

SS-8 Determination—Determination for Public Inspection

Occupation 02LAW.7	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. [REDACTED], chief executive officer, responded to our request for completion of Form SS-8.

From the information provided the firm is law firm serving primarily insurance companies and the worker was engaged as an "Of Counsel" attorney. The firm states the worker, as part of their verbal agreement, was required to bill 1500 hours per year so as to allow her to earn income on her files and to cover overhead expenses such as support staff and rent. The firm states they provided no training to the worker. The worker was assigned cases by the senior attorneys of the firm. The firm states the worker determined how she performed her services and if any problems or complaints arose, the worker could ask the advice from the firm's owner. The worker was required to personally perform her services and she performed services at the firm's office, in her home office, at court, and various other places. The worker was required to submit monthly status reports to the firm as the firm states their clients requested a reporting to them. The worker made notes in the clients' files so that all the attorneys and staff could answer questions for clients or opposing counsel if she was unavailable. The worker's routine was dictated by the deadlines in the handling of a legal case. The firm states they often told the worker that as long as she was staying on top of the cases assigned to her and attained her billable hour goals, they did not care where or when she performed her services. The firm states the worker rarely attended any meetings and there was no penalty for non-attendance of meetings.

The firm provided an office, office supplies and equipment, office staff, and an office computer to the worker in order to perform her services. The worker provided her personal iPad to use when she worked at home. The firm later in the relationship provided an iPad to the worker. The firm states the clients reimbursed the worker for mileage and travel expenses. The clients paid the firm for services rendered by the worker and the firm paid the worker on an hourly basis. The firm states that in negotiating the terms of their relationship with the worker, it was explained to her that she would not receive a salary but that she would be paid at an hourly rate for each hour she billed and that she would be paid once the billing was paid. If the billing was not paid she would not be paid for the time she billed clients. She was to keep track of her time on each file using a computerized timekeeping system. The firm calculated how much time the worker worked on any files for which they had been paid during that period. The firm states that if they were paid, the worker received a check; if not, the worker did not get a check. The firm states the worker had a risk of loss on subrogation contingency cases as she might not recover enough money to justify the time she put into those cases. The firm states subrogation case work did not count towards her billable hours requirements. The firm reported the worker's earnings on Forms 1099-MISC.

The worker was eligible for malpractice insurance, the firm paid for some, but not all, of the worker's continuing legal education, and they paid the worker's [REDACTED] professional privilege tax.

The firm states the worker is a highly experienced licensed attorney with more than 10 years of experience practicing law and she was very familiar with the status of a contract worker. The firm states it was explained to the worker that she would be responsible for her own taxes and that she would be given a 1099-MISC at the end of the calendar year. The firm states the worker stated that she understood these terms and that she preferred to take care of her taxes herself and did not want them withheld.

Either party could terminate the work relationship at any time without either party incurring a liability.

Analysis

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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

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.

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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. The firm counseled the worker on her failing to meet the minimum billable hour's requirement as it causing problems for their clients and costing them the revenue they counted on to run their practice. These factors gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

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 provided the office space and all equipment, supplies, and materials to the worker in order to perform her services at their premises. The worker provided her own telephone and iPad when working from home which she occasionally did. 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 term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

The worker did not have an opportunity to incur a loss or realize a profit as a result of her services. "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.

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 the firm's business. If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.