

SS-8 Determination—Determination for Public Inspection

Occupation 02CON.5 Consultant/Advisor	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

Case Facts: The firm is in the business of providing third party administration services for retirement plan sponsors. The worker provided his services to the firm as a pension consultant with services including pension consulting, serviced existing clients and generated new business for the firm in 2008 through 2013 and received the Forms 1099-MISC for these services. Additionally, the firm stated on their Form SS-8 they acquired a firm owned by the worker from 1999-2004. Following the acquisition, the worker was employed by the firm for transitional services. In 2008 however, the worker's status was changed to an independent contractor, but the services he provided stayed the same. Per the worker's request, this determination is for tax years 2008 through 2013.

The worker stated that the firm provided an annual consultants meeting. The firm stated that the worker was a prior business owner and was responsible for his own training and instruction. The workers' assignments were self-generated and he determined the methods by which the assignments were performed. If problems or complaints arose the worker was required to contact the firm's president and the president was responsible for problem resolution. The worker explained that the firm required the worker to report his sales activity. The worker worked full time and his schedule varied. He provided his services personally on the firms' premises and the firms' clients' locations. The firm maintains that the worker worked primarily leases by him, as well as from his home. The firm held annual meetings about services and sales strategies. If additional help was required, the worker needed the firm's approval for hiring and the firm compensated the helpers.

The firm provided all the necessary supplies and equipment the worker needed to provide his services such as; business cards, stationary, and promotional material. The worker supplied the office supplies. The firm contends that the worker provided all the necessary supplies, equipment, and materials needed. The worker indicated that he leased office space which was referred to as a [REDACTED] and the telephone listing was under [REDACTED]. He worker did not incur any business expenses in the performance of his services for the firm. The firm stated that the worker did not lease office space, equipment, or facility and was not reimbursed for any business expenses incurred while providing his services. There was an Independent Contractor Agreement submitted by the worker which stated that he received commissions paid at the rate of 20% on the first year annual revenue received; subsequent years prior to the end of the Agreement will be paid at 8%. The firm's responsibility for commission payments to the worker will cease December 31, 2013. The firms' customers paid the firm for the services the worker provided. The worker stated that the firm established the level of payment for the services the worker provided. The firm expresses that the worker established the level of payment for the services he provided.

The worker did not perform similar services to others during the same time period. The firm believes that the worker did provide similar services to others during the same time period. The Independent Contractor Agreement stated the worker is bound to exclusively work for and with the firm through December 31, 2010. He will use exclusively the firm business cards, letterhead, and promotional materials. Additionally, the contract stated that the worker was not to engage in, market or sell pension services to any of the firms' customers, except on behalf of the firm during the term and until December 31, 2015. He provided his services under the firm's business name. The relationship is governed by a contract that carries responsibilities, benefits, and liabilities for each party. In fact, the relationship ended because the contract ended.

Analysis

The application of the three categories of common law evidence to the available facts of the relationship indicates that the firm retained the right to direct and control the worker in the performance of his services. Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.

The firm's contention that the worker was an independent contractor is without merit. It is the firm's responsibility to treat workers according to federal employment tax guidelines and law. Neither the firm nor the worker has the right to decide whether the worker should be treated as either an independent contractor or an employee. Worker status is dictated by the characteristics of the work relationship. If the work relationship meets the federal employment tax criteria for an employer/employee relationship, federal tax law mandates that the worker be treated as an employee.

There was a written contract describing the terms and conditions of the relationship. However, for Federal tax purposes it is the actual working relationship that is controlling and not the terms and conditions of a contract be it written or verbal between the parties. See also Section 31.3121(d)-1(a)(3) of the Employment Tax Regulation.

Hence, to clarify the Federal Government's position on worker status, we will be determining this case based on their common law practices in which the actual relationship between the parties is the controlling factor.

The firm instructed the worker regarding the performance of his services. The firm retained the right, if necessary to protect their business interest, to determine or change the methods used by the worker to perform his assignments. The facts show that the worker was subject to certain restraints and conditions that were indicative of the firm's control over the worker. 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.

The worker had a continuous relationship with the firm as opposed to a single transaction. 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 worker rendered his services personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. However, it is also possible that the individual may be an employee acting in the capacity of a foreman for, or a representative of, the employer. The worker's services were under the firm's supervision.

The firm provided the worker with the necessary equipment and materials. His pay was based on commission. The worker could not have incurred a loss in the performance of his services for the firm, and did not have any financial investment in a business related to the services performed.

The worker worked under the firm's name, and his work was integral to the firm's business operation. The above facts do not reflect a business presence for the worker, but rather, strongly reflect the firm's business. The fact that the worker was not closely monitored would not carry sufficient weight to reflect a business presence for the worker. In fact, many individuals are hired due to their expertise or conscientious work habits and close supervision is often not necessary.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.