

SS-8 Determination—Determination for Public Inspection

Occupation 02CON.10 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

Information provided indicated the firm is a ice skating rink and sports center. The worker had been a full time employee as General Manager until October 4, 2013, at which time the firm stated there was a management reorganization resulting in the elimination of that position. Beginning the October 7, 2013 the worker signed a consulting/contractor agreement to perform full time consulting services, up to 40 hours a week, relating to the accounting, operations and any other areas relating to the firm for the next eight weeks. The worker continued to receive the same amount of weekly pay with a fifty-nine sent raise for a total of \$1192.31. The firm stated he would now receive a 1099-MISC. document. The contract stated he is to be available between the hours of nine a.m. to five p.m. Monday through Friday. He shall make himself available to perform services on firm premises with a twenty-four advance notice that his services will be needed on site. Assignments were as directed by [REDACTED] or [REDACTED] management or designees.

The worker has indicated there were no changes in services provided. From April 2002 through October 4, 2013 he was the firm’s general manager, after that date that considered him to be a contracted consultant. The worker he performed however never changed. He agreed work assignments came from [REDACTED], Asset Manager, same as when he was considered an employee. He agreed he was required to be available from nine am to five pm and able to perform work on site with a 24 hour notice. He stated all work was performed on the firm premises. The firm continued to provide all equipment, and supplies. He was paid on a bi-weekly basis, same as before. The customer continued to pay the firm. Either party could terminate the work relationship without incurring a penalty or liability. He did not perform similar services for others. He indicated the contract ended. The worker also provided a copy of said contract.

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

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.

CONCLUSION

Based on the above analysis, we conclude this is an erroneous misclassification of employment. The firm continued 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. Although there had been a consulting contract established the services performed did not change. The worker continued to perform services on a full time basis from nine to five, indicating he was not available to provide said services to the general public. He was required to be available at a moments notice to be on firm premises. He was still guaranteed the same weekly pay as he had been given previously, with a slight raise. He continued to receive and report to the same management personnel as he had when he was considered an employee.