

SS-8 Determination—Determination for Public Inspection

Occupation 02COM.2 Communicator	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

Information provided indicated the firm was the marketing arm for their real estate business [REDACTED]. The worker had been retained by the firm from 2011 through 2012 and provided services as their Chief Technology Officer.

The firm stated the worker was a consultant and ended the agreement on December 7 2012. He was an IC and has provided documentation to show this in the worker's own words (note that documentation was dated September 2013, none months after this work relationship ended.) The firm stated to the unemployment division, the worker had his own company [REDACTED] and requested to be paid directly and not to his company. The firm stated work assignments were received by agreement & through verbal ongoing conversations. The worker determined how he performed said assignments. The firm stated the worker determined his own routine and hours. He performed the majority of work from home, twenty percent at the office. No meeting requirements. He was to perform services personally. The worker could hire, the firm paid them. Firm agreed the worker provided the computer and other items needed. He was paid a lump sum. If the customer paid the worker, all money was turned over to the firm. Either could terminate the work relationship without incurring a penalty or liability. The firm stated he quit.

The worker stated he was promised \$60K per year and to be an employee. [REDACTED] changed it to "how much do you need monthly to live?" He said numerous times he would pay him minimally until they were making more money to reimburse him for pay & taxes. He stated his title was chief technology officer. He oversaw the development/design of all web properties, recruited, trained and managed all overseas contractors, managed auto-dialer campaigns including the development; often oversaw their sales department including managing, training and assisting realtor's on the phone. [REDACTED] dictated his time at the office and he was also on call. From August 2011-October 2011 initially he met with them once a week after his full time job to help them develop various web properties before being offered a full time position as Chief Technology officer. Four months into the job [REDACTED] created a work agreement, he doesn't recall signing nor did he get a copy. He did sign a non-disclosure agreement. Work assignments were given every morning from [REDACTED]. It was up to him to figure out how to accomplish the task. He provided all information into a drop box; [REDACTED] created his own reports from that information. The worker stated he would typically arrive between eight-thirty and leave anywhere from five pm to twelve am. Ninety-five percent of the time he spent several hours at home working since they had a development team overseas. He then states eighty percent of the work was done at the firm's premises and twenty percent of the work was done at night at his house. He worked sixty hours per week the first nine months. Mandatory meetings were held Monday's at nine am and Friday afternoon at one pm. He was required to perform his services personally. He, [REDACTED] and [REDACTED] all hired. Either he or [REDACTED] would pay them by company credit card. [REDACTED] approved all hires. The firm provided the desk. He stated he provided the computers, monitors, hard drives, house and keyboard and most of his office supplies. Initially he was paying for their overseas contractors which lasted roughly a month, until he was assigned a company credit card to use for payment to their overseas workers. He was reimbursed for those payments. He stated he received monthly payments that were paid out on the ninth in the total of \$3500.00. The customer paid the firm. He stated he would take Friday's off once in a while. Either party could terminate the work relationship without incurring a penalty or liability.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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 what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

Analysis

-A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. (The worker was given daily assignments from CEO [REDACTED]. The "contract" states he was also required to perform any "other duties as assigned.")

-Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

-A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

-The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

-Workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. See Rev. Rul. 74-389, 1974-2 C.B. 330.

-The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. See Rev. Rul. 71-524, 1971-2 C.B. 346.

We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.