

**SS-8 Determination—Determination for Public Inspection**

Occupation

06AAS.11 Aide/Assistant

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

Information provided indicated the firm produces adventure rock climbing films and organizes tours to show the films. The worker had been retained by the firm as a production assistant- she ordered supplies to produce the films reviewed and edited film footage. Because it was uncertain how much assistance was needed for the project she was originally hired as a 1099 contractor. She was then later hired as a W-2 employee. However, she was released five months later due to none sufficient work. The firm indicated she performed similar services in 2013 for other companies. The firm indicated work assignments were verbal or via e-mail. She would work with other contractors or report to the owner of the company to resolve issues or problems. Methods used to perform her services were done so per industry standard. She provided time reports for her compensation. The services were performed at the firm's office. Ad hoc meetings were required to discuss the projects she was working on. Her services were to be performed personally. The firm indicated there was no set schedule; she worked when she was available. The firm stated they provided the computers with film-specific hard drives and film editing software. She provided her own cell phone. She was paid by the hour and the customeraid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated the worker performed similar services for others.

The firm provided a copy of the 2013 1099 and the 2013-2014 W-2 issued. They provided a copy of the IC Agreement entered into on the 25th of April 2013 between [REDACTED].

The worker indicated the company ran a film tour ever year using films produced by its sister companies, [REDACTED]. She performed services as Post Production Assistant. She troubleshot technical issues, backed up the dropbox, kept logs of location of equipment, shot interviews, did minor editing, managed the DVD production process in-house, did producing work when necessary, assisted supervisors. There was a verbal agreement she would become an employee after two months. As a recent graduate, she was in need of a job and did not realize the contract and her classification violated IRS rules. She was trained on the work flow in post production house and required to perform tasks according to that work flow. She was managed by the owner and supervisors and received assignments from them. They are one of the owners of [REDACTED], [REDACTED] and the upper level managers, [REDACTED] and [REDACTED]. She reported to them. Her schedule was 9-5 with longer hours when needed. Hours over forty were paid at time and a half. Services were performed on firm premises, utilizing the firm's equipment. She was paid by the hour. Either party could terminate without incurring a penalty or liability. She was represented as an employee. She agreed she was laid off due to slowdown in work.

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.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the

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## Analysis

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beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 73-591, 1973-2 C.B. 337.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. In the instant case, the worker was a recent graduate and performed all services under the direction and supervision of the firm. The firm had switched the worker to employee status, (according to worker per verbal agreement) and she continued to perform the same services, under the same direction and control. The firm provided the work space, and equipment and the worker was paid by the hour. This indicates she had no opportunity for profit or loss.