

SS-8 Determination—Determination for Public Inspection

Occupation 03PMW.100 RepairMaintenanceWkr	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 a veterans' organization. The worker was engaged by the organization as a janitor. The firm did not withhold taxes from the worker's remuneration for 2006 through 2015.

Information from the parties supports that the firm provided the worker with his work assignments. The worker submitted written schedules the firm provided to him designating his duties, and the days and times to perform them. Also submitted are notes on deficiencies of the work. If problems or complaints occurred, the worker contacted the firm for resolution. The worker performed his services on the firm's premises. He was required to perform his services personally.

The firm provided all equipment and materials. The worker did not incur expenses in the performance of his services. The firm paid the worker at an hourly rate. It did not cover him under workers' compensation. Neither party indicated an investment by the worker a related business, or the 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 worker stated that he provided similar services for others during the same time period. There is no evidence presented that the worker advertised his services or maintained a business listing. According to the memo submitted by the worker, the firm 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm provided the worker with his work assignments and the methods by which to perform them. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker followed the schedule set by the firm and performed his services according to the firm's direction. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. 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 an hourly rate. Payment by the hour generally points to an employer-employee relationship. 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 was not engaged in an independent enterprise, but rather the janitorial services performed by the worker were a necessary and integral part of maintaining the firm's 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 worker 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, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. 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.