

SS-8 Determination—Determination for Public Inspection

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| Occupation OFF02.260 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

The firm is a language service company offering interpretation, translation, deaf/hard-of-hearing, transcription, and localization services. The worker was engaged by the firm as an intern to work on various projects such as filing papers, updating records, printing proposals, data entry, and record maintenance projects. The firm did not withhold taxes from the worker's remuneration in 2011 through November 2015. In 2015, the firm hired the worker as a full-time project manager and reclassified her to employee status and began withholding taxes.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The firm provided the worker with her work assignments. If problems or complaints occurred, the worker contacted the firm for resolution. The firm allowed the worker to select her own daily routine, schedule, and hours. She performed her services on the firm's premises. The firm stated that the worker was not required to attend meetings. The worker was required to perform her services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the worker with a computer and telephone. The worker did not lease space or equipment, or incur expenses in the performance of her services. The firm paid the worker at an hourly rate. It did not cover her under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business. Other than liability for any equipment she damaged, the worker did not risk incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. It did not prohibit the worker from performing similar services for others during the same time period. The worker agreed to the terms of the firm's mutual non-disclosure agreement. There is no evidence presented showing the worker advertised her services or maintained a business listing. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

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, while the firm stated it did not formally train the worker, it was responsible for resolving any problems or complaints that may have incurred, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. The worker performed her services on the firm's premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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 her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker performed her services under the firm's name. She was not engaged in an independent enterprise, but rather the administrative services performed by the worker were a necessary and integral part of the function of the firm's 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 business. Although the firm did not provide benefits to the worker, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

Federal Fair Labor Standards Act does not differentiate between interns and employees. It does define employees as workers who earn wages. This means that paid interns are employees and do not hold a separate designation for legal purposes such as taxation or worker rights.

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 the entire work relationship, and not an independent contractor operating a trade or business.