

SS-8 Determination—Determination for Public Inspection

Occupation 03OPE.5 Operator	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 firm is in the business of logging, land clearing, and tree removal. As the owner of the firm, you engaged the worker to operate machinery. You reported the worker's remuneration on Forms 1099-MISC for 2012, 2013, and 2014.

Information from the parties supports that you relied upon the worker's prior training and experience to perform his services. You provided the worker with his work assignments. The worker followed the schedule that you set. He provided his services on your customers' premises. If problems or complaints occurred, the worker contacted you or the foreman for resolution. The worker was required to perform his services personally.

The worker stated that you provided all the equipment. There is no evidence presented that the worker leased or rented the equipment or incurred expenses in the performance of his services. You stated that you paid the worker at a per job rate and did not cover him under workers' compensation. Customers paid you directly. Neither party indicated an investment by the worker in your firm, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

You did not make benefits available to the worker. The worker provided similar services for others during the same time period. He distributed business cards under the name of [REDACTED] Tree Service. The worker stated that he provided services to residential customers as a side business. He provided prior services for others as a contractor where he provided his own equipment. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

Analysis

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, 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while you relied upon the worker's prior training and experience to perform his services, you were responsible for resolving any problems or complaints that may have occurred. You retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment and ensure your customers' satisfaction. The worker followed the schedule that you set and performed his services on your customers' premises. 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. The worker was required to perform his services personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. There is no indication that the worker hired additional helpers or substitutes. These facts show that you retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. 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. You paid the worker at a set rate for services performed, and the risk of loss was absent. These facts show that you retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. He performed his services under your name, enabling you to fulfill your agreements with your customers. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a machine operator were a necessary and integral part of your logging, land clearing and tree removal business. 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. You stated that the worker provided similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.