

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.95 Laborer/Trades

Determination:

Employee

Contractor

UILC

Third Party Communication:

None

Yes

Facts of Case

The worker initiated the request for a determination of his work status as a crew member jack hammering tile, grinding thinset, removing debris, etc. in tax years 2013 through 2015. The firm's business is described as dust-free tile removal, wood flooring removal and installation, floor preparation, and floor leveling in residential homes. The worker indicated that prior to be hired by the firm he performed services for the firm but was paid by the state Labor Force.

The firm's response was signed by the owner/president. The firm's business is described as flooring removal and demolition, floor leveling and grinding for preparation of new flooring. The worker performed services doing floor removal as a subcontractor. The firm provided a copy of the agreement between the firm and worker.

The firm and worker agree that the worker was given training in the use of proprietary, specialized tools used exclusively by the firm for the removal of flooring in a dust-free manner. The parties to the work relationship concur the owner or supervisor contacted the worker verbally or by text to report to the next days scheduled project. The firm determined the methods by which the services were performed. The worker was assigned specific tasks and responsibilities as determined by the firm. Any helpers or substitutes were hired and paid by the firm.

The firm provided all vehicles, tools, specialized equipment and materials. The worker provided his own transportation to the job site and any personal tools. The worker did not lease equipment, space, or a facility nor did he incur expenses in the performance of the job. The firm paid the worker an hourly wage. The customers paid the firm. The firm responded that the worker was covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm determined the level of payment for services rendered.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The firm responded that the worker was terminated.

The firm provided a copy of the Non-solicitation, Non-compete, and Non-disclosure Agreement as well as a copy of the Jobsite Rules and Regulations, Basic Policies, Pay Policy, Production Contact, Call When policy, and the Independent Contractor Agreement.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. See Rev. Rul. 70-630, 1970-2 C.B. 229.

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.

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. 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.

Your 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.

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.