

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.224 AdministrativeAssist	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 July 2015 as an administrative assistant. The work done by the worker included sending out leads, data entry, marketing, communications and correspondence, video editing, etc. 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 it is a real estate company/team business. The worker worked on a variety of daily administrative projects and data entry. The worker's job title was administrative assistant. The parties agreed and services were performed under a signed independent contractor agreement for administrative assistant position.

The firm stated it provided the worker specific instruction on how to login to the database for data entry and how to write holiday and thank you cards, in addition to invitations. The firm provided the worker various projects to work on. There was no structured or required schedule only the requirement to complete the projects. Services were performed at the firm's office and worker's home. The worker stated the firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports were not required as most work was done through the software provided or web-based programs the worker was given special access to. The worker personally performed services on a regular, recurring full-time basis. Services were performed at the firm's premises. The firm required the worker to attend weekly staff meetings. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it did not provide supplies or equipment. The worker provided a laptop. The worker did not lease equipment, space, or a facility. It is unknown if the worker incurred expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated she did not establish 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 firm stated it is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the parties. Finished products were returned to the firm. The firm represented the worker as an independent contractor to its customers. The work relationship ended when the contract was terminated. The worker stated she did not perform similar services for others. The firm represented her as an administrative assistant to its customers. The work relationship ended when the worker was unexpectedly fired without warning.

The signed agreement states, in part, procedures and rules could be introduced and/or amended by the firm from time-to-time. The worker was subject to a 90-day probationary period, which could be extended if the firm deemed it appropriate. During the probationary period the agreement could be terminated by either party with one day's written notice. Following the end of the probationary period, the agreement could be terminated by either party by giving not less than one week's notice. The firm retained the right to compensate the worker for 20 hours in lieu of giving notice. The firm retained the right to terminate the agreement without notice or pay in lieu of appropriate circumstances. Appropriate circumstances included, but were not limited to, situations of gross misconduct, gross incompetence, not meeting requirements, and/or gross negligence. The worker reported to the firm's owner and she was expected to perform all duties required of the position and as set out in the job description. A copy of the job description was not provide. The worker was to comply with all of the firm's reasonable directions given and observe all its policies, procedures, and rules as introduced and/or amended from time-to-time. The firm retained the right to require the worker to perform additional or other duties not within the scope of the worker's normal duties and at its discretion amend the job description at any time. Most work would be performed at the firm's office. The firm could require the worker to perform tasks at specified locations which would require driving. Hours of work would vary weekly based on need. The worker was required to work such hours that were necessary to carry out the duties properly. The firm retained the right to vary the worker's hours or times of work. The worker would devote her time, attention, skill, and abilities in the performance of duties for the firm. The worker would be paid an hourly rate of pay, which would increase after satisfactorily completing her 90-day probationary period. The worker would be reimbursed for all reasonable expenses. The worker was entitled to a referral fee for any business procured by the worker's own marketing efforts. The firm did not offer any kind of benefits. The worker would receive holiday pay; however, she was required to obtain prior authorization (14 days) from the firm. Failure to comply with the firm's sickness absence reporting requirement could result in disciplinary action.

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, the firm's statement that the worker was an independent contractor pursuant to a written 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 on-the-job training. The firm also required the worker to comply with all reasonable directions and to observe all of the firm's policies, procedures, and rules, which could be introduced or amended by the firm at any time. 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. 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. Based on the hourly rate of pay arrangement the worker could not incur economic loss or financial risk.

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.

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