

SS-8 Determination—Determination for Public Inspection

Occupation 03INS.32 Installer	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 worker initiated the request for a determination of his work status as a lead installer of boilers and water heaters in tax years 2013 through 2015. The firm's business is described as installing and servicing boilers and water heaters.

The firm's response was signed by an accountant. The firm's business is described as boiler and radiant system installations & design. The worker performed services as a laborer.

According to the firm, there was no training or instructions given to the worker. The firm was awarded five contracts and the worker was contracted for labor only. The worker was sent an email or text or called as to the job assignments. The methods by which the worker performed his services were determined by the plumbing code. The worker was required to contact the owner of the firm if he encountered any problems; however, the worker was to fix his own mistakes or he wasn't paid. The firm indicated that the worker only reported his time. The majority of the services were rendered at the firm's customers' location. The worker was not required to perform services personally; the worker hired and paid for helpers.

The worker responded that he received [REDACTED] cast iron training, [REDACTED] boilers training, as well as daily and constant instructions from the firm. The job assignments were obtained by phone or when he reported to the firm's shop. The worker indicated that the firm designed the jobs and determined the methods by which the worker's services were performed. The worker responded that he was required to submit reports via telephone, email, and send photos. He concurred that the services were rendered at the shop and at customer locations. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm. The worker confirmed that he was not licensed for [REDACTED], electrical, or plumbing; but, he had obtained certificates in some areas such as [REDACTED] refrigeration. The worker acknowledged that prior to his association with the firm and while in school he worked nights and weekends doing odd jobs. He stated the firm had no problem with him continuing to do this as long as it did not interfere with the firm's jobs during the 40-hour work week.

The firm response indicated the firm provided the location, job design, and requirements; while the worker furnished license, safety equipment, and clothing, transportation, and cell phone. The firm paid the worker an hourly wage and a lump sum and acknowledged the customer paid the firm. The firm did not carry workers' compensation insurance on the worker. The worker's financial risk was the replacement of his own tools, equipment, uniform, and vehicle. The firm stated the worker established the rate for products sold and services provided

The worker indicated the firm provided a work truck, power tools, licenses, materials, and gas. He stated that he furnished his own small hand tools. The worker did not lease equipment and did not incur expenses in the performance of the job other than for an apprentice card. The worker responded he was paid an hourly wage and did not bid any jobs for the firm and that the customers paid the firm. The worker concurred that he was not covered under the firm's workers' compensation insurance policy. The worker stated he was not at risk for a financial loss in this work relationship. The worker was not required to provide liability insurance or have a mechanical bond. The firm established the level of payment for services provided or products sold. The worker confirmed that he did purchase materials through firm for side jobs with the firm's permission – the firm had made it clear that he worked for firm for 40 hours a week and didn't care what he did in his free time.

Both parties agreed that no benefits of health insurance, paid vacations, and etc. were extended to the worker. The worker stated he did receive occasional bonuses. Either party could terminate the work relationship without incurring a liability or penalty. The worker stated he was not performing same or similar services for others during the same time frame; the firm disagreed.

The firm provided: copies of email traffic regarding the worker's school schedule and his available time; copies invoices for supplies for worker's personal use; and, a copy of the worker's schedule C for 2013 (which was prepared by the firm's wife). The firm owner is the only employee of the company.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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 to the firm. 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. 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.

CONCLUSION

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.