



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

June 8, 1999

Number: **199948001**

Release Date: 12/3/1999

CC:EBO:2
WTA-N-106817-99
UIL 3121.04-13

MEMORANDUM FOR DISTRICT DIRECTOR,

FROM: SENIOR TECHNICIAN REVIEWER, BRANCH 2
OFFICE OF THE ASSISTANT COUNSEL
(EMPLOYEE BENEFITS & EXEMPT ORGANIZATIONS)
CC:EBO

SUBJECT: LABOR LEASING COMPANY & CLIENT TRUCKING
COMPANY
COMMON LAW EMPLOYER DETERMINATION

This Chief Counsel Advice responds to your memorandum dated March 5, 1999. Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

Issue: Whether a truck driver is an employee of a labor leasing company or the trucking company that is the leasing company's client.

Conclusion: Whether workers are employees of a particular entity depends on the facts and circumstances of the particular case. We have recommended that you contact District Counsel for assistance in making the determination of employee status in a particular case. We can, however, provide a general discussion of this area.

Law and Discussion

Section 3121(d)(2) of the Internal Revenue Code provides that the term "employee" means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an independent contractor is one of fact to be determined after consideration of the facts and the application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar

WTA-N-106817-99

sections of the Employment Tax Regulations; namely, §§ 31.3121(d)-1, 31.3306(i)-1 and 31.3401(c)-1 relating to the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and federal income tax withholding, respectively.

Section 31.3121(d)-1(c)(2) of the regulations provides that, generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

The Supreme Court summarized the common law test for "employee" as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; and the tax treatment of the hired party.

Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-324 (1992), quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The Court added:

Since the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." NLRB v. United Insurance Co. of America, 390 U.S. 254, at 258 (1968). Nationwide at 324.

In Professional & Executive Leasing, Inc. v. Commissioner, 89 T.C. 225, 232 (1987), aff'd, 862 F.2d 751 (9th Cir. 1988), the Tax Court stated that the principles used in determining whether a person is an employee or an independent contractor apply equally to determine by whom an individual is employed.

WTA-N-106817-99

In Rev. Rul. 87-41, 1987-1 C.B. 296, the Service identified twenty factors under which evidence would be analyzed for purposes of the common law test. The twenty factors were developed based upon an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending upon the occupation and the factual context in which the services are performed.

Because of the difficulty in applying the twenty-factor test and because business trends have changed over the years, the Service has recently begun using a new approach with respect to worker classification. Rather than listing items of evidence under the twenty factors, the approach now is to group the items of evidence into the following three main categories: behavioral control, financial control, and the relationship of the parties.

1. **Behavioral Control.** Evidence in this category includes facts regarding whether the business has the right to direct and control how the worker performs the specific tasks for which the worker is hired. Facts that show behavioral control include the type and degree of instructions given to the worker and the training the business gives the worker.

In determining the behavioral control of a truck driver, certain questions should be asked.

Who determines the job to which a truck driver is assigned? Who provides instructions to a truck driver as to a particular job? What are the methods of evaluating a truck driver's work? What procedures are in place for handling customer complaints? If an agreement provides that a truck driver can be trained by the client trucking company or the labor leasing company, how much training is provided by each entity? Were any particular training courses prerequisites to being assigned jobs?

2. **Financial Control.** Evidence under this category includes facts regarding whether there is a right to direct and control how the business aspects of the worker's activities are conducted. Facts that show financial control include whether the worker has a significant investment or incurs significant expenses in the business and whether the worker provides services to the relevant market.

In determining the financial control of a truck driver, certain questions should be asked. Who owns the trucks? Who incurs costs for permits, insurance, damage waivers, and bonds, which are expenses normally incurred by an employer? Does a truck driver perform similar services for other persons? Are there restrictions on a truck driver's ability to do outside work? Is a truck driver paid based upon a percentage of the rate billed or an hourly rate? Is a truck driver allowed to negotiate contract price?

WTA-N-106817-99

3. Relationship of the Parties. Evidence under this category includes facts which illustrate how the parties perceive their relationship. Relevant facts include those which show the intent of the parties with respect to their relationship and whether the parties were free to terminate their relationship at will. The permanency of the relationship between the worker and the business is also relevant in assessing the relationship.

In determining the relationship of the parties, certain questions should be asked. Does a truck driver perceive himself to be an employee of the labor leasing company or the client trucking company? Does a truck driver have the right to quit, and is the truck driver subject to discharge by the labor leasing company or the client trucking company? How long has a truck driver worked for the labor leasing company or a particular client trucking company? What is the frequency and duration of assignments of a particular truck driver to a particular client trucking company? Are there contracts between the client trucking company and a truck driver which address methods of compensation, expenses that will be incurred, the rights and obligations of each party with respect to how the work will be performed, and the ability to discharge and a party's rights upon discharge? Does a truck driver receive any benefits from the client trucking company?

For further information on worker-classification, see the training materials on employee versus independent contractor status. "Independent Contractor or Employee?" (Training 3320-102 TPDS 84238I) (Rev. 10-96). For further information on the trucking industry, see the Market Segment Specialization Program on Trucking Industry (Training 3149-105; TPDS 83186H) (Release Date: May 1, 1993).