

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS.51 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

Information provided indicated the firm is a general contractor. The worker had been retained by the firm in 2014 and 2015 as a foreman/carpenter. The firm reported the income on Form 1099-MISC. The firm stated the worker presented himself as an independent contractor. No other work arrangement was ever discussed. He used his own cell phone, vehicle and tools, determined his work schedule and location. He worked for other general contractors. Work assignments were via communication with the firm. He reported to the firm for any issues or problems. The work was done contingent upon jobs available with no hours set by the general contractor. Services were performed at various construction sites. The firm states supplies were delivered to the job site by vendors due to the general contractor's liability for payment. The firm stated the worker was paid by the hour. The customer paid the firm. The firm did provide workmen's compensation insurance. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated the worker performed services for others. Their permission was not required. He was represented as a subcontractor for [REDACTED]. He left to become a roofer.

The worker stated he was hired as foreman for the firm. He stated the firm determined the work and the schedule. He received his work assignments from the project manager employed by the firm. He provided his time sheets and daily progress reports to the firm. He started work at eight a.m. and got done at four-thirty p.m. with a half hour for lunch. Services were performed at the firm's customer location. Staff meetings were held twice a month. The firm hired and paid all workers. The worker agreed the firm provided all building materials and some necessary tools. He provided his own tools also. He was paid by the hour; he agreed the customer paid the firm. He agreed the firm carried workmen's compensation insurance. Either party could terminate the work relationship without incurring a penalty or liability. He indicated he did not perform similar services for others. He stated he was represented as an employee of the firm. The worker indicated he was fired.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your 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.

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

Analysis

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convenient way of paying a lump sum agreed upon as the cost of a job.

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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

We have applied the above law to the information submitted. As is the case 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, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. The firm obtained all work projects. Then hired the applicable labor force to ensure his contracts were met. The worker indicated he worked full time from eight to four-thirty as determined by the firm. As general contractor responsible for the project being completed on time, he retained the right to direct and control the flow of the work progress.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. All services were performed under the firm's business name, for the jobs bid on and contracted by the firm. No contracts were provided, no indication bids were placed by the worker for the work performed. No evidence has been found to indicate the worker performed services for anyone else during this time frame (as indicated by the firm). The firm provided all the materials required to perform the work (for which they stated they were liable for payment). The worker was paid by the hour for the services performed. The worker had no opportunity to incur a profit or suffer a financial loss.