

SS-8 Determination—Determination for Public Inspection

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| Occupation 02SAL.57 Salesperson | 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 indicates the firm is a public relations business. The worker performed services for the firm in 2013 through 2015. The firm stated the worker led writing projects for their clients while others mainly edited. She also was the only one to manage their website, and to do social media work for their clients. She was a “storyteller” for the firm. She assisted the firm to tell the stories of their clients through various types of news articles, press releases and social media. The firm stated she was treated as an independent contractor during the time she was under contract with the firm. She used her own technology, iPad, laptop, cell phone and home office etc. The work could be completed at a location of her choosing, in the manner she chose to do it. She was not regularly available during “regular business hours, as she came and went as needed to go to other appointments. She was free to provide these services to other clients, (even though the agreement states that it was an exclusive agreement.) She was expected to be on client calls and to meet any/all deadlines set. She was paid on a bi-weekly basis at her request that was changed to hourly on August 2014 again at her request.

The firm stated no training was provided. In fact she provided a good amount of training to the team. In order to learn the firm’s clients, she did her own research on each. Work assignments directly from the firm’s clients, from the editors and from the firm. She determined how the work was performed. The worker, the firm, other members and clients worked together to determine how issues were resolved. The firm indicated no reports were required; she did track her time and invoiced them for that time. There was no daily routine. There were various regularly scheduled calls with clients, but those were different every day. She usually started work in the morning, but there was no oversight on the activities performed during the day. The majority of work was performed at her home office. She was asked to participate in regular weekly phone calls, as well as various internal strategy and planning calls with members of the firm. The firm provided a web-based project management tool, a web-based time tracking tool and business cards. Other than travel (the client paid for, but the firm paid the worker and collected from the firm so she wouldn’t have to wait for her money) and shipping costs, she was responsible for her own expenses. The firm determined the prices for the work she did for their clients. The firm stated at her request she was provided with 2 sick days while she was pregnant, beyond that no paid vacations, sick time bonuses, etc. Either party could terminate the work relationship without incurring a penalty or liability.

The worker stated all of her instruction came from [REDACTED] and [REDACTED]. She stated as the first non-partner of the firm, there really was not a training system in place. As more people were hired, they asked her to train them. They set the deadlines for the work and occasionally asked her to work overtime/weekends to complete assignments. Assignments were given via e-mail. If a project was urgent, the firm would call/text her to tell her to complete it, this was occasionally included weekends, days off etc. She indicated the firm determined how the work was performed. She would ask [REDACTED] or [REDACTED] for assistance if issues arose, as the clients paid them. She stated no real reports were required other than a biweekly invoice. I also pulled monthly time reports for the entire team for several months until a new team member was hired, that task was then given to her. She was expected to be on line and responsive to d-mails for at least eight hours starting at 8 am. She was expected to attend weekly client calls throughout the day. She stated since this was a virtual firm, all workers worked from home. She also traveled with the firm to client events/industry conferences. Mandatory attendance on weekly conference calls with their clients and staff meeting calls. She performed her services personally. The firm hired and paid all workers. The firm paid for their company-wide time tracking program. She provided her own computer, phone and internet. The firm paid for travel expenses. She indicated she was paid by the hour. The client paid the firm. She was given paid vacations and sick days. The worker stated her agreement states; she was under an exclusive agreement under which she will not offer services to other entities. The firm provided company business cards for her. She was introduced as a team member; all services were performed under the firm’s business name. She opted not to renew her contract in January of 2015, as she was expecting.

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.

Analysis

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.

-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.

-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.

-If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

-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.

-If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

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. All services were performed under the firm's business name. Documentation provided by both parties, shows direction and control of the firm over the services performed. The worker was paid a guaranteed salary and/or paid by the hour, both indicating an employee relationship. The firm's website represented her as a member of their staff.