

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF.54 Office Worker

Determination:

Employee

Contractor

UILC

Third Party Communication:

None

Yes

Facts of Case

Information provided indicated the firm is a salon and day spa. The worker had been retained by the firm to perform services as a receptionist. The services were performed from 2005 through 2014.

The firm stated the worker was brought on full time in 2006 to work the front desk and make appointments. She also worked as an independent contractor doing permanent make-up and hypnotherapy in April of 2006 and 2007. She was given a 1099-MISC for the work performed as an independent contractor. In December of 2007 she could not afford to give [REDACTED] a raise and told her she could work out of [REDACTED] doing permanent make-up and hypnotherapy for free and no longer had to give her commissions on it. In September of 2011 her hours were cut back due to lack of business. In March of 2013 she had to cut her hours even more due to lack of business and there was no longer a need for her services. She offered the worker to go on a 1099-MISC as well as cutting her hours. She was advised of the fact that they were personally filing Chapter 13 and as the owner she had to cut back on business costs. She was told she either had to go on a 1099 or she would have to let her go, as she could no longer afford to pay the taxes. She was also allowed to use a room at the spa at no cost or payment to the firm to do permanent make-up as well as hypnotherapy. She was not the only person who had been switched to a 1099 status in order to keep them employed. The firm stated the worker was paid by the hour. The customer paid both, as the worker was the receptionist, and collected payments on behalf of the firm. Either party could terminate the work relationship without incurring a penalty or liability.

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.

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.

The withholding of income tax or the Federal Insurance Contributions Act (FICA) tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government. The filing of an employment tax return and Form W-2 for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period.

The worker received a Form W-2 and a Form 1099-MISC from you in the course of the work relationship, and the services did not substantially change. As previously stated, the issuance of Form W-2 and/or the withholding of taxes on income for an individual would be considered treatment of the individual as an employee, and would apply in this case.

CONCLUSION

Based on the above analysis, I find this to have been an erroneous misclassification of employment. The firm has indicated she switched the workers to 1099 status because she could no longer afford the employment taxes and had to cut costs due to lack of business. At no time did the services performed change. The workers could either accept the new status or get done. 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.