

SS-8 Determination—Determination for Public Inspection

Occupation 03CRA.8 Craftsperson	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 custom cabinetry, architectural millwork, and furniture building. The worker was engaged by the firm as a carpenter. The firm treated the worker as an employee and withheld taxes in 2007 through 2013, and then reclassified him to an independent contractor in 2014. The firm stated that in 2014, the worker made the decision to obtain a business license from the [REDACTED] under the business name [REDACTED]; the business relationship changed as the worker was able to create his own schedule, often working outside of the firm's business hours; the worker reviewed sets of plans, and then the firm and worker then came to an agreement for the cost of the work being performed; and the worker dictated when he expected to receive pay for the work performed. In 2015, when the firm rehired the worker as its shop manager, it initially treated him as an employee, and then reclassified him to an independent contractor at the worker's request; his position did not change.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The firm provided the worker with his work assignments throughout the work relationship. If problems or complaints occurred, the worker contacted the firm for resolution. The worker generally performed his services on the firm's premises, but site work was sometimes required. The worker was required to perform his services personally; the firm was not aware of any sub-contractual agreements.

The firm provided the space, materials, and larger fixed tools. The worker utilized his personal tools and was responsible for their associated costs. The firm generally paid the worker at an hourly rate, but also by piece-work in 2014. The worker did not lease space or equipment. Customers paid the firm directly at prices established by the firm. The firm covered the worker under workers' compensation. Other than acquiring a business name, neither party indicated an investment by the worker in the firm or a related business.

The firm stated that it 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 firm did not prohibit the worker from providing similar services for others during the same time period. There is no evidence presented that the worker advertised his services.

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.

Designating a worker's status as an employee or independent contractor is the responsibility of the employer, not the worker. The fact that the worker may have requested to not have employment taxes withheld from his earnings is irrelevant. If an employer-employee relationship exists, the firm is obligated by law to withhold the appropriate employment taxes.

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 prior training and experience to perform his services, it was responsible for resolving any problems or complaints that may have occurred. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction with the work. The worker performed his services on the firm's premises or at a site designated by the firm. His schedule was dependent upon the needs of the firm. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his 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, while the worker obtained a business name, he 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. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. The firm paid the worker at an agreed upon hourly or job rate, and the risk of loss was absent. 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 his 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 his services under the firm's name. He was not engaged in an independent enterprise, but rather the carpentry services performed by the worker were a necessary and integral part 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 owner of the business. The worker could have performed similar services for others during the same time period; 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. 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.