

SS-8 Determination—Determination for Public Inspection

Occupation 01PLW.25 PlantLandMaintenance	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

The worker initiated the request for a determination of his work status as a landscaper in tax year 2014. The firm's business is described as landscape maintenance.

The firm's response was signed by the owner. The firm's business is described as landscaping and yard maintenance. The worker performed services as 'crew' – he cut grass and cleaned up after tree trimming.

Research indicates the worker was also issued Form 1099-MISC in tax year 2013.

According to the firm, the worker was instructed on safety gear to be worn and on using the mower and other tools. The firm stated the worker was allowed to choose his work based on what was available. The worker was required to contact the firm in the event of a problem. The firm transported the worker to jobs, leaving the firm's location at 8 a.m., and finishing usually in early afternoon. The worker was required to perform the services personally.

The worker responded that he was given on-the-job training and instructions, that the job assignments came from his boss, and that it was the firm that determined the methods by which he performed his job. He concurred that any problems or complaints he encountered were directed to the firm for resolution. The services were rendered at the customer location; the daily routine was to arrive at the firm owner's home, receive the job assignment, ride with or drive the firm's van to the job site(s). He added that any additional helpers or substitutes were hired and paid by the firm.

Both parties acknowledged that the firm provided the mower, weedwacker, blower, rake, saws, ladder, and etc. The firm paid the worker an hourly wage. The firm did not carry workers' compensation insurance coverage on the worker; the firm indicated the worker had outside insurance. The firm and worker agreed the firm established the level of payment for the services rendered.

The firm and worker concurred that there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker responded that he mowed a family member's lawn. The worker did not advertise. The firm indicated the worker performed the services under the firm's name. The worker stated he wore the firm's logo'd shirt.

The firm attached a letter in which he wrote that the worker and a few others were engaged on a contracted basis. The worker was allowed to set his schedule and say 'yes or no' to different types of jobs. The firm stated the worker had outside insurance (no proof was submitted) and the firm made sure the worker followed industry safety standards. The firm indicated the worker was offered the opportunity to become a full time employee but preferred to remain a contracted employee.

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. 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.

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. This is true even if the training was only given once at the beginning of the work relationship.

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.

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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties and have applied the law to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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 the firm's business.

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.