

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.21 Administrative Assist	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 submitted a request for a determination of worker status in regard to services performed for the firm from August 2011 to August 2013 as an executive assistant to the firm's managing member. According to our research, the firm issued the worker Form W-2 and Form 1099-MISC for 2012; Form W-2 for 2013. A copy of the 2011 tax reporting document was not provided to this office. The worker filed Form SS-8 as she believes she was an employee for the entire work relationship as all of the services performed were strictly controlled by the firm. It is unknown why both tax reporting documents were issued. Services were performed pursuant to a signed independent contractor agreement between the worker and firm.

The firm's response stated its business is to provide marketing services for health clubs and fitness centers. The worker responded to the firm's ad seeking a contracted person who had experience in a number of administrative and support responsibilities. The position was posted as a four-month contract with potential for the contract to be extended. The firm engaged the worker as an independent contractor, pursuant to a written agreement, and she ultimately performed contracted services for a total of nine months. During the period in question, the worker had the ability to work in the firm's office, in her home, or in other locations and she worked with limited supervision. In mid-2012, the firm's business growth required it to retain a full-time employee who would be directed and controlled by the firm. Based on the worker's prior work experience with the firm, she was asked and accepted full-time employment with the firm.

The firm stated it initially provided the worker very little training and instruction. The worker was given tutorials and support phone numbers. The firm provided work assignments to the worker. During the contract period, the worker determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and ultimately determined resolution which the worker subsequently assisted in resolving. The worker elected to provide the firm a daily bullet list of tasks completed. It is unknown the worker's daily routine or schedule as the firm was less concerned with the exact hours worked and more concerned that the work was completed. The worker performed services at the firm's office and other locations. Meetings were not required as the firm and worker communicated via phone and e-mail. The firm required the worker to personally perform services. The worker stated the firm's previous assistant provided a few days of overview and training to her. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker's routine was Monday through Friday, 8 am – 5 pm. From August 2011 to end of June 2013, all work was performed at the firm's premises. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided access to company software. The worker provided a computer and phone. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm as the firm reimbursed the worker for occasional postage. Customers paid the firm. As a contractor, the worker was paid a monthly rate of pay. As an employee, she was paid salary. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. As a contractor, the worker was responsible for equipment repairs or maintenance. As an employee, the firm provided her a computer to use at its office. The firm would have been responsible for its repair or maintenance. The firm established the level of payment for the services provided.

The firm stated that during the contract period, benefits were not provided to the worker. The work relationship could be terminated by either party without incurring liability or penalty; however, the worker was to provide the firm a 10-day notice if terminating the contract. The worker was free to work for others as long as it did not interfere with her completing the firm's assignments. It is unknown if the worker performed similar services for others or advertised. The written agreement contained language related to confidentiality and non-disclosure of the firm's information. As a contractor, the firm represented the worker as a representative to its customers. The work relationship ended when the worker quit. The worker stated she did not perform similar services for others or advertise. When work hours were cut at the end of May 2013, the worker was forced to quit.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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 a written 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments and ultimately assumed responsibility for problem resolutions. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's prior work experience and work ethic the firm may not have had to frequently exercise its right to direct and control the worker; however, the facts evidence the firm did retain the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. Based on the fixed monthly rate of pay arrangement, the worker could not realize a profit or incur a 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term in question. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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 the entire work relationship, and not an independent contractor operating a trade or business.