

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Estimator	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

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 in the business of providing handyman, property care, and building maintenance services for contract partners. The worker was engaged from November 2017 to September 2018 as a materials/project estimator. The worker's duties included estimating the cost of materials and labor for building repairs for the firm's clients. The firm believes the worker was an independent contractor while performing services for them because he signed a sub-contractor agreement, they provided no training to the worker, and they provided no instructions on how and when to complete project estimates. The firm reported the worker's 2017 and 2018 earnings on Forms 1099-MISC.

The firm's maintenance director provided work orders through a maintenance system that the worker utilized to create project estimates and pricing for repairs/maintenance. The firm states the worker determined how he completed those assignments in his own home. The worker was required to notify the firm if any problems or complaints arose for their resolution. The worker was required to personally perform his services. The firm states the worker was not required to submit reports or attend meetings and he worked independently completing project estimates. The firm states the worker had no assigned daily routine, schedule or hours and the worker managed his own schedule. The hiring and paying of substitutes or helpers did not apply in this case.

The firm states they provided a laptop computer to the worker in order to perform his services and the worker provided all additional supplies and resources. The firm states the worker did not incur expenses, he was compensated at an hourly rate, and he did not have an opportunity to incur a loss as a result of his services. The worker did not establish the level of payment for the services provided.

The worker was not eligible for employee benefits. The worker did not perform similar services for others and he did not advertise his services to the public as being in business to perform those services. The firm states they represented the worker as an independent contractor for their company. Either party could terminate the work relationship at any time without either party incurring a liability. The firm states the work relationship ended when the work slowed down in September 2018 and all estimating services transitioned to being performed in-house.

The firm provided a signed copy of a Independent Contractor Agreement between the firm and the worker stating the worker would be an independent contractor in his relationship with the firm.

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 worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the firm's business name rather than an entity of his 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 his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm afforded the worker with a great deal of freedom while performing his services as his services were performed away from the firm's premises. With more and more workers working out of their home office and this becoming the reoccurring trend in the current workplace, this fact by itself, does not mean that the worker is not an employee. A worker can perform his services independently and away from the firm's premises and still be an employee.

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, but rather the services performed by the worker were a necessary and integral part of the firm's business. Subcontractors are truly independent of a firm and a firm's business. Some of the characteristics of subcontractors are that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to have anyone they engage perform services since that person would be representing the subcontractors business, and they would have their own business bank account and credit lines. Subcontractors will file tax returns and conduct themselves as real businesses. Subcontractors will dictate what services their business offers and how they process and perform those services, what software it would use, and how much it would charge for those services. We did not find that the worker had this freedom or autonomy. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker operated a business, advertised his services to the public, had obtained a business license or had a business registration in the state where he performed services.

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 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.

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.