

SS-8 Determination—Determination for Public Inspection

Occupation 03TEC.45 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 worker submitted Form SS-8 in connection with services performed for the firm from January 2014 to December 2014. The work done by the worker included programming and setting up [REDACTED] mills and a [REDACTED] lathe to make aerospace parts. The worker filed Form SS-8 as the firm stated at tax time it would help the worker with his taxes. The worker was told in order to receive pay he would have to be a contractor. Services were performed under a written agreement; the worker did not have a copy.

The firm's response, provided by its certified public accountant, stated it is a machine shop. The worker was hired as a consultant/trouble shooter and he pretty much set his own work schedule. The parties signed a consulting agreement and the worker was treated as an independent contractor. It is believed the worker filed complaint after he quit as the firm accused him of stealing materials from the shop. The firm believes the independent contractor classification was proper as both parties agreed to the arrangement.

Time cards and matching invoices provided by the firm evidence the worker clocked in and out. Daily work hours fluctuated between five and nine hours per day. Total weekly hours ranged from 31.5 to 55 hours. Invoices documented the dates worked, reference was sometimes made to the worker's time card, and some contained comments related to services performed.

The consulting agreement was dated October 4, 2014. It stated, in part, the worker would provide services as a machinist/programmer to provide engineering services to the firm. The worker's duties included, but were not limited to, producing precision components from 3D computer models and paper drawing; generating [REDACTED] programs using CAD/CAM system. The supervisory position required motivation along with strong leadership skills. Supervisors were to be analytical, organized, and capable of making decisions as required. Additionally, the worker was responsible for fabricating replacement and new parts for facility machinery; fabricating, erecting, installing, and maintaining facility machinery; setting up and operating a variety of machine tools to produce precision parts and instruments, including precision instrument makers who fabricated, modified, or repaired mechanical instruments. The worker may also have fabricated and modified parts to make or repair machine tools or maintain industrial machines, applying knowledge of mechanics, shop mathematics, metal properties, layout, and matching procedures, and such other responsibilities as requested by the firm's president from time to time. The worker would submit a monthly detailed report as requested by the firm. The worker agreed to work diligently and to use his best efforts to perform such services for the firm. Reference is made to an attached job description; however, none was attached. The worker would provide a minimum of 160 hours of service per month. The firm would pay the worker for services performed at a fixed monthly rate of pay. After receipt of a proper invoice and monthly report for the billing period, the firm would make payment to the worker within ten days. The worker was required to maintain professional liability insurance. The firm would reimburse the worker for actual expenses incurred in obtaining such professional liability insurance, as well as actual expenses occurred in professional registration, provided the worker provided the firm with receipts for such payments.

The worker stated the firm verbally provided work assignments. Services were performed at the firm's premises. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The firm provided a computer, [REDACTED] lathe, and [REDACTED] mill. The worker provided various hand tools. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm. Customers paid the firm. The firm paid the worker a fixed rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided. The benefit of insurance was made available. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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 a written 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.

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. In this case, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments, required the worker to furnish time cards and invoices, and collected customer payments for services performed. The written agreement documents the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education and past work experience the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. 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. Based on the fixed rate of pay arrangement, the worker could not realize a profit or incur a loss.

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, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.