

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.177 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 laborer doing general clean-up and hauling of materials in tax years 2014 and 2015. The firm's business is described as carpentry work and general contracting.

The firm's response was signed by the owner. The firm's business is described as general contracting – renovation and repairs. The worker performed services as at-will labor, performing various labor, clean-up, and painting.

According to the firm, the only instructions given to the worker was when the project needed attention; there was no formal training provided. The job assignments came from the firm on the job and over the phone; however, the firm stated the worker determined the methods to be used to perform the job tasks. The firm stated the worker worked on some of the firm's larger jobs as an independent day laborer to supplement his client base. The firm indicated the sub-contractors would try to resolve any problem encountered; but, if an issue continued they would involve the firm. The worker was to perform the services personally. Both parties could hire a helper/substitute; however, if the worker did hire anyone he charged the firm more money.

The worker acknowledged that he was not given specific training; however, he was given instructions on how to perform his daily tasks. The job assignments were given at the end of the day for the next day. The worker stated the firm determined the methods by which his services were performed and that any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered Monday through Friday from 9 am to 5 pm. He indicated he was required to perform the services personally and any additional personnel were hired and paid by the firm.

The parties concurred that at times the firm provided materials and supplies; but, it was not always financially feasible. The worker provided his hand tools, cell phone, and transportation. The firm stated the worker was paid a daily rate but charged a higher amount if he brought a helper; the worker stated he was paid an hourly rate with the customer paying the firm. The firm responded that the worker could incur a loss as it pertained to his transportation and personal tools; the worker stated he was not at risk for a financial loss. The firm indicated the worker established the level of payment for services rendered or products sold; the worker disagreed.

Both parties acknowledged that no benefits were extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker responded that he was not performing same or similar services for others during the same time frame; the firm disagreed and added that the worker advertised with business cars, [REDACTED], [REDACTED], and a website.

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.

If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. However, it is also possible that the individual may be an employee acting in the capacity of a foreman for, or a representative of, the employer.

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.

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.

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.