

COMMERCIAL FISHING

THE COMMERCIAL FISHING INDUSTRY

The commercial fishing industry includes any business engaged in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacean, sponge, seaweed, or other aquatic forms of animal and vegetable life.

EMPLOYER CONTRIBUTIONS AND RESPONSIBILITIES

Even though fishing services may not be subject to federal employment taxes, fishing services employers are responsible for reporting wages paid to their employees and paying Unemployment Insurance (UI) and Employment Training Tax (ETT). Employers are also required to withhold and remit State Disability Insurance* (SDI) and may be required to withhold and remit Personal Income Tax (PIT) from non-seagoing workers' wages. Employers are generally prohibited from withholding PIT from seamen's wages except under certain conditions as explained in the section titled "Are Fishing Services Subject for PIT Withholding Purposes?" on the next page.

WHAT ARE WAGES?

"Wages" consist of remuneration for services performed, including cash payments, commissions, share of the boat's or boats' catch, bonuses, and the reasonable cash value of nonmonetary payments such as meals, sleeping quarters, and employee benefits. "Wages" do not include the reasonable value of expenses such as fuel, ice, bait, and fishing gear when the employee is obligated to share the expenses as a condition of employment.

WHO IS AN EMPLOYEE?

An employee for commercial fishing purposes includes any officer of a corporation, any worker who is an employee under the usual common law rules, and any worker whose services are specifically covered by law.

*Includes Paid Family Leave (PFL).

¹Services performed on or in connection with an American vessel include services by the operating crew while underway and services that are not actually performed on the vessel, such as shore services performed as an officer or member of the crew.

²Section 125.5 of the California Unemployment Insurance Code states that an American vessel means any vessel which is documented (meaning registered, enrolled, or licensed) or numbered under the laws of the United States. It also includes any vessel that is neither documented or numbered under the laws of the United States, nor documented under the laws of any foreign country, if the crew of such vessel is employed solely by one or more citizens, residents, or corporations organized under the laws of the United States or of any state, the commonwealth of Puerto Rico, the Virgin Islands, or the District of Columbia.

An employer-employee relationship exists when a person who hires an individual to perform fishing services has the right to exercise control over the manner and means by which the individual performs his or her services. The right of control, whether or not exercised, is the most important factor in determining the relationship. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control.

Control is the most important factor under maritime law, just as it is under the tests of land-based employment. It may be true that, in most maritime relationships, the workers enjoy discretion that is unusually broad if measured by land-based standards — a discretion dictated by the seafaring nature of the activity. However, except where there is nearly total relinquishment of control through a bareboat or demise charter (both of these terms are explained on page 3), the owner may nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer.

The captain is considered an employee unless he or she is the owner or part owner of the boat.

WHERE ARE SERVICES SUBJECT FOR UI, ETT, AND SDI PURPOSES?

When an employer-employee relationship exists, it is necessary to determine whether an employee's services are subject to taxation in California or in some other state. The correct taxing jurisdiction is determined by applying one of the two following conditions:

First Condition

Employment includes fishing services¹ on or in connection with an American vessel² operating on navigable waters within or within and without the United States when the employer maintains an operating office in California from which the fishing services are ordinarily and regularly

supervised, managed, directed, and controlled; **and**, such services are included in employment under the Federal Unemployment Tax Act (FUTA).

In general, fishing services are included in employment under FUTA and California is the proper taxing jurisdiction if the employer's office from which he or she directs and controls the fishing services is in California. However, fishing services are excluded from employment under FUTA if either of the following situations exists:

- An individual's services as an officer or a crew member are performed in catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), unless:
 - Service performed in the catching or taking of salmon or halibut for commercial purposes.
 - Service performed on or in connection with a vessel of more than 10 net tons.
- An individual crew member who is remunerated by a share of the boat's catch, and whose share is dependent upon the amount of the boat's catch, receives no more than \$100 per trip which is paid solely for additional duties (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry, **but only if the average operating crew of the boat on which the services are performed is made up of fewer than 10 individuals.**

When fishing services are excluded from FUTA, pursuant to one of the above conditions, they may still be subject to state coverage, although California may or may not be the state with jurisdiction to tax. See the discussion of the "Second Condition" below.

Second Condition

When the first condition does not establish California or any other state as the correct wage reporting jurisdiction, then the state in which each of the individual's entire services are taxable is determined under one of the following four tests.

Localization — An employee's services are considered subject to employment in California if most of his or her services are performed in or within the three mile territorial limit of California, with only incidental services performed elsewhere.

Base of Operations — If the localization test does not apply in California or in any other state, an employee's services are considered subject to California employment if some

services are performed here and his or her base of operations is here. Base of operation refers to the place of more or less permanent nature from which the employee starts work and to which he or she customarily returns within the terms of the same employment contract.

Place of Direction and Control — If the localization and base of operations tests do not apply in California or any state, an employee's services are considered subject to California employment if some services are performed in California and the place from which the employer exercises general direction and control over the employee's services is in California.

Residence of Employee — If the previous three tests do not apply in any state, an employee's services are considered subject to California employment if some services are performed here and the employee's residence is in California.

ARE FISHING SERVICES SUBJECT FOR PIT WITHHOLDING PURPOSES?

Employers shall not withhold PIT from the wages paid to a master, officer, or any seaman³ who is a member of a fishing crew on a vessel engaged in foreign, intercoastal, interstate, or noncontiguous trade. However, the employer can withhold PIT from the seaman's wages if the fishing services are performed on a vessel in coastwise trade between ports in California, but only when the employer and the seaman voluntarily agree. Only when such a voluntary withholding agreement is in effect are a seaman's wages to be reported as PIT wages on the *Quarterly Contribution Return and Report of Wages (Continuation)* (DE 9C).

IS THE VALUE OF MEALS AND QUARTERS TAXABLE?

Meals and quarters received by fishermen aboard fishing vessels are wages and are taxed based on the reasonable value to the employee.

The value of meals may be calculated by using values established by the EDD or at the option of the employer by equally dividing the cost of food furnished to or consumed by the fishermen by the number of crew. You may obtain the current values from the *Tax Rates, Wage Limits, and Value of Meals and Lodging* (DE 3395).

Quarters furnished to each fisherman are considered to have a cash value if the facilities include all of the following minimum standards:

- Living compartment space that normally permits standing erect.
- Heat, light, and ventilation.
- Gear locker.

³Seaman means an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel. **46 USC Section 10101.**

- Head and bathing facilities.
- Individual bunks or berths with mattresses, assigned to each fisherman.

The value of meals and quarters are subject wages for UI, ETT, and SDI purposes. The value of meals and quarters are not subject to PIT withholding or reportable as PIT wages.

The cash values of meals and quarters are set by the EDD and are subject to change each calendar year on the DE 3395.

ARE JOINT VENTURERS EMPLOYEES?

For a joint venture to exist instead of an employer-employee relationship, the following elements must be present:

1. There must be a community of interest in the undertaking.
2. There must be a sharing of profits and losses.
3. There must be an equal right or a right in some measure to direct and control the conduct of each other and of the enterprise.
4. There must be a fiduciary relationship between or among the parties.

Joint venturers cannot be employees and joint venturers at the same time with respect to the same transaction.

BAREBOAT AND DEMISE CHARTERS

The employer of a bareboat charter crew is the lessee of a vessel once it has been outfitted, equipped, and made seaworthy by the owner. The lessee maintains full responsibility for the vessel, including operating and manning it, rigging it for fishing purposes, and paying for the operation, repairs, moorage, and insurance costs as if it were his or her own.

The employer of a demise charter crew is the same as a bareboat charter, except that the boat may be rigged for fishing purposes. Under a demise charter, the title to the boat is vested in the lessee upon the death of the owner.

SPECIFIC EXAMPLES

Example 1:

Martin Smith, a resident of Eureka, California, owns and operates the vessel *Sundown*. Martin, the captain, customarily fishes for crab out of the vessel's home port of Eureka, but during the summer he fishes for shrimp out of Oregon ports. The crew members who fish for crab are residents of this state and perform their fishing services entirely within the three mile territorial limit of California. The shrimp fishing crew are residents of Oregon and perform their fishing services entirely outside of California. The vessel is less than 10 net tons and usually carries a crew of two in

addition to the captain. The crew only receives a share of the boat's catch as payment for services. Services aboard the vessel are in employment, as the owner/captain has the right to control the manner and means of accomplishing the fishing services.

The first condition in determining whether the worker's services are subject to taxation in California has not been met as the services are not subject to FUTA. The crab fishing services are subject to taxation in California as all services are localized in California. The share of the catch payments made to the crab fishermen are subject to UI, ETT, and SDI but are not subject to PIT withholding or reportable as PIT wages unless Martin and the individual crew member voluntarily agree (see section "Are Fishing Services Subject for PIT Withholding Purposes?"). The shrimp fishing services are not subject to taxation in California as no services were performed within this state. Martin's income from all fishing activities is subject to California income tax but the income is not subject to withholding.

Example 2:

Mike Jones is owner of the fishing boat *Susan*, which he operates out of Fisherman's Wharf in San Francisco, California. The boat is more than 10 net tons, and Mike employs a captain and eight others to work as crew members on the vessel. The proceeds from the sale of the catch offset boat operating expenses, including bait, ice, and fuel, and the balance is divided 60 percent among the crew members and 40 percent between Mike and the captain. On a single voyage, the vessel always offloads its catch of fish or a portion of its catch in Alaska, Washington, or Oregon ports before returning to California. Between voyages, the crew members do not receive additional compensation, but they must do certain work such as repairing nets, splicing cable, and transporting the catch. However, Mike gives the mate, the engineer, and the cook an additional cash payment of \$150 each trip for other duties as is traditional in the industry. The cash payment does not depend upon the boat's catch.

The captain and the crew members, except the mate, engineer, and cook, are exempt from FUTA because their pay is based on a share of the catch, and the total crew is made up of fewer than 10 individuals. The services of the mate, engineer, and cook are fully taxable for FUTA and to California because the place from which the boat is controlled is in California. The services of the remaining crew members are subject to California taxation (even though not subject to FUTA) because they perform some service in California and their base of operations is in San Francisco. The wages are not subject to PIT withholding nor can a withholding be made voluntarily because the fishing services were performed on a vessel engaged in interstate trade.

Example 3:

James and Jane are sole stockholders of More Fish, Inc. The corporation owns the vessel *Albacore*, which is moored in San Diego, California. The vessel is more than 10 net tons, carries a crew of 12, and has adequate quarters for all crew

members. Jane performs all the accounting and banking functions from her home in San Diego and receives a salary of \$100 per month for her services. James is captain of the boat and hires a full crew to fish for tuna off the coast of Mexico and beyond the territorial waters of California. The corporation receives 40 percent of the catch, from which they pay all fuel, bait, ice, and food expenses. The captain and crew equally share the other 60 percent from the sale of the catch. Additionally, the captain receives \$500 and each crew member receives \$100 for each voyage.

Fishing services are subject to taxation in California for UI, ETT, and SDI purposes because the corporation maintains an operating office in San Diego from which the services are ordinarily and regularly supervised, managed, directed, and controlled and the services are subject to FUTA. The wages are not subject to PIT even under a voluntary employer-employee agreement because the fishing services were performed on a vessel engaged in foreign trade. Wages include the fishermen's share of the catch, the fixed fee for each voyage, plus the reasonable cash value of meals and quarters. Also, Jane's salary is subject to all California payroll taxes.

Example 4:

Bob operates the fishing vessel *Sea Bass* from his home port in Crescent City, California. Bob is captain of the 10 net ton vessel and customarily fishes for salmon and halibut within and without the territorial limits of California, Oregon, Washington, and Alaska. Bob hires four crewmen, who are all residents of Crescent City, and pays each of them 10 percent of the catch. Bob retains the remaining 60 percent and pays for all food, fuel, bait, repairs, and other expenses. No other payments are made to the crew.

The services aboard the *Sea Bass* are not subject to FUTA because the operating crew does not receive any cash other than a share of the boat's catch, the amount of the individual's share depends on the amount of the boat's catch, and the operating crew of the vessel is fewer than 10 individuals. Services aboard the vessel are not localized in this state nor in any state, but the place from which the crew members

customarily begin and return from their work (base of operations) is in Crescent City, California. Wages paid to the crew of the *Sea Bass* must include the reasonable value of meals and are subject to UI, ETT, and SDI in California. The wages are not subject to PIT even under a voluntary employer-employee agreement because the fishing services were performed on a vessel engaged in interstate trade.

Additional Information

For additional information regarding workers in the commercial fishing industry, please contact the Taxpayer Assistance Center at 1-888-745-3886 or visit the nearest Employment Tax Office listed in the *California Employer's Guide (DE 44)* or access the EDD website at www.edd.ca.gov/Office_Locator/.

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Requests for services, aids, and/or alternate formats need to be made by calling 1-888-745-3886 (voice) or TTY 1-800-547-9565.

This information sheet is provided as a public service, and is intended to provide non-technical assistance. Every attempt has been made to provide information that is consistent with the appropriate statutes, rules and administrative and court decisions. Any information that is inconsistent with the law, regulations, and administrative and court decisions is not binding on either the Employment Development Department or the taxpayer. Any information provided is not intended to be legal, accounting, tax, investment or other professional advice.