Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Index Number: 3121-0401, 3401-0402

Person to Contact:

Telephone Number:

Refer Reply To:
CC:EBEO:6 - PLR-108460-99

Number: **200006033**
Release Date: 2/11/2000

Date:
November 10, 1999

Key:

Firm =

Worker =

Dear:

This is in reply to a request for a ruling to determine the federal employment tax status of the above-named Worker with respect to services provided to the Firm for the period January 1, 1998 through December 31, 1998. The federal employment taxes are those imposed by the Federal Insurance Contributions Act (FICA) and the Collection of Income Tax at Source on Wages.

According to the information submitted, the Worker was engaged as a technical support services specialist under a written non-personal service contract. Terms in the contract provided that he was to perform his services on the Firm's premises and during its business hours. As a technical support specialist, the Worker's primary responsibility involved managing the Firm's family support center. The center provides technical support and/or transition services to the Firm's eligible clients. Services include providing management of the client automated resource center, providing client computer software application training and set-up, providing electronic information exchange, and counseling for separating or retiring individuals.

The information submitted by both the Firm and the Worker is in substantial agreement. Both state that the Worker was given training by the Firm, initially at orientation and thereafter, on an as-needed basis. Both state that the Worker was given instruction in the way the work was to be done. Both state that the Firm had the right to change the methods used by the Worker or direct him in how the work was to be done. Both state that the Firm provided all tools, equipment, supplies, and materials needed by the Worker in the performance of his services. These included office space, computers,

computer software, books, typewriters, videos, etc.

Both parties indicated that either the Firm or the Worker could terminate the relationship without either incurring a liability. Both indicate that the Worker was required to perform his services personally; that he did not advertise or maintain a business listing in the telephone directory or trade journals; that he did not perform similar services for others; and that he did not represent himself to the public as being in the business of performing the same or similar services.

The parties agree that the Worker was paid on an hourly wage and that he was not eligible for a pension, bonus, paid vacations or sick pay. The Firm did not deduct social security, Medicare, or Federal income taxes from his pay.

Subsequent information provided in this case indicates that the services provided by the Worker had been previously performed by an employee of the Firm. In addition, the Worker is presently engaged by the Firm as an employee in a position that is substantially the same as previously provided as an independent contractor.

Section 3121(d)(2) of the Internal Revenue Code provides that the term "employee" means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee.

The question of whether an individual is an independent contractor or an employee is one of fact to be determined upon consideration of the facts and application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar sections of the Employment Tax Regulations; namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1 relating to the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and federal income tax withholding on wages at source, respectively.

Section 31.3121(d)-1(c)(2) of the regulations provides that 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 the results to be accomplished by the work, but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but also as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which services are performed; it is sufficient if he or she has the right to do so. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished and not as to the means and methods for accomplishing the result, he or she is an independent contractor.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything

other than that of employer and employee is immaterial. Thus, if an employer/employee relationship exists, the designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

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 autonomy must be considered. In doing so, one must examine the relationship of the worker and the business. Relevant facts generally fall into three categories: behavioral controls, financial controls, and relationship of the parties.

Behavioral controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control how the worker performs the specific tasks for which he or she is hired. Facts which illustrate whether there is a right to control how a worker performs a task include the provision of training or instruction.

Financial controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These include significant investment, unreimbursed expenses, making services available to the relevant market, the method of payment, and the opportunity for profit or loss.

The relationship of the parties is generally evidenced by examining the parties' agreements and actions with respect to each other, paying close attention to those facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which 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.

We have carefully considered the information submitted in this case and, in view of the facts discussed above, we conclude that the Firm had the right and did in fact exercise the degree of direction and control necessary to establish an employer-employee relationship. Accordingly, we conclude that the Worker was an employee of the Firm and amounts paid to him for services provided were wages, subject to federal employment taxes and income tax withholding.

Section 3306(c)(6) of the Code, pertaining to the FUTA, provides that service performed in the employ of the United States Government are excepted from the definition of employment.

This letter does not constitute a Notice of Determination Concerning Worker Classification Under Section 7436 of the Internal Revenue Code.

This ruling is directed only to the taxpayer to whom it is addressed. Section 6110(k)(3)

of the Code provides that it may not be used or cited as precedent.

Sincerely yours,

HARRY BEKER
Chief, Branch 6
Office of the Associate Chief Counsel
(Employee Benefits and Exempt Organizations)

Enclosure:
Copy of ruling letter for 6110 purposes