

SS-8 Determination—Determination for Public Inspection

Occupation 02COM.5 Communicator	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 safety manager and dispatcher in tax year 2013. As they safety manager he was responsible for upkeep of trucks and as a dispatcher, he was responsible for finding routes for truck drivers and keeping in contact with truck drivers on an on-going basis. The firm's business is described as trucking (pick-up and delivery of grocery items).

The firm did respond to the request for information; the firm's response was signed by [REDACTED]. The firm's business is described as a trucking service. The worker performed services as an assistant dispatcher. The firm provided a copy of the Job Agreement: the worker will not share confidential information; worker was not to use firm supplies, equipment, or internet for personal use; there was to be a 3-month probation and worker considered a temporary employee until he passed an evaluation at the end of the probation.

According to the firm, the worker was instructed to ask the broker about load information over the phone such as product type, temperature requirements, city and state. The worker was given verbal assignments as needed. The firm responded that both parties determined the methods by which the job was performed. The services were rendered at the firm location or going to pick up parts from dealers. The worker was not required to perform the services personally.

The worker state he was not given specific training; however, he was given detailed instructions in the morning by the office manager. Every morning the firm provided a list of job assignments; and it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered at the firm's location from 8 a.m. to 6 p.m. 5 days per week. The worker stated he was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that nothing (tools, equipment, supplies) were provided by either party. The firm indicated the worker did not lease a facility, space, or equipment. The firm stated the worker did incur the expense of fuel and purchasing a cell phone; the firm reimbursed the worker for fuel and \$250 for the cell phone purchase. The firm paid the worker a bi-weekly wage; the customer paid the firm.

According to the worker, the firm provided everything; the worker furnished nothing and he did not lease equipment and did not incur expenses in the performance of the job. The firm paid the worker a salary; the customer paid the firm. The worker was not at risk for a financial loss in this work relationship. He indicated that the firm established the level of payment for services provided or products sold.

Both parties concurred that no benefits were extended to the worker. The worker stated that he was given an occasional payment of cash or in-kind payment for a job well done. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The firm indicated the worker was a contractor and he performed services under the name of the firm. The work relationship ended upon completion of the probation period. The worker provided a copy of a business card that the firm provided him that identified him as Dispatcher/Safety Manager.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. 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 importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

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. See Rev. Rul. 55-144, 1955-1 C.B. 483.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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 above 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.

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.