

SS-8 Determination—Determination for Public Inspection

Occupation 03PMW.68 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 small engine repairs. The worker was engaged by the firm as a small engine mechanic. The firm reported the worker's remuneration on Forms 1099-MISC for 2013, 2014, and 2015.

The agreement between the parties stated that the worker agrees to perform all services in an acceptable manner and appearance, based solely on the firm's discretion; all accounts will be billed through the firm's billing system; the firm owns all current and future customers; all work will be performed under the firm's name to ensure all equipment and tools remain in good order so to serve its customer base; the firm will pay the worker \$500 per week, for at least 40 hours, 8 hours in any 5 day period, excluding Sundays; for weeks worked less than 40 hours, the rate of pay will be deducted on an hourly basis of \$12.50; compensation payments will be made on the 15th of the following month, and in no case will advance payments be made; the worker is responsible for returning all incorrect orders or the cost of the parts will be deducted from his compensation; all non-satisfactory work will be corrected within 24 hours, or the amount of the bill will be charged back to the worker; both parties agree that in order to dissolve the agreement, a 30 day written notice is required, unless unsatisfactory work is performed or harm caused to either party; immediate termination of this agreement is permissible.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The worker's work assignments were based upon customers' requests. If problems or complaints occurred, the worker was generally responsible for their resolution. The worker prepared work orders. The firm stated that it allowed the worker flexibility in his schedule. The worker performed his services on the firm's premises. The firm stated that the worker was not required to perform his services personally; if additional personnel were needed, the worker was responsible for hiring and compensating them.

The firm provided the parts, chemicals, and the property. Other than providing his personal tools, the worker did not incur expenses in the performance of his services. He did not lease space or equipment. Customers paid the firm directly at prices established by the firm. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business.

The firm did not make benefits available to the worker. The firm did not prohibit the worker from performing similar services for others during the same time period. There is evidence presented that the worker advertised his services or maintained a business listing. He performed his services under the firm's name. 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, 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 his services, it expected the worker to perform all services in an acceptable manner and appearance based solely on the firm's discretion. It, therefore, 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. The firm allowed the worker flexibility in his schedule but the agreement between the parties sets the firm's expectations of the amount of time the worker was required to work. A requirement that workers be on the job at certain times is an element of control. The worker performed his services on the firm's premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Although the firm stated that the worker was not required to perform his services personally, there is no indication that he engaged and paid others to perform services for the firm on his 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 lease space, 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 worker utilized his personal tools. 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. The firm paid the worker on a salary basis. Workers are assumed to be employees if they are guaranteed a minimum salary. 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 his services on a continuing basis. He performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the small engine repair services performed by the worker were a necessary and integral part of the firm's small engine repair 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. The worker could have performed 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. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. 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.