

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.175 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

Information provided indicates the firm is a stone masonry and landscaping stone supplier business. The worker performed labor services from May 2014 through October 2015. The firm reported the income earned on Form 1099-MISC, stating he was an independent contractor because the workers are hired when necessary to fill customer demands (May through September). The firm stated the worker was given instruction of what types of stone products sold, specifics on pallet stacking, safety issues and awareness. Verbal direction was given on an as needed basis to accomplish customer orders. The firm resolved issued or complaints. The firm stated the worker would let the firm know what hours he was available for the week ahead. He set his own hours within reason and open times of the stone pit. Services were performed at the firm's stone pit. He attended work and safety meetings at the beginning and end of shift. He was required to perform services personally. The firm indicated they provided specialty tools and supplies, safety vests, glasses and hard hat. The firm stated the worker provided his own hear, boots, hand tools, business license. (no copy provided). The firm indicated he was paid by the hour, cash advances were as needed. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated the worker was unable to work due to other job responsibilities.

The worker indicated he performed general labor services for the firm, loading rocks into buckets. He was instructed where to dig and how much to load. He was instructed when to show up for work. Services were performed at the firm's quarry. He had no authority to hire anyone. He indicated the firm provided a reflector jacket, rain jackets, and hard hats. He agrees he was paid by the hour, the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. Services were performed under the firm's business name. He stated the season ended and he was laid off.

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

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

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.

Analysis

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. 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.

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.

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. No evidence or substantiation was found or provided by the firm to show the worker owned and operated his own business. The facts presented, indicated the worker was a seasonal laborer, performing services under the firm's business name, paid by the hour and given cash advances as needed. The fact individuals are hired on a seasonal basis, does not make that person an independent contractor. Thousands of workers perform services on a seasonal basis, landscaping laborers, paving companies, summer cook shacks, camping parks, Christmas seasonal help etc. The fact they work season or part time, does not indicate they own and operate their own companies.