

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.227 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 firm is in the business of providing software for the home health industry. The worker was engaged by the firm to provide customer support. The firm treated the worker as an employee at the beginning of the work relationship. In June 2015, the firm reclassified the worker to an independent contractor and reported his remuneration on Form 1099-MISC. Other than changing the worker from a full-time to a part-time basis, there is no evidence that the worker's services changed when the firm reclassified the worker from employee status to an independent contractor.

Information from the parties supports that the firm trained the worker. The worker's work assignments were dependent upon the customers' phone calls. If problems or complaints occurred, the worker contacted the firm for resolution. The worker was required to report his times in and out of the office. He performed his services on the firm's premises. The worker was required to perform his services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the office equipment and supplies. The firm stated that at times, the worker used his personal email and home computer. The worker did not incur expenses in the performance of his services. The firm paid the worker at an hourly rate. It did not cover him under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm stated that it did not make benefits available to the worker after he was reclassified. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. The worker did not advertise his services or provide similar services for others during the same time period.

Analysis

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 an 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm trained the worker. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 firm paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. A continuing work relationship, even on a part-time basis, indicates an employer-employee relationship. The worker performed his services under the firm's name. He was not engaged in an independent enterprise, but rather the customer support services performed by the worker were a necessary and integral part of the firm's software service business. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

The withholding of income tax or the Federal Insurance Contributions Act (FICA) tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government. The filing of an employment tax return and Form W-2 for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period. The worker received a Form W-2 and a Form 1099-MISC from the firm in the course of the work relationship, and the services did not substantially change. As previously stated, the issuance of Form W-2 and/or the withholding of taxes on income for an individual would be considered treatment of the individual as an employee, and would apply in this case.

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 for all services provided by the worker, and not an independent contractor operating a trade or business.