

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.47 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 shows the firm provides innovative technical support and customer care solutions. The worker performed services as a Sales and Marketing consultant in 2012 and 2013, and converted to employee status as full time employee in the middle of 2013. He continued to perform the same services. The firm issued both Form 1099-MISC and Form W-2. The firm stated "Phase 1 was a consulting effort designed to bring strategy and clarity to their current Marketing and Sales team. "Phase 2 was to seek to hire him on full time provided they were satisfied with the consulting efforts. (which happened after the 7 month mark-but [REDACTED] put it off for personal reasons). The firm indicated no training was given as he was a skilled professional. He was given the scope of projects at the start of his acceptance. He would contact the CEO of the firm if he had any issues. Reports that are consistent with project based assignments were required. The firm indicated they did not define hours, or locations of the work to be performed. However, in order for [REDACTED] to be successful as a consultant, it would require him to intimately become aware of existing operations and relationships with their existing customer base. He attended the executive strategic meetings to be informed of the operations and direction. The firm stated the worker would outsource (web development, graphic design, etc.) The firm would pay them. The firm provided normal office equipment and supplies. He provided all outside equipment and supplies. He was paid a set monthly fee. The customer paid the firm. Either could terminate the work relationship without incurring a penalty or liability. The firm indicated there was a non-disclosure agreement. He was presented as VP of Sales and Marketing. The firm indicated the position was eliminated. The firm stated he was subject to profit and loss as a consultant based on his performance during phase 1. There were significant dollars that a small business was spending and if they saw no value, would have stopped his services immediately. The firm states they have already worked through three years of litigious activity with Scott. His last day of active employment was March 2014. He was officially terminated September 2016 despite worker's comp claims and labor wage claims. The firm has spent thousands of dollars defending or holding their position with Scott.

The firm has provided a copy of the March 12, 2012 offer of engagement. It stated the contract engagement was for 3+months as a contractor at the rate of \$10,000 a month no commissions/benefits. "Suggested involvement past that..as FTE at the same base rate, plus commissions /benefits as VP of Sales and Marketing. They state this approach allows them to get to work right off, keep things simple in the short term and easier to define a meaningful win-win moving forward. They provided a copy of the Status Change form dated June 2013 moving him to a full time employee with a raise to \$120,000.00 annually. The firm provided a copy of the nondisclosure agreement.

The worker stated he was hired full time from the beginning. He indicated he received training from two of the company owners. He was to provide weekly progress reports in staff meetings. He worked full time Monday through Friday eight-thirty to six pm. He worked at the company office location as well as at client locations and conference locations. He was required to attend all sales, marketing, management and staff meetings. He was required to perform his services personally. He agreed he was paid a set salary, plus bonuses. He did not perform similar services for others. He was represented as VP of Sales and Marketing.

Analysis

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.

For a defined period of time, the worker was considered to be in a “probationary” (consulting) status to allow the firm time to consider the merits of retaining the worker permanently (as indicated by the firm), and no taxes were withheld from the income. Once the probationary period ended, taxes were withheld from the worker’s income without any meaningful change to the work relationship.

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. Additionally, the withholding of employment taxes from the worker’s wages is considered “treatment” of the worker as an employee, whether or not the tax is paid over to the Government. Since you withheld taxes from the worker’s income after the probationary period, and there was no meaningful change in the work relationship, you effectively assigned an employee status to the worker for the whole time services were performed for you. IRS has no exceptions specific to probationary pay and considers it to be services performed by an employee.

CONCLUSION

Based on the above analysis, we conclude this is an erroneous misclassification. The firm stated the first part of the work relationship was to review and evaluate the work performed to see if the worker was a good fit for the company. The intent was (Phase 2) to move him to a full time position. This is deemed to be a probationary period. The worker performed services, full time, as directed by the CEO. Throughout the work relationship he was promised a set monthly/annual salary. He was required to submit reports of the projects (assigned by the firm) performed. He was required to attend staff meetings.