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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

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Date:

February 15, 2002

Key

worker =

firm =

Dear

This is in reply to a request for a ruling to determine the federal employment tax status of the above-named worker with respect to clerical services she provided to the firm. The federal employment taxes are those imposed by the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages.

According to the information submitted, the firm is a federal agency. The worker was engaged to provide clerical work pursuant to a written contract. She performed her services from June 1, 1996 through May 30, 1999. Her remuneration was based on an hourly rate, which was the result of a bid she submitted to the firm. Information submitted by both the firm and the worker state that the worker performed her services 8 hours a day.

The worker performed her services at the firm's location using equipment and supplies furnished by the firm. The worker was not eligible for any benefits, such as pension, sick leave or vacation time. The worker was given instructions by the firm with respect to her duties.

The worker states that she did not perform similar services for others and did not

maintain her own office or represent herself to the public as being in the business of providing the same or similar services. The worker also states that she did not have a financial investment in a business related to the services performed. The worker further indicates that she did not have an opportunity to incur a loss in the performance of her services for the firm.

Section 3121(d)(2) of the Internal Revenue Code (Code) defines “employee” as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an independent contractor is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar sections of the Employment Tax Regulations, namely sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1, relating the FICA, the FUTA, and federal income tax withholding respectively.

Section 31.3121(d)-1(c)(2) of the regulations provides that 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 the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he or she has the right to do so. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished and not as to the means and methods for accomplishing the result, he or she is an independent contractor.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, the designation of the employee as partner, coadventurer, agent, or independent contractor must be disregarded.

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 autonomy must be considered. In doing so, one must examine the relationship of the worker and the business. Relevant facts generally fall into three categories: behavioral controls, financial controls, and the relationship of the parties.

Behavioral controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control how the worker performs the specific tasks for which he or she is hired. Facts which illustrate whether there is a right to control how a worker performs a task include the provision of training or instruction.

Financial controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These include significant investment, unreimbursed expenses, making services available to the relevant market, the method of payment, and the opportunity for profit or loss.

The relationship of the parties is generally evidenced by examining the parties' agreements and actions with respect to each other, paying close attention to those facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which 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.

We have carefully considered the information submitted in this case and, in view of the facts discussed above, we conclude that the firm had the right and did, in fact, exercise the degree of direction and control necessary to establish an employer-employee relationship. Accordingly, we conclude that the worker was an employee of the firm and amounts paid to her for services provided are wages subject to FICA taxes and income tax withholding.

Section 3306(c)(6) of the Code, pertaining to the FUTA, provides that services performed in the employ of the United States Government are excepted from the definition of employment. Thus, the amounts paid to her are not subject to FUTA taxes.

This ruling is directed only to the taxpayer to whom it is addressed. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,
Michael A. Swim
Chief, Employment Tax Branch 1
Office of Division Counsel/
Associate Chief Counsel
(Tax Exempt & Government Entities)

Enclosures:
Copy of this letter
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