

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.44 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

The firm provides services as a general contractor for renovation and remodeling. The worker was engaged to provide the needed labor for masonry and carpentry work. He received a Form 1099-MISC for his services in 2012 and 2013. There was no written agreement.

The worker noted that the firm provided him with all the details of the work expectations; the firm agreed that it provided the worker with the scope of the job as well as a start date. Both agreed that the worker was given his work assignments verbally from the firm. Each indicated that the other determined the methods by which the assignments were performed; but both agreed that the firm would be contacted if any issues or problems arose. Both also agreed that no reports were required. The firm noted that the worker's routine varied but he always worked at customers' locations. The worker noted that he drove to the job location, worked set scheduled hours, checked into a hotel, and would return to work the next evening until the job was completed. He worked at customers' locations in various states throughout the northeast. There were no meetings. Only the worker noted that he was to provide the services personally but both agreed that the worker did not hire or pay any substitute workers.

Both the firm and the worker agreed that the firm provided all the materials as well as large equipment and tools. The firm noted that the worker provided some of his own tools. The worker noted that he incurred expenses for meals and was not reimbursed; however, the firm paid the worker's travel and lodging expenses. The worker indicated that he was paid by the hour; the firm initially noted that the worker was paid a lump sum but also indicated that the worker was paid by the hour, day, or by the job according to verbal agreements. Both also agreed that the customer paid the firm. Although the firm noted that the worker carried his own worker's compensation and liability insurance, there was no proof submitted. Each party indicated that the other established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same time period though the firm disagreed. The worker indicated that he performed his services under the firm's name. The firm noted that the worker worked under the name of [REDACTED] although there was no documentation supporting that fact (no bids or invoices.) The relationship ended when the worker either quit and/or his services were terminated.

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.

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 bid on the job, obtained the work and remained responsible to the customer. It provided the worker with his instructions and assigned duties. He performed his services according to the firm's scheduled work hours and days which were according to its customer's requirements. A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. In addition, the worker was to provide the services personally. 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.

The worker installed booths, painted, and tiled as directed by the firm. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

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. While there was disagreement on what basis the worker was paid, that is, whether hourly, daily, or per job, the worker had no other economic risk. There was no evidence of the worker bidding on part of the work or providing insurances. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show 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. In addition, if the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

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. There were no benefits and there was no written agreement. The worker provided his labor for the firm's renovation/remodeling jobs. When performing these services, there was no evidence that he was engaged in an independent enterprise, but rather that his services were part of the necessary activities of the firm's operations. 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 firm had indicated that the worker was providing services for others during the same period of time; this would be quite likely and understandable especially if the worker only worked part-time for the firm. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. 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.

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.