

SS-8 Determination—Determination for Public Inspection

Occupation 02REC.4 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 an IT staffing service provider business operation. The firm engaged the worker through an application process to recruit customers and providers to perform IT services under a Independent Contractor Agreement. The worker had prior experience so no formal training was provided. The worker received job assignments in the agreement and was required to perform the services according to the agreement. The worker was required to submit all leads to the firm for approval. The firm required the worker to contact the firm regarding any sign up problems or complaints for resolution. The firm allowed the worker to determine his own work schedule and location to perform the services. The worker indicated he performed services from the firm's place of business during the firm's hours or operation. The firm did not require the worker to perform the services personally. The firm's prior approval was not required for the worker to hire substitutes or helpers and the firm would not reimburse the worker if he hired and paid any.

The firm indicated no one provided any equipment, materials, or supplies. The worker stated the firm provided office space, computer, laptop, and web site subscriptions. The worker provided a cell phone and transportation. The firm did not know if the worker leased equipment or space. The worker indicated he did not lease equipment or space. The firm did not know what expenses the worker incurred in performance of the services and the worker indicated mileage and phone bills as expenses incurred. The firm paid the worker a monthly salary + commissions every 15 days. The customers paid the firm. The firm stated the worker determined the level of payment for the services and the worker indicated the firm determined this issue. The firm did not carry workers' compensation insurance. The worker could not suffer any economic loss and had no financial risk with regard to the performance of the services.

The Independent Contractor agreement indicated the worker to be an independent contractor able to perform the services as indicated in the agreement. There was no ending date of the contract or liability indicated for termination of the contract provided they were given written notice of 15 days to the other party. The contract indicated the worker would not receive any direction or control from the firm as to the methods used to perform the services. The contract indicated the worker would provide all equipment, materials, and supplies needed. The contract allowed the worker to work a flexible schedule as long as deadlines were met. The worker could use employees or contractors to perform the services provided they were engaged exclusively by the worker. The agreement addressed compensation, expenses not being reimbursed by the firm, benefits, tax matters, ownership of property, non-solicitation during the agreement and 2 years after ending,

The firm did not know if the worker performed similar services for others. The worker indicated no similar services were performed for others while performing services for the firm. The firm did not know if the worker advertised as a business to the public. Both parties retained the right to terminate the working relationship at any time without incurring any liability.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. In this case the firm engaged the worker through an application process and agreement to perform solicitation/recruitment services of providers and clients for the firm's [REDACTED] business operation. The firm required the worker to meet the firm's designated deadlines and allowed the worker to determine work schedules and locations to perform the services. The firm required the worker to contact the firm regarding any problems or complaints for resolution. The worker was not required to perform the services personally and would not be reimbursed if he hired any substitutes or helpers and paid them. The firm required the worker to submit all orders to the firm for approval. These facts evidence behavioral control by the firm over the services performed by the worker.

The firm provided the business office made available to use by the worker. The firm provided office equipment, materials, and supplies at the firm's place of business. The worker provided a cell phone and transportation. The worker did not lease equipment or space. The worker did not incur any significant on-going business expenses. The firm paid the worker a monthly salary + commissions every 15 days. The customers paid the firm. The firm determined the level of payment by the customers for the services and amount paid to the worker on a monthly basis + commissions. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered control over profit or loss. The worker could not suffer any economic loss due to on-going significant business capital outlays being made. The worker did not have control over profit and loss with regard to the services performed for the firm's business operations. These facts evidence financial control by the firm over the services performed by the worker.

There was a signed Independent Contractor agreement between the firm and the worker indicating the worker was a independent contractor and addressed various job requirements and liability issues. It is noted that whether there is an employment relationship is a question of fact based on the autonomy of the work relationship and is not subject to negotiation between the parties. The worker did not perform similar services for others while performing services for the firm's business operation. The worker did not advertise to the public as being engaged in a business. The worker personally performed services for the firm's business under the firm's business name on a regular continuous basis over a period of about 3 months. Both the firm and worker retained the right to terminate the working relationship at any time without incurring any liability for termination. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.