

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.36 Overseer	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 is an oil and gas consulting company. The worker had been retained in 2014/2015 as the firm's Senior Quality Assurance Analyst responsible for functional and system testing for [REDACTED] software. The firm reported the income on Form 1099-MISC. We requested information from the firm concerning this work relationship. Because we received no reply, we are issuing this determination based on the information and documentation available to us. The worker has provided a copy of the employment offer given to the worker. The firm stated they would pay her \$40.86 per hour. The worker was required to invoice on the 15th and last day of the month. The worker was required to notify the firm if she was not going to be available in advance. Expenses would be reimbursed in accordance with the firm's Operation Manual. The firm would provide her a computer, on loan to interface with company personnel. A performance evaluation would be conducted at the end of six months with the potential to become a W-2 employee. The worker indicated she was told due to financial problems she could not be converted.

The worker also provided a copy of the vendor services agreement. It states the worker is to attend a mandated training and is designated and approved as such be an Area Manager or Vice President. Travel days are subject to firm approval. The worker is to comply with the firm's policy on Health, Safety and environmental conditions and company's drug and alcohol policy. The agreement also have a non-compete clause during and after for two years from doing business which competes with or is similar to the firm's business. She indicated she was provided training from the program Manager. She reported to the program manager for any issues or problems. She provided daily [REDACTED] meetings with the team and testing reports as the project required. She performed services Monday and Friday from home from 7:30-4:30, Tuesday through Thursday at the firm's office from 8 to 4, as it was mandatory. She was required to perform her services personally. The firm provided the work space and computer. She was paid by the hour, the customer paid the firm. She indicated she had been given paid vacations, sick pay, paid holidays, personal days and bonuses. She was represented as an employee of the firm, and given business cards representing her as their [REDACTED] Virtual Instructor/Software QA Team Lead. The worker indicated she was terminated.

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

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.

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 establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

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 worker has provided a copy of the letter offering her the position of Senior QA Analyst. The firm in that letter determined the rate of pay being offered. At no time did the worker submit a bid in an attempt to get the position. It was obvious the intent was to switch the worker over to employee status, after the evaluation/probation period. Had the worker not passed her evaluation(s), she should have been terminated or transferred to employee status as promised. The worker was provided with company business cards that represented her as a member of the firm's team. The worker indicated she was provided with full company benefits such as paid vacations, sick pay, paid holidays, personal days and bonuses. The worker was required to notify the firm in advance for time off. The standard "vendors agreement" utilized by the firm, held a non-compete clause, which in fact prohibited the worker from performing as a subcontractor, (one who is business for themselves, in competition with the firm.)