

SS-8 Determination—Determination for Public Inspection

Occupation

05CCP.29 Childcare Provider

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

Information provided indicated the firm was the paying agent for services performed for the President and his wife as a mother's helper and any additional assigned special projects including clerical/administrative responsibilities for [REDACTED] (paying agent). She was hired on a 60-day trial basis. During that time she would be paid every two weeks via [REDACTED] check. If the probationary period was satisfactory the agreement was she would be put on payroll January 1, 2014. However it was determined during the trial period, the work relationship was not satisfactory and it was terminate January 23, 2014.

For a defined period of time, the worker was considered to be in a "probationary" status to allow the firm time to consider the merits of retaining the worker permanently, and no taxes were withheld from the income. Once the probationary period ended, taxes were to be 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.

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.

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 this is an erroneous misclassification of wages. The income reported on Form 1099-MISC represented income paid to the worker during a probationary period of employment. 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.