

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF.40 Receptionist

UILC

Determination:

☒ Employee

☐ Contractor

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is in the business of constructing and selling new homes. The worker was engaged to open and close the model home when the sales associate was off. There was no on-site supervision; she greeted and obtained completed registration forms from visitors to the model home. The worker received a 2011 Form 1099-MISC for her services. There was no written agreement.

Both the firm and the worker agreed that the worker was given instructions on how to open/close model homes, and to make sure they were ready for visitors. The firm noted that the worker's duties involved opening and manning the model homes. The worker did not sell but only requested that the guests fill out a registration card. The worker indicated that she greeted guests, showed the home and options. The customers either walked-in or called. The worker turned in registration cards that the sales associate would follow-up on. Both parties agreed that the firm's sales associate determined the methods by which the assignments were performed and would be contacted if any issues/problems arose. Only registration cards would need to be submitted by the worker. Her work routine consisted of working two days a week for about ten hours a day; the firm specified that the model was unlocked at 10AM and closed at 6PM. Both agreed that all of the worker's services were performed at the firm's model homes. Both also agreed that the worker was to provide the services personally.

The firm provided the model home, sales brochures, registration cards, phone, and fax. Both parties agreed that the worker was paid an hourly rate and had no other economic risk. Both also agreed that the customer paid the firm. Only the firm indicated that the payment for services was a negotiated amount.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The firm noted that the worker was only temporary fill-in help. Both agreed that the relationship ended when the worker quit.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, 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 firm provided the worker with instructions and her assigned duties; she worked without direct supervision. She performed her services according to the firm's scheduled work hours and days. A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. The firm also had pointed out that the worker had much free time where no specific work activities were assigned to her; however, the firm retained the right to assign other duties whether they chose to or not. The fact that the worker's services were only temporary as she filled in for the firm's sales associate did not support an independent contractor status; it indicated that she was a part-time worker.

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 worker simply received an hourly rate of pay and had no other economic risk. 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.

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. There were no benefits and there was no written agreement.

The worker was engaged to open and man the firm's model home. She was not engaged in an independent business enterprise, but rather the services performed by the worker were part of the regular and necessary activities of the firm's home sales operations, even though part-time and temporary in nature. 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.

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.