

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.157 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

Information provided indicated the firm is a residential concrete foundation business. The firm indicated the worker was retained by the firm to provide concrete flat work, which is not part of the foundation walls and footings (100% of their company sales). Flat work is a specialized service provided by many independent contractors who ONLY provide that service and none other. Flat work is performed weeks to months after a foundation has been formed. They feel flat work is a separate service and independent of theirs. Therefore, they reported the income earned in 2012 and 2013 as self-employed and issued Form 1099-MISC. The firm stated he had his own equipment, his own trucks and he hired his own workers. He had also worked for others in the same field. The firm indicated work assignments were given by phone. [REDACTED], owner of the firm was responsible for any issues or problems. The firm indicated the worker made his own work schedule. The work was performed at various work site locations. The firm indicated the worker was paid a lump sum. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated the worker did perform similar services for others. The firm indicated he advertised on his truck. He was fired because he was incapable. A photo of the worker's truck showing [REDACTED] was provided.

The worker stated he would set up forms and pour concrete and remove forms as assigned by the firm. He indicated services were performed at the firm's customer locations 3-4 days per week. He indicated the firm hired and paid all workers. The worker indicated he used the firm's equipment and supplies. He stated he was paid by the hour. The customer paid the firm. The worker indicated he quit.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, 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.

Analysis

We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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. 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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. Although evidence was submitted to indicate the worker owned his own business. It is established that all work had been obtained by the firm, and performed at the location of the firm's clients. Not only did the worker perform "flat work" but also performed other small foundation jobs for the firm's client. The firm obtained those contracts, billed those clients, then paid the worker by the hour to perform those services. The work was not performed under [REDACTED], nor did the worker submit bids for the jobs.