

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.123 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 indicated the firm is a construction contractor. The worker had been retained as a project manager for tax years 2013 and 2014. The firm reported the income on Form 1099-MISC. The firm feels he was an Independent Contractor because he brought his management expertise, was not trained by the company, worked autonomously, used his own computer, car and office equipment. He set his own hours and was assigned to selected projects. There were agreements in place which outlined compensation, non-compete and confidentiality clauses. Copies were provided. Work assignments were discussed with the President as to whether he would take on additional projects that came into the company. He provided task completion schedules and project updates. Most days included time on client site, working off site and vendor locations, his home and office. Meetings were scheduled at the convenience of both parties. The firm indicated the worker would hire helpers if needed. The firm would pay them. The worker was paid by the hour plus reimburseables (mileage, parking etc.) Either party could terminate the work relationship without incurring a penalty or liability. He was represented as the project manager representative for the firm. The firm indicated the worker resigned.

The firm provided a copy of the confidentiality and non-disclosure agreement, which was signed only by the worker. The firm provided a copy of the EMPLOYEE Non-compete Agreement. (Again only signed by the worker as employee.) A copy of the Construction Manager's Services/Responsibilities was provided.

The worker agreed he provided services as project manager, administrative and site management of construction projects. He stated he was under the control of another person, received a fixed monthly wage, plus expense payments for travel and did not supply materials. He received on day of on the job training and work assignments came from [REDACTED]. He provided a punch list for construction tasks and attended weekly meetings. He stated he worked seven a.m. to five p.m. he would pick up any needed materials (purchased on the firm's [REDACTED] Business card the firm gave him in his name), checked on jobsite progress, solicit for bids, scheduled subcontractors, ordered materials and had client progress meetings. Services were performed at various locations. He was required to perform his services personally. The firm hired and paid all workers. The worker agreed the firm provided all construction supplies and materials. He provided his own car and cell phone. He was paid a set salary. He agreed the clients paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. He performed all work under the firm's business name with his own business email address. He stated he quit.

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

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. T

Analysis

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. (in the instant case the firm provided all materials, and/or provided the worker with a company charge card to purchase materials.)

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 were performed on a continuing basis, as assigned by the firm. The parties had a (employee) non-compete agreement, which contained specific employer/employee language. The worker was at no time in a position to incur a profit or suffer a business financial loss.