

SS-8 Determination—Determination for Public Inspection

Occupation 03PMW.64 RepairMaintenanceWorker	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 providing clean-room and data center cleaning services. The worker was engaged by the firm to perform the specialized cleaning services, and at-times, to act as the on-site manager. The firm reported the worker's remuneration on Forms 1099-MISC for 2012 through 2014.

Information from the parties supports that while the firm relied upon the worker's prior training and experience to perform her services, it provided her with a training manual addressing her job description, general cleaning rules, "employee" conduct, etc. The firm offered the worker jobs, which she could accept or deny. The worker performed her services according to the customer's scope of work while following the firm's guidelines. If problems or complaints occurred, the worker contacted the firm for resolution. The worker submitted invoices to the firm. She performed her services on the firm's customers' premises. The firm stated that the worker was not required to perform her services personally.

The worker did not lease space or equipment, or incur expenses in the performance of her services. Any travel expenses were reimbursed by the firm. The firm paid the worker at a daily rate. It covered her under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make general benefits available to the worker. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability. The firm stated that the worker performed similar services for others during the same time period. The non-compete agreement between the parties prohibits the worker from competing with the firm for a period of two years following termination. There is no evidence presented that the worker advertised her services or maintained a business listing. She performed her services under the firm's name.

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, the firm's 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. If a firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her services, it provided her with a training manual. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction with her work. Once the worker accepted a job, she followed the schedule set by the firm. She provided her services at the firm's customers' locations. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. Although the firm stated that the worker was required to perform her services personally, there is no indication that she could not engage and pay others to perform the specialized services on her behalf. These facts show that the firm 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. The firm paid the worker at a daily rate and the risk of loss was absent. These facts show that the firm 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 her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker performed her services under the firm's name, enabling the firm to fulfill its contracts with its customers. The worker was not engaged in an independent enterprise, but rather the cleaning services performed by the worker were a necessary and integral part of the firm's data center and clean-room cleaning 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 business. The firm 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 the firm retained control over the work relationship and services of the worker.

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.