

SS-8 Determination—Determination for Public Inspection

Occupation

04FSC.28 Overseer

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The payer is a [REDACTED] municipality. According to the consulting agreement entered into on October 11, 2005, the City appointed the worker as Interim Human Resources and Risk Manager of the City of [REDACTED]. Per Amendment No. 2, dated October 3, 2006, on September 19, 2006 the City Council reclassified the position of Human Resources and Risk Manager to Director of Human Resources and Risk Management. In 2005, the City initially reported the worker's remuneration on Form W-2, but subsequently reclassified her to an independent contractor when the consulting agreement took effect, and reported her remuneration on Forms 1099-MISC for 2005 through 2012. There is no evidence that the worker's services changed.

Information from the parties supports that the City relied upon the worker's prior training and experience to perform her services. Her functions and duties were specified in the agreement, and included other proper duties and functions as the City Manager assigned. If problems or complaints occurred, the worker contacted the City Manager for resolution. The worker invoiced the City providing detailed lists of tasks performed and the required payment. The City provided the worker with an office on its premises; she also worked from her home office. The worker attended portions of weekly Executive team meetings to coordinate her activities with the Executive team, and attended City Council meetings as she determined. According to the agreement, if the worker engaged additional consultants, persons, employees, or firms, the worker would obtain the City's prior written approval; the worker would be responsible for their work; and they would be charged at cost.

The City provided the worker with the use of a desk at City Hall, phone and computer at the City, software, letterhead when doing work for the City, and general office supplies were available at the city. The worker furnished her home office and computer. Initially the City paid the worker on a monthly salary basis, and later paid her at an hourly rate, on a bi-weekly pay schedule. It reimbursed her for select training and conferences. The City did not cover the worker under workers' compensation.

The worker stated that she obtained the job by submitting her resume and undergoing an interview process. The City did not make benefits available to the worker. It did not prohibit her from providing similar services for others. She used the City's letterhead and performed her services under the City's name. There is no evidence submitted that the worker advertised her services or maintained a business listing. Both parties could terminate the agreement without cause by giving a thirty-day notice, and in fact, the work relationship ended when the City terminated the contract.

Analysis

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded. Therefore, the City's statement that the worker was an independent contractor 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the City relied upon the worker's training and experience to perform her services, the City was responsible for resolving any problems or complaints that may have occurred. It is only reasonable to assume that it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker was required to submit detailed reports of her activities on her bi-weekly invoice in order to ensure the City Manager was regularly informed of work being performed by the worker, and to ensure and maintain necessary communications and contacts with key personnel within the City's Office. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. At times, the worker provided services from her home. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. These facts show that the City retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. During the work relationship, the City paid the worker on a monthly salary basis and at an hourly rate, on a bi-weekly payment schedule, and the absence of risk-of-loss was absent. In such instances, the City assumes the hazard that the services of the worker will be proportionate to the regular payments. These facts show that the City retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She performed her services under the City's name. The worker was not engaged in an independent enterprise, but rather the human resources and risk management services performed by the worker were a necessary and integral part of the municipality's mission when it created the position of Interim Human Resources and Risk Manager. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business arrangement depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the payer. The worker was not prohibited from performing similar services for others, but it appears that she devoted substantially full-time services to City and, therefore, she was restricted from doing other gainful work. Although the City did not provide benefits to the worker, it terminated the work relationship without incurring a liability. 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. These facts show that the City retained control over the work relationship and services of the worker.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the payer to directly supervise the services so the control over the worker by the payer is more general. Factors such as integration into the payer's organization, the nature of the relationship and the method of pay, and the authority of the payer to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

Section 3401(c) of the Internal Revenue Code (IRC) provides that the term "employee" for income tax withholding purposes includes an officer, employee, or elected public official of the U.S., a State, or any political subdivision or instrumentality thereof. Section 31.3401(c)-1(a) of the Employment Tax Regulations further expands the definition of "employee" for income tax withholding purposes to include officers and employees, whether elected or appointed, of a state or political subdivision thereof.

Based on the above analysis, we conclude that the City 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.