

SS-8 Determination—Determination for Public Inspection

Occupation 03IEI.19 Inspector	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 offering property inspections. The worker is engaged by the firm as a property inspector. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 through 2015. In 2016, the firm informed the worker that it was reclassifying him from an independent contractor to employee status. There is no evidence presented that the worker's services or the work relationship changed when the firm reclassified the worker from an independent contractor to an employee.

The worker submitted the independent contractor agreement signed on May 23, 2013, stating among other things that the firm will not withhold taxes from the worker's pay; the firm will pay the worker on a commission basis; the firm agrees to pay all educational expenses and the worker agrees to work for the firm for at least two years; the worker may employ assistants as he deems appropriate; neither the worker nor his assistants are eligible for benefits; the worker will perform his services when inspections are scheduled; the worker will submit invoices to the firm for all services performed; the firm will provide all equipment, tools, and supplies necessary to perform services; the worker has the right to control and determine the methods and means of performing the services; and the worker retains the right to perform services for others. Also submitted are the confidentiality agreement and covenant not to compete.

Information from the worker supports that the firm provided the worker with [REDACTED] training and on-the-job training. If problems or complaints occur, the worker contacts the firm for resolution. The worker completes a written report for each inspection from his home. Reports go directly to the client from the firm's email. The worker's schedule is dependent upon inspections scheduled by the firm.

The worker provides his own computer, truck, contractor license, and a digital camera. He incurs truck expenses including gas and insurance, and cell phone and internet service expenses. The firm does not cover the worker under workers' compensation. Customers pay the firm directly at prices established by the firm. The worker did not indicate an investment in the firm or a related business, or the risk of incurring a financial loss beyond the normal loss of compensation. There is no evidence that the worker advertises his services or maintains a business listing. He distributes the firm's business cards and fliers to solicit business for the firm.

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. 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.

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 trained the worker. It retains the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Training a worker indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. The worker writes inspection reports from his home. Work done off the premises of the person or persons receiving the services, such as at the home of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. Although the agreement between the parties states that the worker may hire assistants, there is no indication that he engages and pays others to perform services for the firm on his behalf. These facts show that the firm retains behavioral control over the services of the worker.

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, does 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. There is no evidence to suggest the worker's computer, cell phone, and camera were purchased exclusively for business purposes. Presumably these items are also used by the worker for his personal needs, and therefore, they are not considered a significant business investment. The firm pays the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm retains control over the financial aspects of the worker's services.

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 performs 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 performs his services under the firm's name. He is not engaged in an independent enterprise, but rather the inspection services performed by the worker are a necessary and integral part of the firm's property inspection 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 firm does not prohibit the worker from performing similar services for others; 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. These facts show that the firm retains control over the work relationship and services of the worker.

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee for the entire work relationship, and not an independent contractor operating a trade or business.