

SS-8 Determination—Determination for Public Inspection

Occupation 03IEI.20 Inspector	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 marketing software company in the human resources marketplace. The worker indicated she was hired on a part time basis as a telecommuting researcher for tax years 2012 through 2016. The firm reported the income on Form 1099-MISC for tax years 2012 through 2016; the firm also issued a W-2 in 2016 reclassifying the worker as an employee. The worker is currently an employee of the firm.

The firm stated no training or instructions were given, initially they reviewed the work to be done, what information they needed, tips on getting it etc. and shows the worker how to enter the information into their systems. The firm indicated no additional training was given. The worker actually provided a copy of the [REDACTED] (guidelines and instructions on how to do her job. She also provided copies of canned scripts to utilize, copies of e-mails assigning her work. The firm indicated if she had issues or concerns she would contact their research director. All work was performed off firm premises, they believe at her home. She was not required to attend meetings. The firm indicated they provided nothing. The worker was paid by the hour on a bi-weekly basis. Internet expenses were reimbursed for half each month, as long as she reported hours worked. Either party could terminate the work relationship without incurring a penalty or liability. The firm believes the worker had other jobs. The firm provided information in January of 2017 at that time the worker was still performing services for the firm.

The worker stated the initial offer was to work in the capacity of part time information researcher with the option of telecommuting. She was offered a pay rate of thirteen dollar per hour for twenty hours per week. There was also a trial period to determine if she was capable of learning what was necessary from in-house training sessions to do the job well and would be a good fit for the position. All work assignments came from her supervisor. Any changes or corrections were decided by her supervisor, regardless of telecommuting. She reported any problems or complaints to that supervisor. Because she did work from home, she was required to e-mail her supervisor with weekly activity logs (copies provided). Once her updates are completed and saved to the [REDACTED] database, it is the property of the firm. All e-mails and correspondence was signed as "researcher" with the [REDACTED] logo and assigned company e-mail signature. In April of 2016 she was told they were no longer required. Her initial schedule was twenty hours per week; she had the option of telecommuting, working in the office or both. She chose to telecommute. Her supervisor said she was free to work as many hours per day as she wished as long as she fulfilled the assigned hours per week. She does work at home, but does not have a home office, if her laptop or Internet were to fail; she would have to work from the firm's office. She was never notified of any meetings she was required to attend. She indicated she was required to perform her services personally. The firm hired and paid all workers. The firm provided instructional guidelines for work assignments; computer or laptop in the office was available if hers failed. The firm reimbursed her for partial cost of her Internet (copies provided). She agrees she was paid by the hour. Either party could terminate the work relationship without incurring a penalty or liability.

Analysis

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 1099-MISC and a Form W-2 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.

For a defined period of time, the worker was considered to be in a "probationary" status to allow the firm time to consider the merits of retaining the worker permanently.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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.

Conclusion:

Based on the above analysis, we conclude this is an erroneous misclassification of employment. The firm had maintained the right of direction and control over the worker to the degree necessary to establish that the worker was a common law employee, throughout the work relationship. She had been hired on a probationary period to see if she could do the work and would be a "good fit" for the company (EE). The firm provided training and specific guidelines, scripts etc., for the worker to utilize, and was under the direction of her supervisor at all times. Further she was paid by the hour, submitted bi-weekly time sheets, and was reimbursed for partial expenses of her Internet costs. Last, the firm converted her to employee status in November of 2016 without any changes in services taken place. Therefore, any income previously paid for the same services should have been corrected as wages.