

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.19 Laborer/Trades	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. [REDACTED], president of the firm, responded to our request for completion of Form SS-8.

From the information provided the firm is in the business of residential construction and the worker was engaged to perform vinyl siding installation, drywall repair, carpentry, and trim installation services. As jobs became available, the firm contacted the worker by telephone or in person. The firm states the worker could accept or reject any jobs offered to him and the worker determined how he performed his services. The worker personally performed services at various jobs sites of the firm. The firm states the worker determined his own schedule. The firm states the worker was responsible for resolution to any problems or complaints that occurred on the job sites. The worker was required to submit lien waivers and invoices to the firm and the firm states the worker was not required to attend meetings. The firm states the worker was responsible for the hiring and paying of substitutes or helpers.

The firm provided the materials to the worker in order to perform his services. The worker provided and incurred expenses for tools and transportation and the firm reimbursed the worker for fuel expenses. The clients paid the firm for services rendered by the worker and the firm paid the worker at an hourly rate and piece work basis. The firm reported the worker's earnings on Forms 1099-MISC. The firm did not carry workers' compensation insurance on the worker. As evidenced by the information provided by the firm, in 2009, the firm reimbursed the worker for liability insurance but later changed to deducting the liability insurance amounts from the worker's pay. The firm states the worker could incur a loss due to the cost of repair or remedy for any faulty workmanship or work not done.

The worker was eligible for bonuses. The firm states the worker performed similar services for others and the worker was not required to seek their approval to do so. The worker did not have an investment in a business related to services performed and therefore, he could not incur a loss as a result of his services. Either party could terminate the work relationship at any time without either party incurring a liability.

Analysis

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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. While the worker was afforded some freedom of action as to when and how to perform his services, the need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The worker did not have a business license or business registration in the state which he performed services. While the obtaining and paying for liability insurance and the submission of invoices are characteristics of an independent contractor, the total relationship needs to be analyzed to make an accurate decision of a worker's status. If a worker is required to provide insurance or submit an invoice in order to obtain a job or as a condition of employment, the factor that the worker possesses insurance or submit an invoice to get paid loses weight in determining the worker's status as an independent contractor.

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. There was no evidence presented or found in this investigation that the worker had an investment in a business related to the services performed for the firm. While the worker provided hand tools in order to perform his services, this is not considered a significant investment. 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.

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.

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.