

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS.2 MiscLaborServices	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 submitted a request for a determination of worker status in regard to services performed for the firm as a laborer. Work performed included cleaning, moving, and packing customer belongings; moving furniture and appliances; in-shop cleaning of customers stored items. The firm issued the worker Form 1099-MISC for 2011, 2012, and 2013. The worker filed Form SS-8 as he received Form 1099-MISC; however, he believes he should have been classified as an employee.

The firm's response states it is an insurance damage restoration and contents cleaning and restoration business. The work done by the worker included contents cleaning and manipulation. The firm believes the worker was an independent contractor as he offered his services as an independent contractor, there was no direct job over site, and there was a verbal agreement for the cost of each individual job. The worker performed services from August 2011 to June 2013.

The firm stated it did not provide specific training or instruction to the worker. The firm's project manager requested estimates from the worker to do a particular job. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm's project manager was contacted. The worker was responsible for correcting his errors. The firm required the worker to provide verbal reports and invoices. Meetings were not required. The worker's daily routine was unknown. Services were performed in customers' homes. The firm did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided him in-house on-the-job training related to use of various cleaning chemicals and daily work instruction related to services to be performed. The worker did not bid on jobs. The firm's content cleaning department manager determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker's routine consisted of 7 am to 3:30 pm, Monday through Friday. The worker was required to clock-in and out daily. As requested by the firm, the worker prepared a weekly invoice for an amount due which represented the number of hours worked multiplied by his hourly rate of pay. The firm requested the worker only identify one job on each weekly invoice; however, the worker typically worked several different jobs during the week. Services were performed at the firm's shop approximately 40% of the time; the rest of the worker's time was spent at customer locations. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it did not provide supplies, equipment, or materials. The worker provided all necessary cleaning equipment to facilitate completion of the contract. The worker did not lease equipment, space, or a facility. It is unknown if the worker incurred expenses in performing services for the firm. Customers paid the firm. The firm paid the worker per invoice. A drawing account was allowed for advances as the job progressed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker did not establish the level of payment for the services provided as it was negotiated between the worker and project manager. The worker stated the firm provided a vehicle which was used to travel to customer locations. It advertised the firm's business and was loaded with various equipment, tools, boxes, and cleaning supplies and chemicals all provided by the firm and used by the worker. The firm also provided the worker work shirts which were worn while performing services. The worker provided his lunch. The worker did not incur expenses in performing services for the firm. The worker was paid an hourly rate of pay; a drawing account for advances was not allowed. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated it is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The firm represented the worker as a subcontractor to its customers. The work relationship ended when the worker went away. The worker stated he did not perform similar services for others or advertise. The firm represented him as an employee to its customers. Services were performed under the firm's business name.

Copies of invoices for 2011 – 2013 evidence they were primary hand written on blank or various scraps of paper on a weekly basis. The worker personally invoiced the firm for services performed.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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 a verbal 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.

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, based on the worker performing services on a regular, recurring basis evidences the services performed were integral to the firm's business operation. The firm's project manager oversaw work assignments and was contacted if problems or complaints arose. The firm collected payment from its customers for services performed. All of these facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

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. In this case, the worker did not invest capital or assume business risks. 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. Based on the lump sum or hourly rate of pay arrangement, the worker could not realize a profit or incur a loss.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.