

SS-8 Determination—Determination for Public Inspection

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| Occupation 02OFF.228 AdministrativeAssist | 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 human resource consulting company. The worker had been retained in 2014 to performed administrative work. The firm reported the income on Form 1099-MISC. The firm indicated the worker set her own hours, provided her own equipment and office space. She provided accounting support to her father’s business at the same time. The firm indicated the worker received work assignments via e-mail or telephone call. She determined how she performed her services. Services were to be performed personally. The worker was paid by the hour. The customer paid the firm. Either could terminate the work relationship without incurring a penalty or liability. The firm indicated she did perform similar services for others, their approval was required. She did not have direct communication with their clients. She was fired for lying about her relationship with a vendor. After which she downloaded financial information about the firm and kept.

The worker indicated her title had been Executive Assistant. The worker took direction from both [REDACTED] and [REDACTED]. She received training on the firm’s applications for AP and timekeeping. The worker agreed work assignments came via conference call or e-mail. She would have reported to the firm if problems existed. She indicated she worked six plus hours per day Monday through Friday. She indicated the firm determined the number of hours she worked. She agreed services were performed at her home. She was required to attend conference calls or team, in person meetings. Services were to be performed personally. She stated the firm provided office supplies and was reimbursed for travel expenses. She agreed she was paid by the hour. The customer paid the firm. Either could terminate the work relationship without incurring a penalty or liability.

Both parties provided a copy of the Independent contractor/consultant agreement. It states the firm engages the worker as an independent contractor under a work for hire arrangement. The scope of work states she was to perform services as an administrative assistant, providing support services as assigned by the firm. She would work under only minimal supervision. She could set her own hours and use her own equipment. She would be paid \$25.00 per hour. Payment and fees would be paid according to the company’s policies and schedule (twice monthly, after Receipt of invoice.) Note: the firm did not provide copies of invoices. Schedule B contained a non-disclosure agreement.

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 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.

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, coadventurer, agent, or independent contractor must be disregarded. Therefore, the firm'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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm trained the worker. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. The firm paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. A continuing work relationship, even on a part-time basis, indicates an employer-employee relationship. The worker performed his services under the firm's name. He was not engaged in an independent enterprise, but rather the customer support services performed by the worker were a necessary and integral part of the firm's software service business. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. Both parties retained the right to terminate the work relationship at any time without incurring a liability, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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 the firm 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.

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 for all services provided by the worker, and not an independent contractor operating a trade or business.