

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.26 OfficeWorker	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 mobile advertising company. The worker performed services as a mobile advertising account associate for tax year 2013.

The firm stated he was instructed on the basics of the [REDACTED]. Assignments were from the VP of advertising [REDACTED]. She determined how the work was performed, and responsible for resolution of all issues. Services were performed on a flexible schedule on firm's premises or from home. Daily meetings regarding campaigns were required. Services were required to be performed personally. The firm provided a computer. The firm indicated on the SS-8 the worker was paid by the hour. However, the agreement they provided indicated a \$4,000.00 a month base salary. The customer paid the firm. The firm indicated no benefits were given. Either party could terminate the work relationship without incurring a penalty or liability. The worker was represented as an account associate. The firm indicated the job completed.

The worker stated he received extensive training and was always instructed how to perform work by either the VP of advertising or Ad Ops Manager. Work assignments were given directly via management. All reports were logged through computer software and available for management review at all times. He had to report advertising performance of his campaigns. He performed services Monday through Friday nine am to seven pm. Services were performed on firm premises 98% of the time, 2% from home. He was required to attend scrum meetings every morning as well as other meetings as instructed. Services were to be performed personally. The firm provided the office space, computer and equipment, He was paid on salary. He agreed the customer paid the firm. The firm did carry workmen's compensation insurance. He stated he was provided sick pay, and paid holidays. Either party could terminate the work relationship without incurring a penalty or liability. He stated he was laid off when the firm downsized.

Both parties provided a copy of the "at will" employment agreement states they would work together on a month to month basis for the first 1-3 months. After the initial 1-3 month period the firm would present the worker the opportunity to participate in their group bonus plan, their health insurance plan, which the firm contributes \$300 a month, and the firm's incentive stock plan. The firm provided copies of invoices from the W which shows billing for the \$4,000.00 per month.

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.

Analysis

-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.

-The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

-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. See Rev. Rul. 56-694, 1956-2 C.B. 694.

-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. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

-Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary.

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. The parties both provided a copy of the employment agreement, which did not at any time specify it was an independent contract agreement. Further, after a probationary period of 1-3 months the worker was to be provided with company benefits, indicating an employer/employee work relationship. He was given a guaranteed set monthly salary, provided training and instructions from the firm. He answered to a supervisor from the firm and required to attend meetings and submit reports.