

SS-8 Determination—Determination for Public Inspection

Occupation 03TEC.14 Technician	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 provides business conferences and event productions for their clients. The worker performed services from 2006 through 2013. The firm provided a copy of the written contract signed between the firm and the worker's newly formed company in September 9, 2013. Therefore, this determination will cover the income reported to [REDACTED] from 2006 through 2013, that had been reported on Form 1099-MISC under her Social Security Number only. We are prohibited from performing determinations on business to business transactions.

The firm indicated the worker was given a brief general overview of the firm's products and services. The firm indicated the worker performed services as an event sponsorship sales person as an independent sales rep. The worker represented herself on her Link-in page as an independent sales rep for the firm. The firm indicated no assignments were given to the worker by the firm. She was not required to contact the firm for problems or complaints relating to sales prospects. The firm stated she would provide the firm with a monthly invoice with sales for commission payment. There was no set work schedule, or work location. She performed services at her own discretion from her own place of business, potential customer location and conference locations. The firm indicated the worker would have hired and paid any helpers. The firm stated they provided a laptop with company software licenses for sales tracking purposes. The firm indicated the worker did lease, they had no information as to what, where or how. The firm did reimburse for approved travel to and from certain company sponsored events. She was not required to attend. The firm indicated the worker was paid on a commission basis. No cash advances were allowed. The customer paid the firm. The firm and worker had mutually agreed upon the commission rate paid. There was a 12 month non-solicitation agreement for existing clients of the firm. She was represented as a sales representative for the firm business.

The worker indicated she had begun work as an employee, she was given both W-2 and 1099-MISC pay documents. She indicated the firm switched the work classification to independent status, but there had been no changes in services. The worker provided a copy of the original employment agreement with [REDACTED] (same business identification number). It provides a base salary of \$3,000 per month and 15% commission for the first 3 months. For the next 4-9 months the base salary was to be \$1,500 per month with 20% commission (with draw). After 10 months 25% commission with draws and 20% commission on event sponsorships. It also stated she would accrue one full week of paid vacation for every six months of employment. She stated the firm provided sales force training when the company moved to the [REDACTED]. They provided media kits, pricing, packages and contracts. Assignments were given from [REDACTED] via e-mail, phone and infrequent meetings. She would contact [REDACTED] if any issues or problems arose. She was required to provide commission reports for payment, and update the sales force database, where they could run the sales reports. She stated her hours were 9 to 5. All contracts were subject to approval by [REDACTED] before final signatures were obtained from clients. She agreed she worked 90% of the time out of her home, the rest of the time at events sites or clients office. She was required to attend all scheduled events when called, and meet with [REDACTED] when called, approximately twice a year. She agreed the firm provided the computer, phone line, business cards, sales materials and software. She stated she leased nothing. She indicated all expenses were reimbursed, except her cell phone, internet connection and client gifts. She agreed she was paid on commissions. Either party could terminate the work relationship without incurring a penalty or liability. She stated she was terminated by the firm.

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.

Analysis

- 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.
- 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.
- 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.
- 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. See Rev. Rul. 74-389, 1974-2 C.B. 330.
- The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. See Rev. Rul. 75-41, 1975-1 C.B. 323.

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. Services were performed under an employee agreement, until September of 2013, when the worker established her own company. The worker continued to perform the same services after the firm switched her status to that of an independent contractor.