

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.206 Receptionist	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 December 2014 to April 2015 as a receptionist. The work done by the worker included handling phone calls and messages, picking up and delivering the mail, preparing for meetings, maintaining an adequate inventory of office supplies, beverages, and snacks, providing secretarial support to the executive assistant, greeting guests, and providing assistance to the support team by answering incoming calls. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated its business is software development. The worker was engaged as an office receptionist. Duties included answering phones, filing, and distributing mail. The firm was not looking to hire a receptionist full-time.

The firm stated the worker only received instructions within a receptionist job title. The worker worked under the human resources department and reported directly to the HR manager. The HR manager determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports and meetings were not required. The worker was required to sit at the front desk, answer incoming calls, greet visitors, and distribute office mail. The worker was required to report to the firm for eight hours on required days. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided on-the-job training related to its phone system and sales system in order to assist the support team. The firm required the worker to prepare time sheets and inventory lists. Services were performed at the firm's premises on a regularly scheduled basis. The firm required the worker to attend its annual meeting.

The firm stated it provided office supplies and equipment. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. She did not incur expenses in the performance of services for the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk.

The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. The firm stated it represented the worker as a contractor to its customers. The work relationship ended when the job was completed. The worker stated the firm represented her as its receptionist to its customers. The worker quit.

An unsigned consulting agreement provided by the worker states, in part, the worker was engaged as a receptionist and administrative assistant. Duties included those identified above by the firm, including support of the marketing and support teams, restocking the kitchen, loading and unloading the dishwasher, and other projects, as assigned. The worker would be paid an hourly rate of pay. The term of the agreement was TBD (to be determined). The worker would be reimbursed for expenses having been approved by the firm in advance. The worker could not assign or delegate her duties without the firm's prior approval.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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.

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. In this case, the firm provided training and instruction. The firm also provided work assignments, determined the methods by which assignments were performed, 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, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly 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 an 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.

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