

SS-8 Determination—Determination for Public Inspection

Occupation 02CON.11 Consultant/Advisor	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 requested a determination of employment status for services performed for the firm in 2004-2014 as a business consultant. The worker performed the same services for the the firm from 1998 through part of 2004 and was treated as an employee under another name. In 2004 the worker signed a contract that she was an independent contractor. The firm responded to our request for information.

The firm stated no W-2s were ever issued. The firm evaluates [REDACTED] franchisee locations to assure compliance with [REDACTED] operations and standards. The firm stated that worker had no job title and presented herself as an independent contractor. The firm believes she was an independent contractor because the firm had no control over her other than to request the locations to be evaluated. The firm and the worker signed a written agreement. The worker submitted her evaluations directly to [REDACTED]. The worker was provided a monthly list of locations via e-mail. The worker and [REDACTED] determined the methods. The worker contacted [REDACTED] directly with problems. The worker was required to complete reports. The firm was unaware of her schedule as she decided when she was working. She had 30 days to complete the evaluations. The firm provided the worker with a laptop with [REDACTED] software and a digital thermometer. [REDACTED] provided the manual she was to follow. The worker billed the firm and customers paid the firm directly. No benefits were received. Either party could have terminated without liability.

The firm attached further explanation to the above statements:

The evaluation the worker performed at each location was created by [REDACTED]. The firm has a contract with [REDACTED] to evaluate all [REDACTED] franchisee restaurant locations within a certain area designated by [REDACTED]. The firm contracts with contractors to perform these evaluations. These contractors, such as the worker, go to the specified locations to evaluate based on [REDACTED] standards, not the firm's. The evaluation reports are maintained solely by [REDACTED]. The contractors have 30 days to complete the assigned evaluations. The firm does not see the evaluations or have any input regarding them. The firm does get a copy from the worker. The contractors are paid a flat fee per evaluation and can hire workers to assist if they want. The worker did not come in to the firm except 4 times a year for non-mandatory meetings lasting approximately an hour each. No work was done at the firm's offices. On every invoice the worker submitted she wrote "contractor invoice" on the top and referenced the independent contractor agreement at the bottom. The contractor at times also billed for direct travel related expenses incurred and at times a fuel surcharge. No receipts were ever provided. When problems occurred and [REDACTED] could not resolve them the firm would be contacted to facilitate resolution of the issue.

A copy of the contract was enclosed stating the worker was an independent contractor. It states that the worker was engaged to provide ongoing training to franchisees, inspect and do a business review of all franchisees at least once a month and provide a report of the inspection to the firm, and to provide advertising and marketing advice, direction and training to the franchisees. The fee schedule was determined by the firm. The worker was required to invoice the firm on the 14th and last day of each month for fees and direct related travel expenses. All records remain the sole property of the company. Confidentiality agreement included with a covenant not to compete.

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.

Therefore, your 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your business and contracts. 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. The worker received her assignments from the firm. Although the worker was given some flexibility in her schedule, the firm maintained the right to direct and control the worker in the performance of her services.

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. There was no evidence that the worker performed any services of an independent nature. She performed her services as a representative of the firm. The firm contracted with [REDACTED] to perform inspections, training, etc. and the firm engaged the worker to perform these services to fulfill the firm's contract.

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, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The firm reimbursed the worker's travel expenses.

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 was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. The worker had no investment in the firm's business, received a flat rate per inspection, and could not suffer a loss.

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.

Firm for further information please go to www.irs.gov Publication 4341.