

SS-8 Determination—Determination for Public InspectionOccupation
04FSC.35 OverseerDetermination:
☒ Employee ☐ Contractor

UILC

Third Party Communication:
☒ None ☐ Yes**Facts of Case**

Information provided indicated the firm is an LED lighting company. The worker had been retained by the firm as Vice President and COO of the firm. The firm stated he did general administration work as well as outside sales. The firm issued a 1099 in 2015. No pay documents were found or provided for the prior years. The firm stated the worker was provided product training. He would receive work assignments monthly and quarterly. Both the worker and the owner of the firm would resolve issues. The worker was required to provide commission and travel reports. The worker performed services doing outside sales calls, e-mails and meetings. Services were performed on firm premises, at customer locations and at his home. The firm stated the worker could hire with permission from the firm. The worker could pay the help, but he was reimbursed from the firm. The firm stated they provided the sample products, sales materials, desktop and phone. The worker was paid on commission. The customer paid the firm. The firm indicated the worker established the level of payments. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated the worker advertised via business cards (they were the firm's business card, it represented the worker as Vice President and COO of the firm). The firm stated the worker was a partner, and that he resigned. The firm also provided a copy of an insurance claim filed, where the firm listed the worker's occupation as Operations Manager.

The worker filed the SS-8 for services performed as the Vice President/Operations Manager for the firm. The worker indicated these services were performed from July 2013 through January 2016. He completed an on line course LED Certification Program — [REDACTED]. The firm would provide weekly work assignments. He provided weekly accounts receivable/ payable reports. Services were performed on the firm's premises, ninety percent of the time. He was required to attend weekly sales meetings, marketing meetings and monthly report meetings. He was to perform his services personally. He is required to perform his services personally. He agreed he is able to hire with approval of the firm. He agreed if he paid anyone he was reimbursed by the firm. The worker indicated firm provided all equipment and supplies. He was given a set salary, plus commissions. The customer paid the firm. The firm did carry workmen's compensation insurance. The worker indicated he was provided with paid vacations, sick pay, paid holidays, personal days and bonuses. Either could terminate the work relationship without incurring a penalty or liability. He was represented as the VP/COO of the firm. He stated he quit due to low salary.

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 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

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 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 owner of the business.

Analysis

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.

The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

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.

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.

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.