

Internal Revenue Service

40 Lakemont Road
Newport, VT 05855
Index (UIL) No.: 3121.04-01

February 7, 2012

Department of the Treasury

SB/SE, Compliance
BIRSC, SS-8 Unit

Third Party Communication: None

Form: SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*

Person to Contact:

Telephone Number:

Fax Number:

Refer Reply to: Case # 97460

Dear _____ :

The purpose of this letter is to respond to a request for a determination of employment status, for federal employment tax purposes, concerning the work relationship between _____, referred to as "the university" in the rest of this letter, and _____, referred to as "the worker" in the rest of this letter. It has come to our attention that the worker began providing services in 2004 and continues through the present time.

DETERMINATION RESULT

We hold the worker to be an employee of the university. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

DESCRIPTION OF WORK RELATIONSHIP

The university is a non-profit institution of higher learning. The worker is engaged by the university as an adjunct professor. He is hired on a contract basis for each class, contingent upon enrollment. The university did not train or instruct the worker. The worker is responsible for resolving any problems or complaints that may occur. The university advertises the class to prospective students; it registers eligible students for the class; and it sets the class time and place. The worker generally teaches one night

per week. He is required to submit his course syllabus and grades on the university's timeline. He is required to perform his services personally.

The university provides the classroom and various equipment, materials, and supplies. The worker provides his laptop and thumb drive. He incurs expenses for attending conferences, meals for guest speakers, his home office, and business cards. The university pays the worker on a salary basis, and will reimburse any expenses with a valid business purpose. The students pay the university directly. The university establishes the level of payment for the services provided.

The worker is a member of a collective bargaining union. He provides his services according to the contract negotiated by the university and union, and follows the guide for adjunct professors. The worker provides similar services for others. Both parties reserve the right to terminate the work relationship at any time without incurring a liability or penalty.

LAW

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.

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, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded.

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, while the university relies upon the worker's training to carry out the classes assigned to him, it sets the time and place of each class. A requirement that workers be on the job at certain times is an element of control. The worker resolves problems or complaints that may occur, but it is only reasonable to assume that the university is responsible for the resolution of any problems beyond the worker's capacity or responsibility to resolve. The worker is required to perform his services personally, meaning he cannot engage and pay others to perform services for the university on his behalf. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Revenue Ruling 55-695, 1955-2 C.B. 410. These facts show that the university retains behavioral control over the services of the worker.

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, does not have the opportunity to realize a profit or incur a loss as a result of the services provided. The worker provides equipment in the classroom; however, the term "significant investment" does not include tools or instruments commonly provided by employees in their trade; nor does it include education, experience, or training. The students pay the university directly at fees set by the university, showing the university has the financial control.

These facts show that the university retains control over the financial aspects of the worker's services.

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 is not engaged in an independent enterprise, but rather he performs his services on a continuing basis, under the university's name. His teaching services are a necessary and integral part the university's curriculum. Integration of the worker's services into the university's operations generally shows that the worker is subject to direction and control. When the success or continuation of a program 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 university. Although the university does not provide benefits to the worker, both parties retain the right to terminate the work relationship at any time without incurring a liability, a factor indicating an employer-employee relationship. These facts show that the university retains control over the work relationship and services of the worker.

CONCLUSION

Based on the above analysis, we conclude that the university has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.

TAX RAMIFICATIONS

Many religious, charitable, educational, or other nonprofit organizations are exempt from federal income tax. However, they must withhold federal income tax from their employees' pay and report each employee's compensation on Form W-2. If an employee is paid \$100 or more during a calendar year, his/her wages are also subject to FICA taxes (social security and Medicare).

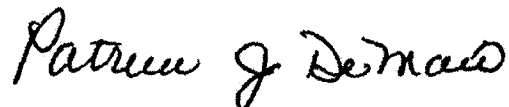
Payments for services performed by an employee of a nonprofit organization described in section 501(c)(3) are not subject to FUTA taxes.

OPTIONS AND ASSISTANCE

Since the university is correctly treating the worker as an employee, the university is not required to adjust its employment tax returns.

If you have any questions concerning this determination, please feel free to contact the person whose name and number are listed at the top of this letter. Please refer to your case number (97460) when contacting us about this case.

Sincerely,

A handwritten signature in black ink that reads "Patricia J. DeMaio". The signature is written in a cursive style with a large initial "P".

Patricia J. DeMaio
Operations Manager

Enclosures: Notice 441
Notice 1036
Sanitized Determination Letter for Public Disclosure

cc:

*To order forms and publications, please call 1-800-TAX-FORM or visit us online at www.irs.gov/formspubs.

Letter 3711(CG) (Rev. 5-2011)
Catalog Number 36629P