

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.71 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 worker initiated the request for a determination of his work status as a foreman and construction superintendent in tax year 2013. The firm's business is described as general contractor, residential.

The firm's response described the business as residential and commercial construction. The worker performed services as general carpentry.

According to the firm, the worker performed general carpentry; no training was required as the worker was a licensed general contractor and skilled carpenter. The job assignments were determined by the firm; but, the worker determined the methods by which the services were performed. The firm indicated that the worker and firm's manager resolved problems that needed to be addressed. The worker determined his own schedule and routine with the services being performed at residential and commercial job sites. The firm stated the worker was not required to perform services personally; however, the issue of hiring and paying helpers/substitutes never arose.

The firm responded that the firm provided lumber, doors, windows, sheetrock and trim. The worker provided saws, tables, routers, levels, etc; The worker did not lease equipment, space, or a facility; but, the worker incurred expenses for travel, transportation and meals. The firm stated the worker billed the firm for \$XX/hour; the customers paid the firm. The worker was not covered under firm's workers' compensation insurance. The worker at risk for loss or damage to tools and equipment. The firm indicated that the worker did not establish the level of payment for services rendered. The worker concurred with firm with the exception that the firm provided trailer, power tools, vehicle, saws, and etc. with the worker furnishing small hand tools. He also responded the he did not invoice firm, but provided a time sheet with the hours worked for the week.

Both parties agreed that no benefits were extended to the worker; the worker did respond that he was given a bonus after the completion of a project ahead of schedule. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame, but it was unknown if worker advertised. The worker disagreed stating the was not working for others at that time.

The firm provided a copy of the license from the city of [REDACTED] registering the worker as a general contractor for period of September 2012 through September 2013. The worker acknowledged that he was self-employed doing small carpentry jobs, but that he did not have employees for the period of time prior to seeking a job with the firm in 2013.

Analysis

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. See Rev. Rul. 71-524, 1971-2 C.B. 346.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. See Rev. Rul. 70-309, 1970-1 C.B. 199. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties and have applied the above law to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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 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.

CONCLUSION

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.