

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.29 Manager	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 contracted with various government based clients to provide software maintenance and software development for web based projects. The worker provided software development services from 2009 through 2013. The firm reported the income on Form 1099-MISC until tax year 2013, when a W-2 was also issued. Documentation also provided found the State of [REDACTED] Unemployment Division also found the worker to have been an employee.

The firm indicated no training was provided. Work assignments were given via e-mail or phone. Meetings generate a statement of work discussing terms. The firm stated the worker submitted invoices of her hourly summary, paid bi-monthly. The firm stated she worked 100% from their home office. There were 2-3 in person meetings per year for 4 hours each. 4 to 5 phone calls per month, no penalty for not attending. The firm stated the worker hired others twice to assist her. Her contract stated, all must be reviewed by the firm. The firm indicated she paid them herself. She hired her husband to work with her. After their divorce he stated he would no longer work with her. The firm provided a secure laptop with special security software. The firm reimbursed for documented travel expenses and some special software. She was paid by the hour plus completion bonuses. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated she performed similar services for others. The firm stated the worker quit.

The firm stated she was offered a full time employment and refused. She testified under oath during a contract dispute case in [REDACTED] that a full time position with their firm was not in her best interests financially and that she preferred to remain an independent contractor and pay her own expenses and taxes. They followed the contract requirements, which included work outlined in agreed upon with the Statements of Work,. The firm stated she was also denied unemployment benefits in a case decided in December 2013 in the state of [REDACTED], as the judge agreed with them that she had left her contract with their business without being considered an eligible employee. She was paid a higher contracted rate, than regular employees. She worked the number of hours negotiated in her Statements of Work. She let them know when she would be on vacation. When they could schedule quality reviews and meeting times. The reviewed work quality for all vendors including [REDACTED]. They Scheduled 2-4 meetings per month to review work status. But otherwise allowed her to work based on her personal schedule.

The worker stated she was assigned tasks by e-mail/phone by the CEO of the firm. He contacted [REDACTED], CEO for any issues or complaints. She stated daily updates with clients of the firm, with the CEO and with the firm's other employees. She had to report on what detailed work was done biweekly. She agreed she performed services at her home office. She stated weekly company meetings, and daily status update meetings with client and the CEO were required. She stated she was required to perform her services personally. She indicated she never hired substitutes or helpers. The firm paid all. The firm provided software, computer and small business expenses. She provided her office supplies, phone service, internet etc. The firm reimbursed for any purchase of hardware and software used to execute any of the firm's projects, and non-routine travel expenses. She agreed she was paid by the hour, plus discretionary performance based bonuses and the client paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The finished product is always returned to the firm or the firm's clients. All services were performed under the firm's business name. She agreed she resigned. She indicated she had been converted to employee status in 2013 and granted unemployment. The firm issued both a 1099 and W-2 for 2013.

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

Analysis

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. It is never a matter of choice, that determines whether one is an employee or independent contractor, but specific employment tax rules. It is ultimately the firm's responsibility to correctly classify the individuals performing services for them.

ANALYSIS

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. The firm started the work relationship on a three week trial period, with a work performance evaluation performed, not once but on a continuing basis. This indicates the firm retained the right to direct and control services performed. Services were performed on a continuing basis, and not a one time business transaction. The worker was required to attend daily, weekly and yearly meetings with the firm and submit daily reports of the work performed. The worker was required to simply provide the firm with the numbers of hours worked. All work had been performed for the firm's client, under the firm's business name.

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. The worker was guaranteed a set hourly wage, with additional bonuses promised. Evidence provided indicated the firm had increased the worker rate of pay also. The firm's client continued to pay the firm for the services provided. The firm provided the computer and software programs, and reimbursed the worker for business expenses, previously approved by the firm.

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. Both parties provided substantiating documentation in this case, two numerous to list. The contract itself states the worker shall perform all duties as designated by the Board of Director os the company, including, without limitation, product development, software development, software testing and all other project lifecycle activities in business consulting and software system management. This indicates the firm retained management control of the work assignments given. A copy of the [REDACTED] employment division meetings were provided finding the worker also to have been an employee, not an independent contractor, as stated by the firm.