

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.167 Laborer/Trades

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is in the business of providing residential concrete work. The worker was engaged to provide labor, assisting on the jobs, breaking cement, and digging dirt as directed by the firm. He received a Form 1099-MISC in 2014 and 2015 for his services. There was no written agreement.

Both the firm and the worker agreed that the worker received on-the-job instructions, assisting where needed. Both parties agreed that the firm provided daily work assignments and instructions. The firm determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. There were no required reports. The firm noted that the hours were Monday through Friday, 7:30am to 4pm. The worker added that he would be picked-up from his home, go to the job site, do the work as assigned; then be driven home. The work hours varied each day. There were no meetings other than in the mornings to discuss the jobs. Only the worker indicated that he was to provide the services personally with the firm hiring and paying any substitute workers.

Both the firm and the worker agreed that the firm provided all supplies and equipment. Both parties agreed that the worker was paid a weekly amount and had no other economic risk. The customer paid the firm. The firm 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. The relationship ended when the worker quit.

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. 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 provided the worker with daily on-the-job instructions. He was to assist with various phases of the concrete work as directed by the firm. The worker worked according to the firm's set scheduled hours and days with the firm providing transportation to and from the job sites. 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. Though the worker's hours may have fluctuated, he provided his services on a continuous basis throughout the time period involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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. The worker had no investment in the business or the equipment, tools, and supplies. The worker simply received a weekly salary and had no other economic risk. 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.

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 concrete business. When doing so, the worker was not engaged in an independent enterprise. His services instead 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 indicated that the worker had agreed to receiving a Form 1099-MISC which denoted his worker status as one of an independent contractor. In *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. So, even though the parties might have agreed to this arrangement, the facts did not support that type of relationship.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.