

SS-8 Determination—Determination for Public Inspection

Occupation 05COU.11 Counselor	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 indicates the firm is an outpatient behavioral health facility. The firm indicated the worker performed services as a contract monitor/janitorial worker. He kept the building clean, between group sessions. He monitored client's activities on breaks. The firm felt he was an independent contractor because he could not work a set schedule, he had to leave at certain times to go to his children school and they discussed this with him, when he signed the W-9. The firm indicated in 2012 to 2014 he had a set shift to work, outlined specifically as a counselor and participated in weekly staff meetings. The firm indicated he had daily work assignments. The worker reports to the program director upon arrival to receive his work assignments for the day. If a problem arose he was required to contact one of the owners. The firm stated sometimes he would come in at nine and work to one, other times he would come at ten and work until two. Services were performed on the firm premises. He was not required to attend staff meetings. He was required to perform all services personally. The firm provided cleaning supplies. The worker was paid by the hour. Both the firm and worker negotiated the pay rate. Either party could terminate the work relationship without incurring a penalty or liability. The firm represented him as a contractor. The firm indicated the worker quit.

The worker filed the SS-8 for services performed as a counselor in training and janitorial services provided. The firm reported the wages under two different Business identification numbers (EIN) for tax years 2013, 2016 and the worker indicated 2017, although it was one work relationship performed during the same time frame. The worker was previously issued W-2 pay documents (again under two different EIN #s). He was trained by the supervisor to perform his services. He was told each day which group to counsel, who to drug test and what time to clean up. He reported to [REDACTED], supervisor for any issues or problems. He indicated he started work every day at eight-thirty am and had counseling session's every day at ten am. All work was performed on the firm premises. Staff meetings were held every Thursday at two. He was required to perform his services personally. The firm provided all equipment and supplies. He was paid by the hour. The clients' paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. All work was performed under the firm's name. He indicated 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.

The withholding of income tax or the Federal Insurance Contributions Act (FICA) tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government. The filing of an employment tax return and Form W-2 for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period.

Analysis

The worker received a Form W-2 and a Form 1099-MISC from you in the course of the work relationship, and the services did not substantially change. As previously stated, the issuance of Form W-2 and/or the withholding of taxes on income for an individual would be considered treatment of the individual as an employee, and would apply in this case.

Conclusion:

Based on the above analysis, we conclude this is an erroneous misclassification of employment. The worker performed services as a janitor and as a counselor for the firm. He did so under the direction and supervision of the firm. 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 fact the work schedule became flexible, does not mean the worker was an independent contractor. He did not own or operate a cleaning business, or a consulting business. All work continued to be performed in the order assigned by the firm. The worker was paid by the hour for all services performed. The firm provided all cleaning supplies, and office space for counseling sessions. The worker indicated he continued to attend weekly staff meetings.