

SS-8 Determination—Determination for Public Inspection

Occupation

04FSC.8 Overseer

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

Information provided indicated the firm provided software and technology services for event organizers. The worker indicated specifically for race management and registration. The firm stated the worker had been retained by them in 2013 as their account manager. The worker stated he was the Chief business Development Officer. The firm reported the income on Form 1099-MISC.

The firm stated the worker primarily worked as a sales consultant, he also worked with their race timing division. He was hired to build relationships with race timing companies. They agreed on a three month trial basis at three hundred dollars a week plus commission. He was free to work at their office or from home, whatever hours he wished. He could contact any timing company, anywhere in the [REDACTED]. The firm stated training was given to the worker on how to demo the [REDACTED] event dashboard. The firm stated he did not receive work assignments. He pursued any sales opportunity he identified through his own research and analysis of potential customers. If he had any issues he would have contacted the owner of the firm for resolution. He provided weekly verbal updates of potential leads. The firm's typical schedule was ten to eleven a.m. to six/seven p.m. The worker would often come in before nine and leave before four as that was more convenient for him. The firm stated they provided no equipment, space or materials. (yet they stated he performed services at their office). He was paid on commissions. The customers paid the firm. The firm stated he worker determined his own rate of pay. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated he did perform services for others. The firm referred to him as their account manager for [REDACTED]. The firm stated he quit.

The worker stated he was represented as an employee of the firm. He was given a verbal offer of equity and never told this was a contract position. He was given a company security card given to all other employees of the firm. He was shown how to order chips and time races. He indicated work assignments were given verbally, via e-mail and text. He agreed he reported to the founder/CEO for any issues. He stated he reported to the office between eight-thirty/nine and worked until six/seven. He indicated services were performed at the office, races and warehouse. He stated he attended daily stand-ups for development work. He was required to perform his services personally. He stated he provided his own laptop. He indicated he was given a set salary. He agreed the customer paid the firm. He indicated he was given personal days, and free races. Either party could terminate the work relationship without incurring a penalty or liability. He stated he was called an employee under [REDACTED]. He agreed he quit.

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.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

Analysis

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. The firm stated the worker had been retained on a three month trial basis and was guaranteed a set salary per week plus commissions. Probationary employees, even though they may not qualify for benefits, privileges, or seniority protection, still are considered employees for federal employment tax purposes. Payments made to them as compensation for services are wages subject to employment taxes. In the instant case, it appears the services performed did go past the three month period. However, the income was still paid for services rendered, therefore still considered wages. The worker did not own or operate his own business to provide the services, which is required as an independent contractor.