

SS-8 Determination—Determination for Public Inspection

Occupation 03TEC Technician	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

Information provided indicated the firm is an shop, that services and installs generators in . The worker performed services as a mechanic/helper in 2017. The worker indicated the income reported represented wages paid during a 90 day probationary period. He has indicated the company pays all new people as contractors until they decide if they are going to work out or not. They are put on payroll when/if they stay on, with no changes in services. The worker indicated work was assigned as trucks came in. The remainder of time was spent rebuilding Units. The owner and shop foreman determined how the work was performed and resolved any complaints. He provided documentation of work orders to the firm. He indicated he clocked in at eight am and received a half hour for lunch, he was supposed to clock out at four-thirty but often stayed until the job was finished or at a stand still. All work was performed on firm premises. Staff meetings were required when called by firm. He was required to perform his services personally. He indicated he provided his own tools, the firm provided parts and materials. He stated he was paid by the hour. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The worker stated he quit as the firm wished to extend the ninety day probationary period.

The firm responded to our request for information. They indicated the worker was hired on an as needed basis from July to October of 2017. There was no contract. The firm stated work assignments were contracted with each services. He performed services from eight to four-thirty as needed for service work. They agreed services were performed on their premises. They agreed he was required to perform his services personally. The firm agreed they provided all supplies and materials and the worker provided his own tools. The firm indicated the worker incurred no expenses, he was contract labor only. The firm agreed the worker was paid by the hour and the customer paid the firm. The firm stated he worked a little over ninety days as contact labor. The firm stated the relationship ended due to poor service.

ANALYSIS

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 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.

-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.

-If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

--Payment by the hour, week, or month generally points to an employer-employee relationship.

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.

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 on firm services under the firm's business name and reputation. Work assignments were determined by the firm. The firm provided all parts and materials for the service work to be performed. The worker was paid strictly by the hour. Both indicated the worker had no financial or business investment in the services performed. The customer paid the firm for the services received, at the rate determined by the firm. Further, probationary pay is considered wages for employment tax purposes and should always be reported on Form W-2 with applicable tax withholdings, whether or not the individual completes the probationary period and is hired on full time or not.