

SS-8 Determination—Determination for Public Inspection

Occupation

03PMW.96 RepairMaintenanceWkr

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 providing and stocking vending machines for companies and the worker performed services as a vending machine repair technician. The worker replied to a classified ad the firm had placed and firm states the worker had all the relevant electrical background and skills to do the repairs on their vending machines. The firm states they discussed with the worker that this position would be a 1099 contractor position and they discussed the tax ramifications of such. The firm states the worker readily agreed to perform their repair work under these conditions. The firm believes the worker was an independent contractor (IC) because they supplied the worker with a list of machines to be fixed, he then would set his own schedule and repair the machines based on his experience.

The firm states the worker received no outside training and they showed the worker the basics of the vending machine. The firm states the worker already knew more about the electronics and refrigeration than they could teach him. The worker's assignments were a list of machines that needed to be repaired. The worker and their instructions on how to determine what's wrong with their machine(s) determined how the worker performed his services. The worker kept in contact with the firm if any problems or complaints arose. The firm states the worker was responsible in resolving the problem. The worker maintained and submitted a repair log to the firm. The firm states the worker did not have a set routine or schedule and the worker's schedule was at his discretion. The worker personally performed his services at the firm's customers' locations. The firm states the worker was not required to attend the firm's staff meetings.

The firm states they provided basic tools to the worker in order to perform her services and the worker had access to their company van when it was available. The firm states the worker provided specialized tools and a personal vehicle. The worker did not incur expenses, the clients paid the firm for services rendered by the worker, and the firm paid the worker at an hourly rate. The firm states they carried worker's compensation insurance on the worker. The firm believes the worker could incur a loss due to loss or broken tools and normal wear and tear on his vehicle.

The worker did not perform similar services for others and he did not advertise his services. The firm states they represented the worker as their repairman to their clients. Either party could terminate the work relationship at any time without either party incurring a liability.

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 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. Even when a company allows a worker considerable latitude in performing their services, the retention of the right to give instructions or directions, without exercising that right, is enough to make the worker an employee. In many instances, this retention is indicated by the requirement that the worker provide the firm with frequent reports. 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.

In this investigation, we looked at whether the worker displayed characteristics of an independent contractor; such as the outpouring of money into a business offering those services to the public and the opportunity to incur a loss or realize a profit as a result of her services. The worker in this case did not have this. The worker did not have a business license or business registration in the state which he performed services.

While the firm provided the worker with freedom of action as to when he performed his services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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 some of his own 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. If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not 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.

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, 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.

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

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.