

SS-8 Determination—Determination for Public Inspection

Occupation

02SAL Salespersons

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

Information provided finds the firm operates two watersports, rental company. The worker has performed services since 2010 for one company and income earned was reported on Form W-2 and commissions on Form 1099-MISC through 2015. Income from the second company, [REDACTED] were only reported on Form 1099-MISC. for tax years 2014 and 2015. The firm indicated he had been on payroll for [REDACTED] until tax year 2014. He had a set schedule and specific duties. Commissions for tickets he sold for activities booked for the firm had consistently been reported on Form 1099-MISC. The firm has indicated the worker had his own ticket booking website (no evidence provided) where he booked trips for all vendors in their operating location. In November of 2014 the firm indicated he resigned to work his business full time booking numerous vendors in the area. The firm stated hours and locations of the work varied. If the worker needed assistance he would have hired and paid that individual. The firm indicated they provided no equipment, or materials. the customer would pay the worker thirty percent deposit for the activity booked, the remainder of the amount would be paid to the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated the worker collected all sales materials from the vendors he serviced. The worker represented himself as an independent ticket agent. The worker stated he stopped selling tickets for the firm.

The worker indicated he was assigned specific days and hours at the same location, used company provided equipment, wore company provided uniform and was paid on a bi-monthly pay period. He stated he worked for the same person who had several companies performing different services. He stated he performed services eight to five, at a desk in the lobby of a hotel. Guests would inquire about tour options and he would make reservations for them and charge their room through the hotel's computer system. All work was performed on the hotel premises. He was required to perform his services personally. The owner of the firm hired and paid all individuals. The worker indicated he was paid on commissions. 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. He indicated he did not perform similar services for others. He was represented as an employee. He stated he left as he accepted another position for another company.

ANALYSIS

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

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. No information was provided or found to indicate the worker performed services in an independent contract status. Numerous Form 1099-MISC documents were not present from other companies, as had been suggested by the firm. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. All sales performed by the worker were done so under the firm's business names. Commissions paid over and above regular wages should have been included on Form W-2 and are subject to all employment taxes.

For the tax years 2010 through 2014 in question, it is possible that the firm's statute of limitations has expired for the assessment of taxes in this matter. If so, it will not be necessary for you to amend your return(s). Internal Revenue Code (IRC) section 6501(a) provides that the statute of limitations for assessment generally expires three years from the due date of the return, or three years after the date the return was actually filed, whichever is later. IRC section 6501(b)(2) provides that for certain employment tax returns, the three years would begin April 15 of the following year for which the return was due. IRC section 6511(a) provides that a claim for credit or refund of an overpayment shall be filed within three years from the date the return was filed, or two years from the date the tax was paid, whichever expires later.