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Tax Law Application to Fishermen

workmen's Compensation Application to Fishermen

26 M.R.S.A. 1043

39 M.R.S.A. 2 (5)

STATE OF MAINE

Inter-Departmental Memorandum Date December 8, 1976

To The Honorable Lawrence P. Greenlaw, Jr Dept. State House
From Donald J. Gasink, Asst. Atty. Gen. Dept. Employment Security Commission

Subject

Dear Representative Greenlaw:

The answers to the questions which you addressed to the Attorney General by letter dated December 6, 1976, are as follows:

Question 1: The classes of fishermen set out in the recent federal tax amendments are not because of those amendments now automatically excluded from the coverage and tax requirements of the Maine Employment Security Law. Under 26 M.R.S.A. § 1043 (9.E.), any employer liable for the federal unemployment tax is automatically an employer under the Maine law, but an exclusion under the federal unemployment tax statutes is not an automatic exclusion under the Maine statutes.

The federal amendments deal with the catching of fish and other forms of aquatic animal life, the latter consequently including lobster and crab fishing. The Maine Employment Security Law in Section 1043 (11.F.32.) already excludes from employment,

"services performed by an individual operating as a sternman, as defined in Title 36, section 5102, subsection 8-A, on a lobster or crab fishing vessel of less than 10 tons."

A sternman is defined in subsection 8-A of section 5102, Title 36 as:

"Any person performing service on a lobster boat engaged in lobster fishing under an arrangement with the operator or owner of such boat shall be a sternman for the purpose of this Part, provided that:

- A. Such person does not receive any cash remuneration and such person receives a share of the boat's lobster catch; and
B. The amount of each person's share depends on the amount of the boat's lobster catch."

The Maine Employment Security Law, then, already exempts both lobster and crab fishing arrangements on vessels of less than 10 tons which have the same characteristics as those exempted by the federal tax amendments.

Question 1a: If the existing exclusion in 26 M.R.S.A. § 1043 (11.F.32) is not thought to be sufficient, that exemption should be amended. If an amendment were proposed with a scope identical to that of the federal tax amendments, such an amendment would not cause the Maine Employment Security Law to be nonconforming with the Federal Unemployment Tax Act.

Question 2: The enactment of the federal amendments does not automatically exclude those classes of fishermen now excluded by the federal amendments from coverage under the Maine Workmen's Compensation Law. The workmen's compensation statute concerning the definition of "employee," 39 M.R.S.A. § 2 (5), does not incorporate any of the amended federal statutes in its exclusions from coverage. However, Subsection 5 (A. 1) of Section 2 does already exclude as employees:

"Persons engaged in maritime employment, or in interstate or foreign commerce, who are within the exclusive jurisdiction of admiralty law or the laws of the United States; and persons operating as sternmen as defined in Title 36 section 5102, subsection 8-A."

The sternmen definition in Title 36, as quoted earlier, concerns lobstermen only. Therefore, the Maine Workmen's Compensation Law already excludes lobstermen whose sharing arrangement falls within the requirements of Section 5102, and the exclusion is not limited to boats under 10 tons. If fishermen other than lobstermen are to be excluded, they must come within the first part of Subsection 5 (A.1.). The first part of that subsection, however, dealing with maritime employment or interstate or foreign commerce and exclusive federal admiralty jurisdiction, is of uncertain applicability to share fishing arrangements. There have been no Maine Supreme Court cases concerning such share arrangements and workmen's compensation.

Fishermen, and that term will be used in the remainder of this opinion to mean fishermen other than lobstermen, are typically engaged in maritime employment. The difficulty lies with the statute's requirement that fishermen also be "within the exclusive jurisdiction of the admiralty law or the laws of the United States,..." in order to be excluded from the Maine Workmen's Compensation Law. If the injury occurs at sea or completely on navigable waters, then the injury is within the exclusive jurisdiction of admiralty law. However, if the injury occurs while falling from a boat to a dock, or simply on the dock, the admiralty law is not exclusive. In Lermond's Case, 122 Me. 319 (1923), the claimant fell from a ladder while descending to the wharf, hit part of wharf's bumper log and was injured, and fell into the water. He was awarded compensation since admiralty jurisdiction was not exclusive. The first part of of subsection 5 (A.1.), then, will

exclude fishermen injured while at sea, but for injuries received around docks, wharfs, etc., the exclusion is much less certain and would depend on how and where the injury occurred.

Subsection 5 (A), in language before the exclusions are listed, also requires that for a person to be considered an employee, that person must be "in the service of another under any contract of hire, express or implied, oral or written..." The sharing of the catch may indicate that the fisherman is not in the service of the operator or owner of the boat, but sharing the catch is only one factor which must be considered. A much more important factor would be the actual control or the right to control, exercised, or held by the operator or owner. The degree of actual or potential control exercised on the fishing boats with share agreements probably varies from boat to boat, and those variations create further uncertainties over whether share fishermen would be considered employees under subsection 5 (A) of section 2 of the Workmen's Compensation Law.

Question 2a: In view of the uncertainties in the coverage in subsections 5 (A) and 5 (A.1.) as applied to share fishermen, I think it is advisable to amend subsection 5 (A.1.) to specifically exclude share fishermen working under the arrangement specified in the federal tax amendments or in 36 M.R.S.A. § 5102 (8-A). The Maine Workmen's Compensation Law need not be consistent with the federal tax amendments.

DJG:er