

SS-8 Determination—Determination for Public Inspection

Occupation 02CSP Computer Services Personnel	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 firm is a software development and marketing company. The worker performed the services as the firm's Web Design Manager for tax years 2016 and 2017. The firm reported the income on Form 1099-MISC. The firm stated no training was given other than general direction on website requirements. Work assignments were given via e-mail, documents and verbally. The worker reported to the firm for any issue resolution. The firm stated they reviewed his work. No specific hours were required. Occasional company meetings and social were required, there were no penalties for not attending. The worker was required to perform his services personally. The firm indicated they retained hiring approval. The firm provided Microsoft Office and one-two other programs. The worker provided his own computer and all other programs. The firm stated the worker was paid progressive payments towards balance owed. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated he was represented as a contract employee. The firm stated the worker quit. The worker indicated he was told how he should perform his job, what software he should use, specific times work was due, specific changes and updates he should make. He was told where and when he should attend meetings, whether in person or via Skype. Work assignments were verbally, via phone and e-mail. The CEO and Marketing Vice President resolved any issues or problems. He provided daily, verbal and weekly e-mail reports. He indicated he performed services Monday through Friday, nine to five. Daily Skype meetings were held between ten and eleven, sometimes at the CEO's residence. Everyone employed by the firm worked from home, it is a remote location job. He agreed he was to perform his services personally. The worker agreed the firm provided software, training materials and company e-mail. He provided his workspace, computer, internet, transportation to meetings and cell phone. Lodging was reimbursed if it was necessary to travel for meetings or expos. He stated he was paid by the hour or \$750.00 a week regardless of the number of hours worked. It was also agreed he was a stakeholder. Should a stakeholder event occur he would receive a certain percentage as a bonus as well as compensation for time accrued for overtime. The customer paid the firm. The worker indicated he was given personal days. Either party could terminate the work relationship without incurring a penalty or liability. The worker agreed he resigned.

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.
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Analysis

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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. 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. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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. Payment by the hour, week, or month generally points to an employer-employee relationship.

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 were performed as trained and directed by the firm. All work was reviewed and critiqued by the firm. In the current day and age of computers, many companies are worked from home, this does not indicate they are independent contractors or that they own their own companies. The worker was guaranteed a set weekly/hourly wage. Various reports and meetings were also required.