

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS.58 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 used car sales business and the worker was engaged from 2011 to 2015 as a mechanic repairing cars. The firm provided no training to the worker in regard to his services. The firm states when the worker showed up for work, they would give him a car to check out. The worker was required to notify the firm if any problems or complaints arose for their resolution. The firm states the worker was not required to submit reports or personally perform his services. The worker performed his services on an as needed basis at the firm's premises. The worker did not perform services more than 7 hours per day for the firm. The firm believes the worker was an independent contractor (IC) because he provided his own tools.

The firm states they provided car parts to the worker in order to perform his services and the worker provided his tools. The worker was compensated at a daily rate and the firm states the worker was allowed a drawing account for advances. The firm states they carried workers' compensation insurance on the worker. The worker did not have an investment in a business related to services performed and therefore, he could not incur a loss or realize a profit as a result of his services.

The worker was not eligible for employee benefits. The firm states the worker performed similar services for others but he did not advertise his services. Either party could terminate the work relationship at any time without either party incurring a liability.

The firm provided the following additional information for consideration in this case:

- Copy of W-9 forms for 2011 & 2012 signed by the worker.
- Copy of 1099-MISC's they issued to the worker for 2011, 2012, 2013, 2014, and 2015.
- Copy of signed acknowledgments for each year the worker performed services indicating that he received his 1099 form from the firm and he understood that no taxes have been withheld from his pay and he was responsible for his taxes.
- Copy of signed agreements between the firm and the worker for each year the worker performed services that stated the firm was contracting the worker for a set daily rate for no more than seven (7) hours per day; the worker must provide his tools and equipment and he will receive a 1099 form at the end of the calendar year; and the worker would be responsible to file and pay any income tax owed.

Analysis

As in this case and 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 worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. 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. These factors 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 subcontractors are 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 have anyone they engage perform services since that person would be representing the subcontractors business, and they would have their own business bank account and credit lines. Subcontractors will file tax returns and conduct themselves as real businesses. Subcontractors will dictate what services their business offers, how they perform those services, and how much their business would charge for those services. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker operated a business, advertised his services to the public, had obtained a business license or had a business registration in the state which he performed services. It should be noted that it is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting oneself and be an employee of one or all of whom engages him.

The firm's statement that the worker performed services on an as-needed basis and therefore, an independent contractor is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants.

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. While the worker provided his own hand tools, this is not considered a significant investment. 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.

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.

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. 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.