

SS-8 Determination—Determination for Public Inspection

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| Occupation 02COO.18 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 business as a travel agency. The worker was engaged by the firm to sell travel and travel services to the public. The firm did not withhold taxes from the worker's remuneration in 2013 and 2014. The worker signed an independent contractor agreement.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The firm provided the worker with its expectations. The worker's work assignments were determined by answering cold calls, and referrals from the firm. If problems or complaints occurred, the worker contacted the firm for resolution. The worker was required to submit booking invoices for payment. The firm allowed the worker flexibility in his work hours, but at times required him to be on the firm's premises to provide telephone and walk-in coverage. The worker performed the majority of his services on the firm's premises but also worked off-site meeting with clients or from his home. He attended staff meetings. The worker was required to perform his services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the office equipment, materials, supplies, and the property. The worker used his personal computer and incurred postage and transportation costs. He did not lease space or equipment. The firm paid the worker on a commission basis. The firm did not guarantee him a minimum amount. If the worker shared a sale, the commission was split. The agreement between the parties stated that any misquotes by the worker must be honored and the misquoted amount will come from the worker's commission. 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.

The firm did not make benefits available to the worker. The worker did not advertise his services or provide similar services for others during the same time period. Any solicitations were for the benefit of the firm. According to the business card submitted by the worker, the firm represented him as a Vacation Specialist, Master Cruise Counselor, and [REDACTED]. He provided his services under the firm's name. The firm 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. 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, while the firm relied upon the worker's prior training 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 and ensure its customers' satisfaction. At times, the worker worked from his home, but was also required to provide coverage on the firm's premises. 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. 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. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. 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 on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. Any bookings made by the worker benefited the firm's business. Although any misquotes by the worker were to be honored and the misquoted amount would have come from the worker's commission, it only reduced his earnings; it did not put him in the posture of incurring a loss. 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 his services on a continuing basis. He performed his services under the firm's name. 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 travel agency 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 owner of the business. Although the firm did not provide benefits to the worker, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.