

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS.56 MiscLaborService	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is in the business of manufacturing light suits for shows and the worker was engaged under written agreements as a technician who would come in to help solder and crimp wires. The firm believes the worker was an independent contractor as he set his own schedule and he was hired under a contract as an independent contractor.

The firm states the worker was taught how to solder and crimp wires and his assignments were given to him by his supervisor. The firm states the worker was required to personally perform his services and he determined how to complete his assignments. The firm states the worker would contact the person who trained him or the firm's chief operating officer (CEO) if any problems or complaints arose for their resolution. The worker was not required to submit reports to the firm. The firm states the worker made his own hours and he worked when he was available at their premises in the state where the worker resided. The worker was not required to attend meetings.

The firm states they provided all tools the worker needed for performing his services and the worker provided his own computer. The worker did not incur expenses but if he incurred travel expenses and baggage fees, the firm states they would reimburse the worker for these expenses. The firm paid the worker at an hourly rate and they reported the worker's earnings on Forms 1099-MISC. The worker did not have an opportunity to incur a loss as a result of his services.

The firm states the worker performed similar services for others and there was a 10 year non-compete agreement with the worker indicating he was not to work with a direct competitor of theirs. The firm states the worker did not advertise his services and he was represented to their clients as a contractor performing services under their business name. Either party could terminate the work relationship at any time without either party incurring a liability. The relationship ended when the job was completed and the worker's services were no longer needed.

Analysis

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, the firm provided the worker with training as to how to perform his services. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

Subcontractors are truly independent of a firm and a firm's business. Some of the characteristics of a subcontractor is that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to send anyone in their place since that person would be representing the subcontractor's business, and they would have their own business bank account and credit lines at suppliers. Subcontractors they will file tax returns and conduct themselves as real businesses. We did not find this took place in this case. There was no evidence presented or found in this investigation that the worker had a business, a business license or business registration in the state which he performed services.

While the worker submitted invoices to the firm and the submission of invoices is a characteristic of an independent contractor, the total relationship needs to be analyzed to make an accurate decision of a worker's status. If a worker is required to provide an invoice in order to obtain a job or as a condition of employment, the factor that the worker submitted an invoice to get paid loses weight in determining the worker's status as an independent contractor.

The payer's statement that the worker performed services on a sporadic basis and therefore, an independent contractor is without merit. A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

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. "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.

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

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, while there was a consulting agreement between the firm and the worker indicating the worker will be treated as an independent contractor for tax purposes, it 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.

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.