

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.25 Tradesperson	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 painting interiors and exteriors of commercial and residential buildings. The worker was initially engaged by the firm as an apprentice painter until his painting skills increased. The firm reported the worker's remuneration on Forms W-2 for 2012 and the beginning of 2013. In 2013, the firm reclassified the worker from an employee to an independent contractor and reported his remuneration on Forms 1099-MISC for the remainder of 2013 and 2014. There is no evidence submitted that shows the worker's services changed.

Information from the parties supports that although the firm hired the worker as an apprentice, the worker had experience in the construction business. The firm provided the worker with his work assignments. It was responsible for resolving any problems that were beyond the worker's capacity to resolve. After the firm reclassified the worker, it required him to sign a subcontract agreement for each job; there are no completion dates on the agreements. The firm afforded the worker flexibility in his daily schedule. The worker provided the firm with daily updates. The firm required him to submit daily time sheets for his work. If the worker missed a safety meeting, the work could have been assigned to another worker. The worker was required to perform his services personally, and the firm chose who would work jobs with the worker. The firm stated that if needed, the worker could have paid any help needed for the assigned job.

The firm stated that it provided the paint and containers and the worker provided brushes, rollers, ladders, tarps, tape, cutters, staple gun, hand tools, saws, transportation, and his cell phone. The worker drove the firm's truck to job sites. The firm paid the worker the total amount of pay when the job was completed according to the subcontract terms and conditions. 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 the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability. The firm did not prohibit the worker from doing work for others, and in fact, the worker provided services for others during the same time period. He advertised his flooring services by distributing his business cards. The firm represented the worker as a subcontractor for [REDACTED]. The firm stated that the work relationship ended when the contract was completed.

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, the firm relied upon the worker's prior experience to perform his services. The firm was ultimately responsible for resolving any problems or complaints that may have occurred, 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 and ensure its customers' satisfaction with the work. The worker provided the firm with daily updates and reported the hours worked. 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 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 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 company truck the worker drove to work sites, allowing the customer to view the worker as the firm's representative. The worker utilized his personal 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 the agreed upon amount. Workers are assumed to be employees if they are guaranteed a minimum amount. 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. A 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. The worker performed his services under the firm's name, enabling the firm to fulfill its contracts with its customers. The worker was not engaged in an independent enterprise while performing services for the firm, but rather the painting and related services performed by the worker were a necessary and integral part of the firm's painting 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 provided services for others 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, it appears that the firm terminated the work relationship and did not incur a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. 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 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 for the entire work relationship, and not an independent contractor operating a trade or business.