

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.22 Administrative Assist	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 produces and installs custom window treatments. The firm stated she was hired to organize and automate the office. After this task she trained for another position within the company as an employee. The worker had been given general guidelines of the company's objectives. Work assignments came from company owner's [REDACTED] and [REDACTED]. They provided general guidelines at the inception and periodically thereafter. The firm indicated there had been no set schedule due to the worker's drive time and family obligations. For security reasons work had to be performed during office hours of eight to five. All work had been performed on firm premises. Services were to be performed personally. The firm indicated they provided the computer and office supplies. The worker was paid by the hour, determined by the firm. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The worker quit without notice.

The worker indicated the verbal agreement was that she was hired as a 1099 employee for 90 days, after that she would receive a W-2 after that time. She stated she was trained by a co-worker, bookkeeper and daughter of the owners. She was trained on the computer, phones, order entry and production. Work assignments were given from the owners, their daughter, the bookkeeper and co-workers. She indicated she worked nine to five Monday through Friday. Paid holidays and paid vacations were given (after one year). She agreed services were performed on firm premises utilizing the firm's equipment and supplies. She indicated weekly staff meetings were required. She stated she resigned after a new employee had been hired to replace her.

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.

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 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.

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. See Rev. Rul. 70-630, 1970-2 C.B. 229.

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 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. All services had been performed on firm premises, utilizing the firm's equipment and supplies. Training, instructions and work assignments were given from the inception of the work relationship. No evidence has been provided the worker provided services as her own business entity. She was paid by the hour, indicating no opportunity for profit or loss.

For the tax year 2011, it is possible that the statute of limitations has expired for the assessment of taxes in this matter. If so, it will not be necessary for you to amend your return(s). Internal Revenue Code (IRC) section 6501(a) provides that the statute of limitations for assessment generally expires three years from the due date of the return, or three years after the date the return was actually filed, whichever is later. IRC section 6501(b) (2) provides that for certain employment tax returns, the three years would begin April 15 of the following year for which the return was due. IRC section 6511(a) provides that a claim for credit or refund of an overpayment shall be filed within three years from the date the return was filed, or two years from the date the tax was paid, whichever expires later.

NOTE:

For a defined period of time, if the worker was in fact 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 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.