

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS.55 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 payer as a typesetter. The work done by the worker included image or photo manipulation using computer applications. The payer issued the worker Form 1099-MISC for 2013 and 2014. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The payer's response stated its business is creating signs, pictures, letters, and names for companies who need gifts and promotions for their employees. The worker printed on toys and gift items and handled packages and delivery. Services were performed from May 2013 to August 2014. The parties had a verbal agreement.

The payer stated it did not provide specific training or instruction to the worker. Work assignments were provided to the worker by verbal instructions. The payer determined the methods by which assignments were performed. The payer was contacted and assumed responsibility for problem resolution. Reports and meetings were not required. The worker's schedule was determined when hours were available. The worker split his time between his home and the payer's office. The payer required the worker to personally perform services. The worker stated the payer provided him specific training and instruction related to typesetting, using different applications, and the process of production. The worker received work assignments each morning consisting of a stack of orders to be processed that day. The worker's routine consisted of starting at 6 am; sorting the orders and working on them one at a time; coordinating the work with the graphic personnel. The work day ended at 2 or 3 pm. The worker performed services at the payer's premises only. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated it provided all the supplies needed. The worker provided transportation. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the payer. Customers paid the payer. The payer paid the worker commission and piece work. The payer guaranteed the worker a minimum hourly rate of pay. A drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated he was paid an hourly rate of pay. The payer established the level of payment for the services provided and the products sold.

The payer stated the benefit of bonuses was made available to the worker. The worker had no responsibility in soliciting new customers. The work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others. The payer's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The payer advertised and provided materials and instructions or patterns to the worker. The work relationship ended when the payer terminated it. The worker stated the benefit of paid holidays was made available to him. The worker did not perform similar services for others. The payer represented the worker as an employee to its customers. Due to production the worker was let go and replaced with a new typesetter.

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 payer'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.

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. In this case, the payer provided verbal instructions in connection with work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer has the right to control the equipment, it is unlikely the worker had an investment in facilities. In this case, the worker did not invest capital or assume business risks as the payer provided all supplies needed. As acknowledged by the payer, the worker did not incur economic loss or financial risk. Based on the commission, piece work, 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 payer'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 payer 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.

The payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.