

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.99 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 an internet marketing service for airport parking vendors. The worker performed services in 2011 through 2013. The firm indicated he performed commission sales, pay per click management services and newsletter writing services. The firm indicated he was already skilled in selling, writing and [REDACTED]. He was given general instructions to sell the company's services, to manage the company's advertising campaigns and to produce a weekly newsletter for the company. The firm states he was not managed by the company. No reports were required. The firm stated for a short time the worker came to the firm's home to work, two to three days per week, after June of 2012 he worked where he pleased. The firm stated he could have hired and paid help if he so desired. From April to June of 2012 the firm provided a computer and telephone line, from June 2012 to September 2013 he provided his own. He was paid on commission and an hourly rate for pay per click management and newsletter writing. The customer paid the firm. The firm indicated the worker determined the rate for services. The firm stated they had a 12 month term agreement for the 2013 tax year. No copy was provided. The firm indicated the worker performed similar services for others. He introduced himself as calling from LongtermParking.com. The Newsletter was written under his own name and blog. The firm indicated he quit.

The worker indicated he was given an office and computer. He started work at nine am and stayed until one-thirty or two-thirty depending on the owner's decision. The firm paid for him to take classes and buy materials for [REDACTED] and [REDACTED]. Work assignments were via e-mail phone call or speaking with the owner. Calls logs were at times required by the firm. He indicated work was performed from the office, then eventually sometimes from home. Working from home increased at the owner's decision. Meetings were called by the owner when needed. He indicated he was required to perform his services personally, and did not have the authority to hire. The worker agreed the firm provided a computer, desk, phones etc. He also provided a computer for when he was asked to work from home. He stated he was paid by the hour with quarterly performance bonuses. He agreed the customer paid the firm. The worker indicated the firm did carry workmen's compensation insurance. He stated the firm determined the rates paid for services. Either party could terminate the work relationship without incurring a penalty or liability. The worker stated the owner refused to pay him for hours worked or the quarterly performance bonus.

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

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 continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 or documentation has been provided or found, indicating the worker owned a business. Services were performed under the firm's business name, for the firm's business clients, not those of the worker. He was paid by the hour, plus commissions on sales. The worker had no business or financial investment or expenses.