration but allow the guide to coordinate with the customers the precise route, stops and highlights.

The guidelines are based on case law including court decisions and decisions of the Unemployment Insurance Appeal Board, which have held that the common law tests of master and servant must be applied in making a determination of whether services rendered by an individual are in the capacity of an employee or an independent contractor. An individual's exposure to a risk of profit or loss as evidenced by investments made or costs assumed may also be a factor, and is considered in these guidelines. All factors concerning the relationship between the two parties must be taken into consideration to determine if the party contracting for the services exercises, or has the right to exercise, supervision, direction or control over the worker. No one single factor is controlling, nor do all factors need be present to establish the nature of the relationship.

Employers may request a formal determination of the status of individuals performing services for unemployment insurance purposes by writing to the Liability and Determination Section and furnishing complete details of the relationship. Employers who assume an individual performs services as an independent contractor and do not report and pay contributions based on that

assumption may find they are subject to a retroactive assessment, interest, or penalty, if it is later determined through an audit, a claim for benefits, or some other review, that there was an employment relationship. Therefore, it is to the employer's advantage to request a determination when the status of tour guides is in question.

The Department of Labor is implementing these guidelines with an effective date of July 1, 2000. Therefore, employers may discontinue reporting individuals for unemployment insurance purposes where the application of the guidelines results in a status of independent contractor as of the third quarter of 2000. Please note the prospective nature of the implementation. As a result, the Unemployment Insurance Division will not issue redeterminations and refunds for previously reported individuals.

Employers with questions regarding the interpretation or application of the indicators outlined in the guidelines in relation to an unemployment insurance matter may contact the Liability and Determination Section at (518) 457-2635. Employers with questions in relation to a Division of Labor Standards issue should call (518) 457-4321. Division of Safety and Health issues may be referred to (518) 457-1212.

Tour Guides

Indicators of Independence

The strong indicators a tour guide is an independent contractor when performing services for a tour operator are:

1. While the tour operator may specify the point of departure and destination, the tour guide may select or alter the itinerary without prior approval of the tour operator.
2. The tour guide sets or negotiates the rate of pay received from the tour operator.
3. The tour guide is not required to maintain a log or submit reports.
4. The tour guide is not restricted from setting up a private unscheduled side excursion/tour/event with customers without prior approval of the tour operator. The tour guide handles arrangements and collection of money for side trips.
5. The tour guide is free to accept or reject an assignment.
6. The tour guide is free to accept assignments from other tour operators.

Other indicators a tour guide is an independent contractor when performing services for a tour operator are:

7. The tour guide provides maps, videos, journals, and periodicals.
8. The tour operator may require a neat appearance but does not dictate attire.
9. The tour guide has private business cards and is not restricted from distributing them to the tour operator's clients.

Indicators of Employment

The strong indicators a tour guide is an employee when performing services for a tour operator are:

1. The tour guide is prohibited from accepting assignments from other tour operators.
2. The tour guide is paid at a rate established by the tour operator.
3. The tour guide must accept an assignment from the tour operator.
4. The tour guide is required to follow a point-to-point itinerary established by the tour operator, or must obtain approval for any variation from an established itinerary.
5. The tour guide is provided with sick leave, vacation, and health insurance.
6. The tour guide is required to submit written logs, reports, or check in at regularly established intervals.

Other indicators a tour guide is an employee when performing services for a tour operator are:

7. The tour guide is required to wear a uniform or other standardized attire.
8. The tour guide is prohibited from forming private side excursions/tours/events without approval of the tour guide operator.
9. The tour operator provides maps, videos, journals, or periodicals.

Neutral Factors

These factors neither point to an employment or independent contractor relationship:

1. The tour guide is provided with meals and lodging.
2. The tour guide is required to notify the tour operator if there is an emergency or unusual incident during the tour.
3. The tour guide is required to notify the tour operator if services cannot be performed or the tour cannot be continued.
4. The tour guide is a member of an accredited tour guide association.
5. The tour guide is required to obtain a guide license or certification.