

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.145 Laborer/Trades

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

Information provided indicated the firm assembles and fabricates slip form curb machines and molds. The worker performed services as a welder/fabricator for the firm from 2011 to 2015. The worker was issued a W-2 from the firm's payroll company for tax years 2012, 2013 and 2014 with applicable employment taxes withheld. The firm also issued 1099-MISC documents for all years, with no changes in services having taken place. The firm indicated no training or instructions were provided. Work assignments were given via a posted schedule of machine deliveries. The worker determined how the work was performed. He reported to [REDACTED], in the firm's head office located in [REDACTED], services were performed at the firm's [REDACTED] location. The firm indicated he would arrive between seven am to eight am and work until two-thirty or three, four to five days per week. All work was performed on the firm's premises, utilizing the firm's equipment. The worker voluntarily attended planning meetings. Services were expected to be performed personally. The firm hired all individuals who were paid through [REDACTED]. The firm stated the worker provided some welding equipment also. The worker was paid by the hour, the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated the firm closed the [REDACTED] location, moving everything to [REDACTED].

The worker indicated he performed services for the firm as a welder/fabricator. He was instructed where and when to work throughout the work relationship. He was issued both a 1099-MISC and W-2 with no changes in services. The firm had told him they could no longer afford to use the payroll service, and started paying him directly. He indicated he started work at six-thirty am and worked until three, Monday through Friday, with some overtime. All services were performed on firm premises, utilizing the firm materials, supplies and equipment. He provided some tools also. He agreed he was paid by the hour, with some fuel reimbursements. The customers paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. He agreed the firm closed the [REDACTED] location and moved to [REDACTED].

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 or sole proprietor 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

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.

CONCLUSION

Based on the information provided we find this to have been an erroneous misclassification of employment. The worker received a Form W-2 (from the firm's payroll company) 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.