

SS-8 Determination—Determination for Public Inspection

Occupation 07ESW Enforcement/Security Workers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

Information provided indicated the firm is a tactical security and patrol service business. The worker provided security, patrol and transport services for the firm. Although the firm withheld taxes from the worker's pay, the firm issued Form 1099-MISC for 2017. The worker indicated the firm issued a refund check for the taxes withheld. The worker provided copies of the check stubs showing the withholdings. The firm indicated there had been an employment agreement, but did not provide a copy. The firm stated the worker knew from the beginning he was a 1099 worker based on contracts with their clients. The firm indicated they provided the necessary security and fire arm training required to perform the job. The firm indicated work assignments are emailed to worker, he accepts or rejects assignments. The worker was to report to the firm if there were any issues. The worker was required to supply competition reports. Services were provided when the firm had contracts. He was required to perform his services personally. The firm provided the vehicles, the worker provided his own uniform pants, firearms, and duty gear if he wanted. He provided his own meals. The worker was paid by the hour. The customer paid the firm. The firm indicated they did carry worker's compensation insurance. Either party could terminate the work relationship without incurring a penalty or liability. The worker did not perform similar services for others. The firm indicated there was a non-compete agreement. He was represented as a contractor. The work agreement was terminated due to lack of performance.

The worker agreed all training pertaining to the job was provided by the firm. Work assignments came from the firm owner. The worker indicated he was scheduled on an hourly basis, with clocking in and clocking out. Copies of the time sheets were provided. Services were performed at the firm's client locations. Staff meetings were attended when requested. The worker agreed he was to perform his services personally, the firm provided all equipment and supplies, and vehicle. The worker agreed he was paid by the hour and the clients paid the firm. Either could terminate without incurring a penalty or liability. The worker indicated he was represented as an employee of the firm. He stated he quit.

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.

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.

-Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

-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.

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. 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 provided substantiation that proved the firm did in fact withhold employment taxes, but then issued Form 1099-MISC to report the wages. The firm indicated there had been an employment contract (not an independent contractor agreement.) All work had been performed under the firm's business name. The worker was paid by the hour for the services performed, indicating no opportunity for profit or loss. All training required to perform the services, was provided by the firm.