

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.203 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

The worker submitted a request for a determination of worker status in regard to services performed for the firm from September 2014 to present (2016). The work done by the worker includes answering phones, sales, e-mailing quotes, taking payments, scheduling installs, faxing, and scheduling measurements. The firm has issued the worker Form 1099-MISC for 2014 and 2015. The worker filed Form SS-8 as she believes she has erroneously received Form 1099-MISC.

The firm's response states it is a granite shop business. The worker answers phone calls. There is no written agreement between the parties. The worker does not have a set work schedule.

The firm stated it does not provide the worker specific training or instruction. The worker answers phones and tells potential customers the firm's pricing. Complaints are not possible based on the worker's responsibilities. Reports and meetings are not required. The worker has an open schedule with no set hours. Services are performed at the firm's shop. The worker stated work assignments are provided to her verbally, by e-mail, and sales paperwork. The firm determines the methods by which assignments are performed and assumes responsibility for problem resolution. The worker's routine consists of Monday through Friday, 8 am – 5 pm. The firm requires the worker to personally perform services.

Both parties agreed the worker does not lease equipment, space, or a facility. The worker does not incur expenses in the performance of services for the firm. Customers pay the firm. The firm pays the worker an hourly rate of pay; a drawing account for advances is not allowed. The firm carries workers' compensation insurance on the worker. The worker does not incur economic loss or financial risk. The worker does not establish the level of payment for the services provided or the products sold. The worker stated the firm provides a car, computer, [REDACTED], phone, and desk. The worker provides herself. The firm establishes the level of payment for the services provided and products sold.

Benefits are not made available to the worker. The work relationship can be terminated by either party without incurring liability or penalty. The firm stated it is unknown if the worker performs similar services for others. There is no agreement prohibiting competition between the parties. The worker obtained the job from a [REDACTED] posting. The worker continues to perform services for the firm. The worker stated she does not perform similar services for others. The firm represents her as an employee to its customers. Services are performed under the firm's business name.

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.

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. In this case, the office services performed by the worker are integral to the firm's business operation. This fact evidences the firm retains 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, past work experience, and work ethic the firm may not need to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retains 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 has not invested capital or assumed business risks. As acknowledged by the firm, the worker does not incur economic loss or financial risk. Based on the hourly rate of pay arrangement, the worker cannot 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business. Both parties retain the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performs similar services for others as an independent contractor or advertises business services to the general public. 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 has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.