

SS-8 Determination—Determination for Public Inspection

Occupation 03TEC.21 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 pharmaceutical consulting. The worker was engaged by the firm to provide IT services, website programming, Windows server programming, and photography services. The firm reported the worker's remuneration on Form 1099-MISC for 2013.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The worker's general assignments were outlined in the proposal the firm submitted to the worker. If problems or complaints occurred, the worker contacted the firm for resolution. The firm required the worker to submit invoices for services. He provided the firm with updates of his projects. The worker provided his services on the firm's premises in [REDACTED]; he could work at other locations at his discretion. According to the worker's invoices submitted by the firm, any additional helpers were reimbursed by the firm.

The firm provided the server to upload projects, and the web hosting server. The worker provided his camera, lighting, and expertise. He incurred expenses for design software, travel, and photography equipment. According to the invoices, the firm paid the worker bi-weekly on a salary basis. It reimbursed him for any hardware/software that was to be left at the firm's property. The firm did not cover the worker under workers' compensation. The worker's risk of loss involved the loss or damage of his equipment and software.

The firm did not make benefits available to the worker. The firm stated that the worker provided similar services for others during the same time period. He advertised his services on Facebook, Twitter, and his own website, which appears to offer services on a project basis. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the worker terminated the work relationship when he took another job.

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, while the firm relied upon the worker's training to provide his services, it is only reasonable to assume that 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 was required provide the firm with project status updates. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The worker provided services from the firm's premises and other sites at his discretion. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. Although the firm stated that the worker was not required to perform his services personally, the firm reimbursed the worker for any additional helpers needed. 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 bid on jobs, invest in office space, 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 worker utilized his personal camera and other 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 at an hourly rate. Payment by the hour generally points to an employer-employee relationship. The firm made payment to the worker on a bi-weekly basis. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. 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. The worker was not engaged in an independent enterprise while providing services for the firm, but rather the IT services performed by the worker were a necessary and integral part of the firm's consulting 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 provided similar services for other 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.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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.