

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.123 Administrative Assistant	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 January 2014 to November 2014. The worker was originally responsible for answering the firm's phone line. When the phone line was terminated, the worker's duties were focused on website design for the firm and other related business entities. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated its business was initially established as a three-person LLC for the business purpose of organic plant supplements and nutrients. It was subsequently reorganized and converted to a one-person LLC for the business purpose of alternative energy, i.e. converting farm and other organic waste to energy or biochar. For the start-up business, the worker co-developed a website and logo, in addition to customer call and billing support for sales partners. For the successor business, the worker co-developed the website and logo. The firm agreed to pay for services performed over a period of time while the worker sought full-time employment.

The firm stated it did not provide specific training or instruction to the worker. The firm provided work assignments to the worker and determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The firm assumed responsibility for problem resolution. Reports and meetings were not required. The worker performed services from her home office as-needed and as-available. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided her specific instruction, via phone or e-mail, related to what to build, which resources to use, and where to host the completed website files. The worker reported to the firm via e-mail when work assignments were completed. The worker performed services during regularly scheduled hours, i.e. Monday through Friday; 7 am to 4 pm PST, except on major holidays. The worker was expected to simultaneously balance work for businesses owned by the firm's managing member during these work hours. The worker performed services from her home office which was equipped with a firm-owned computer, firm software, and formerly a firm-provided phone. The firm and worker met via phone each morning unless the managing member was traveling or unavailable.

The firm stated it provided website and logo related supplies as recommended by the worker. The worker provided a home office and utilities. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of utilities, incidentals, and mortgage payment. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker established the level of payment for the services provided. The worker stated the firm provided a desktop computer, monitor, mouse, keyboard, external hard drive, [REDACTED] phone, office chair, printer, and all office supplies. The worker provided the desk, headset and speakers, modem, and router. The worker paid the mortgage payment for her home where her home office was located. Customers paid the firm. The firm paid the worker salary. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others. The firm's approval was required for her to do so. The firm stated both parties acknowledged the worker preferred full-time employment and would be seeking such; therefore, delays in work delivery or partner backup might occur. The worker did not advertise. Finished products were returned to the firm's control. The work relationship ended when the worker's services were no longer needed. The worker stated she continued to build and work on websites for the firm's managing member; however, the firm ceased paying her in November 2014.

Both parties provided a copy of the firm's letter to the worker, dated January 8, [REDACTED], in which the firm agreed to pay the worker a fixed monthly retainer. As the firm was a startup business, the customer workload would vary from week to week. The worker's help in the organizational process, paperwork, and standard documents that would accompany the booking, invoicing, billing, and payment receipt process would be greatly appreciated.

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.

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 firm provided work assignments, determined the methods used, and assumed responsibility for problem resolution. 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 education and prior work experience it may not have been necessary for the firm to frequently exercise this right to direct and control; however, the facts evidence the firm retained the right to do so if needed.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "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. 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. The home, utilities, and incidentals are not considered a significant business investment as she presumably utilized these items for her personal needs as well. 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 of this work relationship. 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, and not an independent contractor operating a trade or business.