

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.66 Manager	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 a publishing company. The worker performed services for the firm in various capacities from 2006 through 2014. The firm has reported the income on Form 1099-MISC for each tax year.

The firm indicated she was trained on internal processes and was provided routine updates on new tools developed for the internal system. AS a freelance writer, the managing editor contacted [REDACTED] with work that she was able to accept or pass on to another writer. As an assistant to the managing editor, she edited stories submitted for publication and uploaded them into the content management system before the publishing deadlines. She would contact IT if she had technical issues. The firm stated she worked her own schedule, from her home. No meetings were required. Services were to be performed personally. The firm stated they provided no equipment or supplies. She was paid on a piece work basis. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated she did perform similar services for others. The firm provided instructions on company specific processes and updates. All work is returned to the firm. There was no budget so the worker was no longer needed.

The worker indicated she reported most often to the managing editor, publisher and content director of the firm. She was trained how to use [REDACTED] software system. Assignments were given over e-mail, phone calls or editorial advisory and planning meetings. The timing of their work was governed by the firm’s publication deadlines. [REDACTED], [REDACTED], and [REDACTED] determined how the work was performed. They were responsible for resolution of any issues. For software issues she would create a ticket for tech support. Everything was performed on [REDACTED] software system, there was no printing capability. She maintained an editorial calendar which she shared with management and their clients. She worked five days a week for [REDACTED] until January 2013. After that it was usually Monday to Wednesday each week. There were weekly deadlines, midnight on Tuesdays and Wednesdays for [REDACTED], respectively. The custom publications had monthly or bi-monthly deadlines. She agreed she worked from her home office. She was required to attend monthly/quarterly planning and editorial advisory meetings for two of the custom publications. She was required to perform her services personally. The firm provided the content management system software, and email account [REDACTED]). She provided her laptop, phone and internet service. The firm set the pay schedule, the pay constantly fluctuated. For instance in 2009 she was paid \$235 per week, in 2014 it had been reduced down to \$180.00 per week. The managing editor actually did all invoices. She was paid twice a month. The client paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. All work was performed under the firm’s business name and she was represented as part of their team. She was terminated by the firm due to budget cuts.

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.

Analysis

-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.

-A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

-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.

-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 or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. See Rev. Rul. 74-389, 1974-2 C.B. 330.

-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.

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.