

SS-8 Determination—Determination for Public Inspection

Occupation 02REC.2 Recruiter	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 finding and providing highly skilled technology professionals to companies. The worker was engaged as a recruiter/account manager responsible for acquiring new talent for clients through cold calling, email, online searching as well as accessing existing databases. Both parties agreed that there was a Master Service Agreement between firm and its client; all 'orders' were submitted to and subject to the firm's approval. The worker sold recruiting and staffing services through the firm's [REDACTED] office. The firm noted that the worker provided leads, determined his own territory and where he would work. He received a Form 1099-MISC for his services in 2011, 2012, and 2013. There was mention of a written agreement but neither party could provide a copy.

The worker indicated that there was minimal training; the firm noted that there was no training though it noted that the worker initially performed services for the firm assisting another worker. The worker, in this instant case, noted that he chose his work assignments from the firm's 'pool of openings' (essentially clients looking for personnel); the firm noted that there were no work assignments. Each party indicated that the other determined the methods by which the assignments were performed. The worker noted that the firm would be contacted if any issues arose; the firm noted no one would be contacted. The worker submitted reports which were kept in the firm's [REDACTED] ([REDACTED]) system/database. The worker noted that his routine consisted of arriving at the firm's location in the morning, responding to emails, recruiting and sourcing candidates through on-line sources and the firm database; he made interview phone calls, scheduled interviews, and assisted with resume building. He left the office after 5pm on most days. The firm noted that the worker had no schedule or routine and could work where he wanted to; however, the worker noted that he spent 98% of his time at the firm's office with the balance spent at a client's office or at luncheons with clients. The worker noted that weekly meetings were mandatory; the firm agreed that there were meetings to which he was invited but not required to attend. Both parties agreed that the worker was required to provide the services personally; each indicated that the other would hire and pay any other workers if needed.

The firm indicated that it only provided a laptop; however the worker indicated that the firm provided an office, desk, monitors, phone, copy machine, conference room and supplies. The worker received a salary and commission though the firm noted that his base compensation was a retention fee; both agreed the worker had no other economic risk. Both parties also agreed that the customer paid the firm and that the firm determined the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same time period though the firm disagreed. The worker noted that he advertised through business cards, online advertising, user group sponsorship [REDACTED] and sponsored local events, all which were paid for by the firm. Both parties agreed that the relationship ended when the worker quit.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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 retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Though the firm indicated that it did not provide the worker with instructions, assignments, a work schedule, a workplace, goals, methods, or procedures yet paid him a monthly minimum is not reasonable. The worker may have provided his services without constant, direct supervision, but he noted that he was expected to be at the firm's location during certain hours. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. In addition, the worker provided his services on a continuous basis throughout the time period involved. 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. There was agreement that the worker was to provide the services personally. 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. In fact, information was provided showing that the worker's monthly base amount was increased due to his performance and that he was considered part of the team.

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. The worker was paid a guaranteed monthly minimum in addition to commission. 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. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

Though the firm indicated that the worker could work anywhere, the worker worked mostly at the firm's location; he was provided with a workspace, furnishings, equipment, phone and office supplies. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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. There were no benefits and there was no written agreement provided. Please note, however, 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.

The firm's business is to obtain the appropriate skilled workers for its clients as well as to obtain and keep clients. The worker was engaged to generate new client business as well as to locate personnel needed to fulfill the firm's clients' requirements. In this case, the worker was not engaged in an independent enterprise when engaged by the firm, but rather the services performed by the worker were part of the necessary activities of the firm's regular operations. The worker did not advertise, maintain a place of business or hold himself out to the public to provide similar services. 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.

The firm indicated that the worker worked for others during the same period of time. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them.

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.