

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.92 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 indicated the firm is a wholesale distributor of novelty goods. The worker performed services as a merchandising representation for tax years 2013, 2014 and 2015. The firm advertised on [REDACTED] for candidates, and stated it was a contract position. They reported income earned on Form 1099-MISC. The firm provided a copy of the [REDACTED] independent [REDACTED] & information sheet. It states the worker is not given an employee handbook, but does state she received [REDACTED] and agrees to adhere to all the policies and procedures. It also stated the policies and procedures are continually evaluated and may be amended. The firm indicated instructions were given via their [REDACTED]. The firm would ship a box to the designated stores the worker was assigned to work. The worker was then expected to prepare the displays via the planograms included. The worker is required to take pictures of the final display, attached to a survey form provided by the firm for each client. The firm indicates they have no knowledge of the work schedules. The firm stated services are performed at two locations. A flat rate is paid so they have no idea of the percentage of time per location. The customer pays the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm terminated the work relationship due to a customer complaint. The firm also provided a copy of the [REDACTED], which shows the type of racks utilized, knowledge of work orders/shipments (reps are encouraged to complete service within 5 days of delivery). Instructions given on what to do on their first visit to a client use the [REDACTED] to organize the rack, take a photo of the completed rack, instructions on how to handle damages and returns. Inventory ordering, reporting (to include the date, the time in and time out, service codes (required to record on their reports), excess service time reporting, and deadlines for reports. The firm provided a copy of the survey report they are required to complete.

The worker provided her badge which represented her as the service merchandiser for [REDACTED]. She provided a copy of the firm's [REDACTED] back policies and charges. She provided copies of pages from the merchandising guide also. The worker indicated the firm determined the accounts she would work. The worker also provided a copy of an e-mail notifying everyone of the new procedures in the manual, which they were to follow immediately, it also stated they would be receiving a decrease in payment if they were not servicing their territories as expected. The worker agreed she was paid a set lump sum. The worker agreed she was terminated.

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. The firm did in fact give the worker a merchandising guide, that provided instructions, on what was to be performed, when it was to be performed. The work was performed on a continuing basis, with required reports, with date stamp time in and time out of service. Therefore, the firm did in fact know when the client was serviced. The worker was required to service the client within five days of receiving the shipments. The firm also assigned the clients they were to service. They provided updates to the policies, with the threat of income loss if they did not follow or service the clients as instructed.

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.