

SS-8 Determination—Determination for Public Inspection

Occupation 02AAD.19 Designer/Artist	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 firm is in the business of providing hybrid scale-out network attached storage for technical computing and an enterprise environment. The worker was engaged by the firm through a recruiting agency to create a device driver that did not impair the performance of the firm's other, existing products. The firm reported the worker's remuneration on Form 1099-MISC for 2013.

The agreement between the parties, engaging the worker as an individual, states the worker's project assignment; the worker will render the services and deliverables by the stated completion date. The firm will pay the worker the fee set forth and will only reimburse the worker for expenses for the assigned project, or which have been approved in advance in writing by the firm, provided the worker has provided receipts. The worker is an independent contractor, he is not eligible for benefits, and he may not represent the firm. The worker is responsible for all taxes as the firm will not withhold taxes and will issue Form 1099-MISC. Any inventions by the worker remain the property of the firm; the worker must notify the firm of any such inventions and maintain adequate records. The agreement will terminate on the first anniversary of the effective date unless terminated earlier. The firm may terminate the agreement, with or without cause, at any time with a 15-day written notice. Except during the term of a project assignment, the worker may terminate the agreement with or without cause, at any time with a 15-day written notice. During the term of the agreement, and for one year after, the worker agrees not to interfere with the business of the firm by inducing a worker to leave the firm or take away business. The worker and the firm's manager for software engineering are named as the project managers. The hourly rate of \$100, not to exceed 40 hours a week is stated. Also stated is that the firm will reimburse the worker, based on approval, for travel to the US one time for hands on work with regard to the project

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform the services stated in the agreement. The firm stated that it did not supervise the worker or evaluate his work. He was not expected to follow customary employee policies and procedures that applied to the firm's employees. If problems or complaints occurred, the worker was responsible for resolving them, but the firm's software engineer manager was available for consultation. The worker was required to submit weekly invoices, which were under the name of [REDACTED]. The worker stated that he provided the engineering manager with weekly status updates. The firm allowed the worker flexibility in his schedule and hours, but he followed a routine similar to the firm's other engineers. Although the worker performed his services on the firm's premises, the firm stated that he was not required to do so. The worker was not required to attend any meetings at the firm. He was not required to perform his services personally. He could have subcontracted his obligations with the firm's pre-approval. The worker would have been responsible for compensating any personnel he may have hired.

Due to security requirements, the firm provided the worker with a laptop. It made weekly payments to the worker for 40 hours of work. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm stated that it did not make benefits available to the worker. Under the agreement, the firm was required to provide prior written notice to the firm upon termination; when the firm terminated the contract, it paid the worker for the notice period. The worker maintained a linkedin.com account representing that he was performing services for another firm during the same time period that he was under contract for the firm. The firm terminated the work relationship when, due to business constraints, the firm had to eliminate funding for the project.

Analysis

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, coadventurer, agent, or independent contractor must be disregarded. Therefore, the firm's 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. If a firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's training and experience to perform his services, it is only reasonable to assume that it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Although the worker had a flexible schedule, he maintained a full-time schedule. 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. The worker could have performed his services off-site. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The firm's statement that the worker performed services on a temporary basis and was therefore, an independent contractor, is without merit as both employees and independent contractors can perform services when the needs of a business warrants. There is no indication that the worker hired substitutes or helpers. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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 firm paid the worker at an hourly rate on a weekly basis. 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. The agreement between the parties states that the firm will reimburse the worker for work related expenses and for a one-time trip to the US. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the software engineering services performed by the worker were a necessary and integral part of the firm's business of providing storage solutions for firms with big data workloads. 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 business. The firm stated that the worker could have provided similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. These facts show that the firm retained control over the work relationship and services of the worker.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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.