



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF THE CHIEF COUNSEL

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The Honorable Frank R. Wolf
Member, U.S. House of Representatives
13873 Park Center Road, Suite 130
Herndon, VA 20171

Attention:

Dear Congressman Wolf:

This letter is in response to your inquiry dated August 16, 2012, on behalf of your constituent, _____ of _____, _____ asked whether a person can be an employee and an independent contractor simultaneously, for the same company, when working as a professional consultant on two separate consulting projects. I hope the following general information on the factors the IRS uses to determine whether an individual is performing services as an employee or an independent contractor is helpful in addressing _____ question.

The IRS looks to the provisions of the Internal Revenue Code (the Code) to determine who is an employee subject to federal employment taxes. Code section 3121(d)(2) defines an employee as any individual who, under the common law rules applicable in determining the employer-employee relationship, has the status of an employee. Whether an individual is an employee under the common law rules is a question of fact to be determined after considering the facts and circumstances in a particular case. Individuals can find guidance for determining that status in two similar sections of the applicable Employment Tax regulations: section 31.3121(d)-1 relating to the Federal Insurance Contributions Act (FICA), and section 31.3401(c)-1 relating to federal income tax withholding.

Section 31.3121(d)-1(c)(2) of the regulations provides that the relationship of employer-employee exists when the person for whom the services are performed has the right to direct and control 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. The employer does not necessarily have to 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. Section 31.3401(c)-1 of the regulations has a similar provision.

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 relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, it is of no consequence that the employee is designated as partner, co-adventurer, agent, independent contractor, or the like.

In determining whether an individual is an employee or an independent contractor under the common law rules, we must consider all evidence of control or autonomy. In doing so, we examine the relationship of the worker and the business. Relevant facts generally fall into three categories of evidence: behavioral controls, financial controls, and the relationship of the parties.

Behavioral controls are evidenced by facts that 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. These facts include the provision of training, the issuance of instruction, or the completion of an evaluation.

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

The relationship of the parties is generally evidenced by the parties' agreements and actions with each other, including facts that show not only how they perceive their own relationship but also how they represent their relationship to others. These facts 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.

If an employer-employee relationship exists, the employee is generally subject to FICA taxes (more commonly known as social security and Medicare tax) and income tax withholding. An employer has an obligation to withhold and report these taxes, deposit the withheld taxes with the government, and provide a Form W-2, Wage and Tax Statement, to the employee and to the Social Security Administration reporting the wages paid and the taxes withheld.

In instances where an individual provides services in two separate roles to the same business, the IRS examines separately the relationship between the worker and the business for each performance of services. Just as with any examination of worker status, we examine each relationship based on facts that fall into the three categories of evidence explained above—behavioral controls, financial controls, and relationship of the parties. If an employer-employee relationship is found with regard to performance of services for only one role of the worker, remuneration with regard to only those specific services is subject to all FICA and income tax withholding requirements under the Code. If an employer-employee relationship is found for both roles, then remuneration for all services performed by the worker for the business are subject to withholding requirements under the Code.

A business may file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, to request an IRS determination of the status of a worker, including a class of workers, as an employee or an independent contractor. If the firm is requesting a determination for a particular class of worker, it should complete the form for one individual who represents the class whose status is in question.

This letter provides only general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2012-1, section 2.04, 2012-1 IRB 1, at 7 (Jan. 3, 2012).

I hope this information is helpful. If you have any questions, please contact
of my staff at .

Sincerely,

Victoria A. Judson
Division Counsel/Associate Chief Counsel
Tax Exempt & Government Entities