

SS-8 Determination—Determination for Public Inspection

Occupation 03PMW.151 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 in the business of real estate and property management. The worker was engaged by the firm to perform maintenance and repair services. The firm reported the worker's remuneration on Forms 1099-MISC for 2014 through 2016.

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 the work orders prepared by the firm. If problems or complaints occurred, the worker contacted the firm for resolution. The worker was required to complete bi-weekly invoices on templates prepared by the firm. He provided us with job logs that he maintained. The worker's schedule varied as determined by the time it took to complete the work orders. He performed his services on properties as directed by the firm. The firm stated that the worker was not required to attend meetings, but the job logs presented by the worker show he reported to [REDACTED], an entity owned by the firm, each morning to pick up work orders and property keys, and at times, perform tasks on the property. He was required to perform his services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the materials and supplies. The worker provided miscellaneous supplies, tools, his vehicle, trailer, and fuel. He also incurred expenses for his work clothes, taxes, insurance, etc. The firm paid the worker at an hourly rate according to the work orders, with the exception of March 1, 2015 through May 31, 2015, when the firm paid the worker on a salary basis and withheld taxes. The firm reimbursed the worker for any supplies and materials purchased upon submission of receipts. 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, or the risk of the worker incurring a financial loss beyond the normal loss of compensation, and wear and tear of his vehicle, trailer, and tools.

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 no evidence presented showing the worker advertised his services or maintained a business listing. The worker performed his services under the firms' names and wore shirts with the firm's logo. Both parties reserved the right to terminate the work relationship 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, 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, the firm was responsible for resolving any problems or complaints that may occur, showing 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. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker performed his services at sites according to the work orders prepared by the firm. 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. 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's contractor's license expired on August 31, 1999. He did not invest capital or assume business risks for the time period in question, 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 own vehicle and trailer. He provided his personal tools and equipment. There is no evidence to suggest the worker's truck and trailer, or tools and equipment, were purchased exclusively to perform services for the firm. Presumably these items were also used by the worker for his personal and prior needs, and therefore, they are not considered a significant business investment. Additionally, the term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade. The firm generally 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. According to the logs submitted by the worker, he performed his services on a full time basis. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. The worker was not engaged in an independent enterprise, but rather the maintenance and repair services performed by the worker were a necessary and integral part of the firm's property management 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. 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.