

SS-8 Determination—Determination for Public Inspection

Occupation 02COO.14 Coordinator	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 supply chain auditing. The worker was engaged by the firm to provide sales support and accounts receivable coordination. From January 2013 through October 2013, the worker was a full time employee providing audit services to the lead auditor. The position included an annual salary and benefits and her remuneration was reported on Form W-2. After the worker resigned, she indicated her desire to continue to work with the firm. In November 2013, the firm offered her an independent contractor position as a sales support and account receivable coordinator. It reported the remuneration on Forms 1099-MISC for 2013 and 2014.

The worker provided a letter from the firm to the worker dated October 18, 2013, signed by the firm's COO, offering her a part-time, contractor position with Sales Support and Coordination with a pay rate of \$20 per hour for approximately 20 hours of work per week. It stated the firm's work week of Monday-Friday, 8:00 a.m. – 5 p.m., but stated her responsibilities may require that on some occasions she would work beyond these time frames. The worker was to report directly to the COO, but would occasionally be asked to perform tasks that required her to work with, or even report to others. After 90 days, she would receive an initial performance assessment which, even though the worker was on a contractor basis and was fully provisional, it would be a point in which the firm determined the worker's capabilities, the firm's needs, and the worker's role moving forward.

The worker enclosed an additional letter from the firm to the worker dated January 7, 2015, signed by the CEO, offering her a part-time employee position of Inside Sales & Account Management Coordinator with sales support and operative responsibilities. The letter offered a pay rate of \$20.22 per hour for 24-32 hours of work per week. It stated the firm's work week of Monday-Thursday, 9 a.m.-5 p.m. with responsibilities that may require that on some occasions she would work beyond these time frames. The worker would submit weekly timesheets and report directly to the CEO. The worker would occasionally be asked to perform tasks that required her to work with, or even report to others. After 90 days, she would receive a position and performance assessment, which would be a point in which the firm determined the worker's capabilities, the firm's needs, and the worker's role moving forward. Employment was at-will per [REDACTED] regulations. The worker stated that she declined the above offer.

Information from the parties supports that the firm relied upon the worker's prior training and experience with the firm to perform her services. It provided the worker with her work assignments via email and discussion. The worker determined the methods by which she performed her services. If problems or complaints occurred, the worker contacted the firm for resolution. The worker was required to submit invoices and general updates on her activities. She set her own hours and objectives. The worker worked from her home office with visits to the office for meetings with her supervisors. The worker attended meetings for quarterly reviews of objectives and some client meetings. The firm stated that the worker was not required to perform her services personally. If substitutes or helpers were needed, the worker was responsible for hiring and compensating them.

The firm provided the worker with a network accessed laptop and email. The worker was responsible for all other office supplies, equipment, and materials. She incurred expenses for her phone, Skype, internet, software, and office supplies. The firm paid the worker at an hourly rate; she was eligible for a bonus. Customers paid the firm directly at prices established by the firm. 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 did not make general benefits available to the worker. It did not prohibit the worker from providing similar services for others during the same time period. There is no evidence presented that the worker advertised her services or maintained a business listing. She performed her services under the firm's name. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training to perform her services. The worker worked under supervision, and interacted and supported the firm's sales staff and clients. It is only reasonable to assume that 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. The worker provided the firm with general updates of her activities. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The worker provided services from her home office. 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. Although the firm stated that the worker was not required to perform her services personally, there is no indication that the worker engaged and paid others to perform services for the firm on her behalf. 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. The worker utilized her own office supplies, materials, and equipment; however, it does not appear this was a "significant investment". The firm paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. 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 performed her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the support and coordination services performed by the worker were a necessary and integral part of the firm's supply chain auditing business. 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 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. Although the firm did not provide benefits to the worker, both parties retained the right to terminate the work relationship without incurring a liability, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

It appears that firm's letters offering the worker different positions with the firm were significantly similar in the direction and control that would be maintained by the firm.

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 for all services provided by the worker, and not an independent contractor operating a trade or business.