

SS-8 Determination—Determination for Public Inspection

Occupation OFF02.239 Administrative Assist	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a realtor business and the worker was engaged by the firm in 2014 and 2015 to perform assistance to the firm's owner with various projects, sales, marketing, and database management. The firm believes the worker was an independent contractor (IC) because she had her own business with other clients who were also realtors doing substantially similar work; they and the worker both understood that this was a business to business transaction providing various support services to the firm in addition to other realtors; and the IC agreement was negotiated and signed before the work commenced with mutual agreement. The firm reported the worker's earnings on Forms 1099-MISC.

The firm states they provided some instructions to the worker as to their specific client database including sales calls and marketing and some training on their computer system. The worker received her assignments from the firm via email, telephone, and in person. Who determined how the worker performed her services depended upon the project and the method was flexible. The worker was required to personally perform her services in the firm's office (50%) and in the field (50%). The firm states the worker was required to notify them if any problems or complaints arose if it were related to their clients. There were no specific reports required of the worker but the firm states the worker provided email correspondence to update them on the status of the work. The worker had a flexible routine between the weekdays and weekends due to the nature of the real estate business. The worker was not required to attend meetings. The worker could hire substitutes or helpers with the approval of the firm. The firm states they would be responsible for paying these individuals.

The firm provided a desk, printers, copies, paper, pens, pencils, and desktop computer to the worker in order to performed her services. The worker provided a laptop computer and she incurred some expenses for parking and driving costs. The worker was compensated on an hourly basis which, the firm states was negotiated between they and the worker.

The firm states the worker was eligible for paid vacations, sick pay, and holidays. The firm states the worker performed similar services for others but they are unaware of any advertising the worker would have done. The worker was represented as an assistant for support services. Either party could terminate the work relationship at any time without either party incurring a liability. The firm states they terminated the work relationship.

The firm provided copies of the following documents with the submission of the Form SS-8 for consideration in this case:

- [REDACTED] & Assistant Agreement.
- Worker's real estate salesperson license issued September 22, 2015.
- Broker/Associate-Licensee/Assistants Three-Party Agreement.
- [REDACTED] Addendum to Broker Associate-Licensee/Assistant Three-Party Agreement (For Licensed Assistants of [REDACTED]).
- [REDACTED]/Assistant Independent Contractor Agreement.
- Independent Contractor Agreement dated July 11, 2014.
- Personnel Form for Assistants

Analysis

As in this case and in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm provided the worker with instructions on their client database including sales calls and marketing and training on their computer system. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the worker had a varying schedule due to the nature of the services provided, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

Factors that illustrate whether there is 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.

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. In this investigation, we looked at whether the worker displayed characteristics of an independent contractor; such as the outpouring of money into a business offering those services to the public and the opportunity to incur a loss or realize a profit as a result of her services. The worker in this case did not have this. The worker did not have a business license or business registration in the state which she performed services. The worker did have a real estate license and therefore, we looked at statutory non-employee criteria. Since the worker was prohibited from performing licensed real estate sales services and was compensated on an hourly basis; this code section did not apply in this case. While the firm states the worker performed similar services for others and therefore, is an independent contractor is without merit. It is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting oneself and be an employee of one or all of whom engages her.

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, co-adventurer, agent, or independent contractor must be disregarded. Therefore, the firm's statement that the worker was an independent contractor pursuant to a mutually agreed upon 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.

Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.