

SS-8 Determination—Determination for Public Inspection

Occupation 03TEC.19 Technician	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 operating a mobile screening service by creating individual risk reports (cardiovascular risk assessment via ultrasound scan/digital images) for doctors at their locations. The worker was engaged as a sonographer who scanned patients creating those digital images via an ultrasound machine, then uploaded them to the firm to analyze and submit the risk assessment to the doctors. The worker received a Form 1099-MISC for her services in 2011 through 2014. There were written agreements involving confidentiality and non-compete issues along with an email summarizing the work arrangements.

Both firm and the worker agreed that the firm provided training on the equipment issued to the worker; the firm noted that the actual training was performed by [REDACTED]. The worker was shown how to do the CMT exam, images, measurements and how to fill in data to produce the reports. Physicians' offices scheduled with the firm; the worker would be contacted and could decline. However, the worker noted that she was sent assignments through an on-line office calendar. Both parties agreed that the firm determined the methods by which the assignments were performed and would be contacted if any problems or issues arose. The firm noted no reports were needed, just to upload data and submit an invoice to be paid; the worker noted that she submitted reports that included images and written documentation of what was visualized. Both agreed that the worker had no regular routine; the worker traveled to the scheduled doctors' offices to perform her services. There were no required meetings. Only the worker noted that she was required to provide the services personally. Each indicated that the other would hire and pay any substitute workers.

Both the firm and the worker agreed that the firm provided all equipment. Both parties also agreed that the firm reimbursed the worker for expenses such as airline, hotel, and car rentals that the worker submitted on an expense report. The firm noted that she also invoiced the firm for sundry expenses. The worker noted that she was paid an hourly amount, but paid the same amount when working less; the firm noted that she was paid for 10 days a month or \$300 per day. Both agreed that the customer paid the firm. Only the firm mentioned that the worker could incur a loss/damage to the equipment and incurred Errors & Omissions malpractice costs. Both agreed that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits other than a bonus, and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. The worker noted that she was represented as an employee providing services under the firm's name; the firm noted that she was represented as their contractor. There was a confidentiality clause. The relationship has ended.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

Revenue Ruling 70-309, 1970-1 C.B. 199 considers the employment tax status of certain individuals who perform services as oil well pumpers for a corporation under contracts that characterize such individuals as independent contractors. Even though the pumpers perform their services away from the headquarters of the corporation and are not given day-to-day directions and instructions, the ruling concludes that the pumpers are employees pursuant to an arrangement that gives the corporation the right to exercise whatever control is necessary to assure proper performance of the services. The pumpers' services are both necessary and incident to the business conducted by the corporation; and the pumpers are not engaged in an independent enterprise in which they assume the usual business risks, but rather, work in the course of the corporation's trade or business.

The circumstances in this instant case are much like those in the above ruled case even though it is acknowledged that the services provided are dissimilar. The firm is operating a mobile screening business in another state. It engaged the worker to provide her services under agreed upon terms along with a signed confidentiality and non-compete statement. The worker was to receive a set amount per month (guaranteed) based on ten days of service each month. She would travel to physician's offices, operate the firm's equipment, write assessments and submit the data to the firm. The worker was reimbursed for any expenses associated with her travel. She was required to adhere to work hours upon accepting any work assignments. There was no direct supervision of the firm over the worker's daily work behavior. The worker provided personal services pursuant to a continuing relationship with the firm created by an agreement which acknowledged the part-time nature of her services based on her availability. The 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm provided the worker with instructions, training, and her assigned duties even if not under their direct, daily supervision. The firm obtained the clients, engaged the worker on a part-time basis and, based upon her availability, scheduled her time with its clients. Once she was scheduled for work, she was to be in the scheduled office, for the day, either scanning patients or waiting to scan patients. This illustrated the control the firm had over the worker by requiring the worker to provide her services during specific scheduled hours. 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.

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. The firm provided the equipment and reimbursed the worker for all her applicable travel expenses, again showing the worker's lack of risk. The firm is operating a mobile screening business and the worker's services as the traveling technician operating the equipment were an essential part of the firm's business activities. 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 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 worker's services were both necessary and integral to the firm's business as evidenced by the fact that when the worker could no longer provide her services, the firm no longer operated in that locale. 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.

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.