

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.19 OfficeWorker	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 property management company focusing on single family homes. The firm stated the worker performed services on a part time basis because he was still active military. The firm stated when he was there he took inbound phone calls, but had no real assignments; he collected rent from tenants and deposited them into the owners accounts. The firm indicated no training was given. Due to his military schedule, they could not depend on him on a daily weekly or monthly schedule. Services were performed personally. The firm stated they provided the work station area and access to their software and phone system. The worker utilized his own laptop, phone for work at home. He was paid based on the hours logged on line. The firm stated advances were allowed as needed, he could not take more than the prior month's income. The customer paid the firm. The firm did carry workmen's compensation insurance. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated he performed similar services for others, their permission was not required. The firm stated he went full time in his role with the military.

The worker stated he performed general secretarial duties for the firm. He answered the phones, collected rents, made files and whatever anyone else assigned to him. He stated he was provided on the job training, basis front desk duties etc. He received assignments via e-mail and in person. He reported to the office manager if there were any issues. He provided weekly unit reports. He indicated all services were performed on firm premises, Monday through Friday nine a.m. to six p.m. Staff meetings were held every Tuesday. No penalties for not attending. The worker indicated the firm provided all equipment and supplies. He stated he was paid by the hour. He stated he was let go do to financial issues by the firm.

The firm provided a copy of the independent contract. It states the sub-contractor was engaged in the business of sales, marketing and leasing of real estate his to perform all normal and customary activities related to sales, marketing and leasing of real estate and any services as may be requested from time to time by the firm. He was to be paid \$520 base pay weekly, \$5 per tenant Move in paid monthly, first month income on each new investor sold [REDACTED] services, 100% of [REDACTED] of any commission received on sub-contractors personal home or investments, \$300 per signed lease payable upon occupancy of property by tenant. Contractor to receive 50% of all commission earned from [REDACTED] leases. This commission applies to leases and on contractors own time. 25% of all sales and or listing commissions for real property sales. Payable upon the receipt of certified [REDACTED]

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 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.

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. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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.