

SS-8 Determination—Determination for Public Inspection

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| Occupation 02COO.3 Coordinator | 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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the payer concerning this work relationship. [REDACTED], Assistant City Manager and HR Director, responded to our request for completion of Form SS-8.

From the information provided the payer is a municipality and the worker was engaged from approximately 1985 to 2008 as a tennis instructor to the payer's [REDACTED] and at times, the worker served as the tennis director. The payer reported the worker's earnings on Forms W-2 in these years. In December 2008, the payer created a new position to provide program coordination, training, and instructional services at the payer's indoor tennis center. The payer publicly advertised this position in a newspaper of general circulation. The payer awarded the contract to the worker and the payer states the worker hired an attorney to represent her in contract negotiations with them. The personal services contract was between the payer and the worker's name doing business as [REDACTED]. The payer states the contract included a representation that the worker qualified as an independent contractor. The payer states the worker's duties and responsibilities under the personal services contract left much discretion to the worker as to how, when and where to perform the services. The payer reported the worker's earnings under this contract on Forms 1099-MISC. This determination will focus on and decide the employment tax status of the worker services from 2009 to 2012.

The payer states they provided no training or instructions to the worker in order to perform her services. The payer states in the personal services contract, it outlined the worker's specific required outcomes. The worker determined how she performed her services and she was required to notify the assistant director of [REDACTED] if any problems or complaints arose for their resolution. The worker was required to personally perform her services and she was required to submit invoices to the payer. The payer states the worker set her own schedule and hours. The payer states the worker was responsible for the hiring and paying of substitutes or helpers.

The payer provided the tennis court and tennis balls to the worker in order to perform her services. The payer states the worker provided her experience, tennis equipment, and her reputation as a tennis professional and [REDACTED] certified tennis instructor. The payer states the worker incurred expenses for travel expenses, professional education, professional certification, legal expenses, liability insurance costs, and employment taxes. The clients paid the payer and the payer paid the worker on a commission and lump sum basis. The payer did not carry workers' compensation insurance on the worker. The payer states the worker could incur a loss as a result of her services due to loss or damage to equipment, personal injury, potential decrease in revenue, and indemnification under the Personal Services Contract.

The worker was not eligible for employee benefits. The payer states the worker performed similar services for others and the worker advertised her personal instruction services and tennis workshops directly to city patrons verbally. The payer provided a copy of Page 3 of a June 2010 [REDACTED] newsletter, titled "[REDACTED]". The newsletter states that these services were led by the "legendary tennis professional [REDACTED] and her award-winning certified staff". The payer states this advertisement shows that the City identified the worker as a contractor operating under the business name "[REDACTED]" and shows that she actually rendered services under her business name. Either party could terminate the work relationship at any time without either party incurring a liability. The worker resigned her position with the payer.

The personal services contract prohibited the worker from the worker providing coordination services or instructional services within a 10 mile radius of the City, if the scope was the same or similar in scope of the duties she provided for the city. However, the worker was permitted to and did hold tennis workshops, seminars, and camps within this 10 mile radius and did offer personal (as opposed to group) instruction to individuals within this 10 mile radius. The payer states that with their knowledge, the worker solicited clients directly from individuals enrolled in the City's group instruction programs with the goal of having them enroll in private instruction directly with [REDACTED].

Analysis

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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

The methods by which professional men and women work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of a firm over the manner in which professional workers shall conduct the duties of their positions must necessarily be more tenuous and general than the control over nonprofessional workers. Yet, despite this absence of direct control over the manner in which professional men and women shall conduct their professional activities, it cannot be doubted that many professionals are employees. To give an example outside of the medical profession, there are many eminent lawyers who are full-time employees of corporations and who carry on their professional work with a minimum of direct supervision or control over their methods on the part of their employer.

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, the worker was experienced in this line of work and did not require training or detailed instructions from the payer as she had performed this same job for them previously for 20+ years. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the payer's name and their [REDACTED] rather than an entity of her own. The worker coordinated and operated the payer's programs not her own. Clients paid the payer directly for the programs and camps operated on behalf of the payer. Payments to the worker by the payer were made to the worker personally rather than to a business name. While the worker has an investment in a business providing tennis programs and services, it does not appear that she operated this business while performing services to the payer's clientele under the payer's programs. The payer was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the payer the right to direct and control the worker and her services in order to protect their financial investment, the operation of their tennis facility, and their relationship with their clientele.

While the submission of an invoice and/or the providing of insurance are characteristics of an independent contractor, the total relationship needs to be analyzed to make an accurate decision of a worker's status. If a worker is required to submit an invoice or provide insurance in order to be paid or obtain a job or as a condition of employment, that factor loses weight in determining the worker's status as an independent contractor.

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 payer provided the expense of the tennis courts, facilities, insurance on the facility, and the operation of their tennis center. 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.

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 services performed by the worker were a necessary and integral part of the payer's tennis program. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded. Therefore, the payer's 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.

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.