

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.124 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 telephone sales business. The firm responded to our request for information stating the firm is out of business as of April 2017. The firm indicated the worker performed services in sales and helped with the restaurant for tax years 2014-2017. The firm issued both W-2 pay documents and 1099-MISC documents. No indication from the firm as to why both documents were issued. They stated work assignments were given verbally from [REDACTED]. The work schedule varied. [REDACTED] determined the level of payments for the services provided or the products sold. No other information provided.

The worker stated there had been no changes in services, due to money constraints the firm switched back and forth. He performed cold calls for sales for the firm. Form W-2 pay documents were issued for 2014 and 2015, 1099-MISC forms were also issued for 2014 through 2016. He agreed work assignments were given verbally from [REDACTED]. Work had been performed Monday through Friday nine to five. All work had been performed on firm premises, utilizing the firm's equipment and supplies. The worker indicated he was paid on salary and was given paid vacations, sick pay, paid holidays and personal days, as well as bonuses. The worker also indicated he was given a company e-mail address, company phone, keys to the building and employee handbook with the firm's rules and regulations. The clients paid the firm. He indicated as of April 11, 2017 he was still employed. The worker provided a copy of the [REDACTED] they were required to use when requesting time off, and insurance election form.

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 [REDACTED]. 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.

Analysis

CONCLUSION:

Based on the above information, I find this to have been an erroneous misclassification of employment. 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 you 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. We find the worker to have been an employee for all services performed.