

SS-8 Determination—Determination for Public Inspection

Occupation

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Determination:

Employee

Contractor

UILC

Third Party Communication:

None

Yes

Facts of Case

The firm is an association of academics in the field of [REDACTED] in [REDACTED], which publishes a biannual scholarly journal and organizes a biennial conference on topics related to modern [REDACTED] language, literature, and culture. The worker was engaged by the firm as an editorial assistant. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 and 2014.

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 the proofs of the articles that would be included in the journal issue. According to the letter of hire provided by the parties, the worker's submissions will be read by the editors who will be wholly responsible for the accuracy and correctness of any and all material that appears in [REDACTED] in the submitted articles. The worker worked on her own schedule. She was free to work where and when she wanted. The worker was required to perform her services personally.

The firm paid the worker at an hourly rate that it set, up to a maximum amount. 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 did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability. The worker did not advertise her services. The finished products were returned to the firm.

Analysis

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 relied upon the worker's training and experience, 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 provided services from her home. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. 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 was not engaged in an independent enterprise, but rather the services performed by the worker as an editorial assistant were a necessary and integral part of publishing the firm's biannual scholarly journal. 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, both parties retained the right to terminate the work relationship 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.

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.