

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.24 OfficeWorker	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], owner of the firm, responded to our request for completion of Form SS-8.

From the information provided the firm is an expedited freight company and the worker was engaged to perform sales and dispatcher services. The worker's duties included coming into the firm's office and learning how to associate with clients, obtain new clients, establish a relationship with these clients, procure loads with these clients, and then follow through with each load. This process entailed getting a driver who would pick up a load as requested by the clients and deliver it on time and then processing all of the paperwork for the firm and the client. The firm states that when the worker completed the training process she would have been working her own hours, from her home or from their office, and she would have been paid on a commission basis. The firm states the worker knew from the beginning of the work relationship that she was being hired as a self-employed subcontractor. The firm reported the worker's 2012 and 2013 earnings on Forms 1099-MISC.

The firm states they provided extensive training to the worker in regard to her services. The firm states the details of each load were determined by the client and this is what determined how the worker performed her services. The worker was required to notify the firm if any problems or complaints arose for their resolution. The worker's training hours were from 8 a.m. to 5 p.m. The firm states the worker performed her services the 80% of the time at their office and 20% of the time from her home. The worker was not required to attend meetings.

The firm provided desk space and office supplies and equipment to the worker in order to perform her services. The firm states the worker provided a computer and office supplies. The worker was paid an hourly basis during the training period and the clients paid the firm for services rendered by the worker. The firm did not carry workers' compensation insurance on the worker. The worker did not have an opportunity to incur a loss as a result of her services.

The firm states the worker was not eligible for employee benefits. The worker did not perform similar services for others and the firm states that any advertising would have been the responsibility of the worker. The firm states represented the worker as a representative to their clients. Either party could terminate the work relationship at any time without either party incurring a liability. The firm terminated the work relationship.

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.

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. From the firm's information it appears the firm and worker had an verbal agreement whereas the firm would train the worker so that she would be able to work at home, on a salary against commission basis, obtaining clients and servicing those clients. However, that did not happen this case as the relationship ended during the training process. Therefore, this determination will concentrate on what actually took place during the work relationship and not what was supposed to happen.

What did happen was that the firm was in the process of training the worker paying her an hourly rate for the services she performed. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. 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. This 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.

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.

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.

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, co-adventurer, 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.

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.