

SS-8 Determination—Determination for Public Inspection

Occupation 02CON.28 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 consignment shop that buys and sells used clothing, jewelry, furniture and accessories. The firm indicated the worker performed services as a consultant/manager in 2014. The firm reported the income on Form 1099-MISC. The firm indicated they provided training only on the consignment software that they used. The worker self-regulated and was given freedom as she saw fit, combined with their management expertise. The worker reported to [REDACTED] or [REDACTED] if there were any issues. The worker generally worked Tuesday through Saturday per her request. She came in between nine-forty-five and ten-thirty and usually left promptly at five or earlier. She took time off as needed. Services were mainly performed on the firm premises; she worked on social media from her home off five percent of the time. Few meetings were held or required. She was required to perform her services personally. The firm provided office equipment, supplies, facility. The worker provided industry supplies, such as her cell phone, steamer, a sewing kit, wax paper, etc. She was paid by the hour. The firm indicated cash advances were given whenever needed or requested. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She was represented as a consultant/consignment expert under [REDACTED]. The firm stated the worker became disgruntled while working; therefore her services were no longer needed. The firm indicated the firm has since gone out of business.

The worker indicated she was hired as manager of the clothing boutique. The worker indicated she worked with the owner [REDACTED] on daily tasks, marketing, opening and closing. The worker indicated the firm determined the work schedule, and provided a copy of the monthly schedule posted for November 2014 as an example. [REDACTED] sales reports were provided via the [REDACTED] system. The worker stated work nine-forty-five, the store opened at ten and closed at six. The worker indicated most of her services were performed at the boutique, unless her services were needed in the furniture store. The worker indicated they had monthly meetings. She was required to perform her services personally. The firm provided all supplies and equipment, advertising etc. The worker agreed she was paid by the hour and the customer paid the firm. She was represented as the consignment boutique manager for [REDACTED]. She indicated the firm terminated her services.

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

ANALYSIS

The term “full-time” may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

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.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, 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.

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 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. Regardless, if there was a verbal agreement she would receive a 1099 at year end, it is the actual working relationship that determines the classification. The firm stated she was represented as the consultant/ consignment expert under the firm’s name. She was paid by the hour, therefore had no opportunity for profit or loss.