

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.148 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 worker initiated the request for a determination of his work status as a landscaping/maintenance worker in tax year 2014 and 2015. The firm's business is described as landscape maintenance and construction.

The firm's response was signed by [REDACTED], president. The firm's business is described as commercial landscape company. The worker performed services as a laborer, who provided his own transportation, tools, and safety equipment.

According to the firm, the worker was not given any training or instructions. The firm stated the worker made his own schedule and determined the methods to be used to perform the work. The worker handled any complaints as they arose. The worker was required to provide labor reports to the firm. The worker started at 7 a.m. and went until he completed the task. The firm responded that the worker was required to perform the services personally; any additional helpers/substitutes that were hired substitutes were paid by the firm.

The worker indicated that he was provided training and instructions on how to use mowers, ditchwitch machine, bobcat, and to drive the large trailers, install irrigation systems, and all aspects of landscape construction. He stated the job assignments/schedule were given every day by the firm and it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The services were rendered for 20 properties the firm had contracted to be done on a weekly basis. The worker agrees that he was required to perform the services personally and that additional personnel were hired and paid by the firm.

The firm responded that the firm provided equipment and gas and the worker provided safety equipment and clothing. The worker did not lease equipment, space, or a facility; but, he incurred the expense of travelling to and from the job site. The firm indicated the worker was paid an hourly wage and was allowed a drawing account, as needed. The customers paid the firm. The firm acknowledged that it carried workers' compensation insurance on the worker. The firm replied that the worker was not at risk for a financial loss in this work relationship and that the worker did not establish the level of payment for services provided or products sold.

The worker indicated the firm provided trucks, trailers, zero-turn mowers, ditchwitch, bobcat, all maintenance equipment, and irrigation and construction equipment. The worker stated that he furnished nothing, he did not lease equipment, space, or facility, and did not incur expenses in the performance of the job. He was provided company credit card and was reimbursed for the occasional hotel accommodations and meals. He was paid a salary and stated the customers paid the firm. He concurred that he was not at risk for a financial loss in this work relationship and that the firm established the level of payment for services provided or products sold.

Both parties agreed that there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was performing same or similar services for others during the same time frame; however, the worker disagreed. The worker and firm concurred that the worker did not advertise; however, the worker stated he did hand out the firm's business card when asked by a potential customer.

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.

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.

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.

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.

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. "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.