

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.182 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 carpenter in tax years 2013 through 2016. The firm's business is described as restoration of tobacco barns into small cabins. The worker indicated there were 5-6 workers in the class.

The firm's response was signed by [REDACTED], owner. The firm's business is described as historic restoration, reclaiming, carpentry, and design. The worker performed services as carpenter – tear down and rebuild. There was no written agreement; the worker agreed to perform work and/or be available to perform work for a negotiated set amount each month, in each year.

According to the firm, there was no training or instructions given to the worker; the worker was hired because he was already trained and required no supervision or instruction to perform services for the firm's customers. The work assignments were via a telephone call from the firm. The firm responded that the worker determined the methods by which services were performed and was responsible for the resolution of any problems or complaints; although the worker would notify firm of any issues. The firm stated the worker worked on an as-needed basis and was free to and did perform services for others. The firm stated the worker was required to perform services personally.

The worker indicated he was given specific training and instructions as to disassembly and assembly of the structure. The job assignments were conveyed when the firm's owner drove them to the work site. The worker stated the firm determined the methods by which the worker's services were performed and that any problems or complaints encountered by the worker were directed to the firm for resolution. The worker concurred that he was required to perform the services personally; and added that any additional personnel were hired and paid by the firm.

Both parties acknowledged the firm provided materials, supplies, and equipment; and, the worker provided tools. All purchases/expenses incurred by the worker were reimbursed by the firm. The firm and worker responded that the worker was paid a lump sum payment every month, payable twice a month, even when no work was assigned. The customers paid the firm. The firm and worker concurred that the worker was not at risk for a financial loss in this work arrangement and the firm established the level of payment for services rendered or products sold.

There were no benefits extended to the worker, although he was paid a set amount per week whether he worked or not. Either party could terminate the work relationship without incurring a liability or penalty. The firm stated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker responded that he was represented as an employee and wore a company t-shirt to the job sites. The firm stated the worker was represented as a contractor for the firm.

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.

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. 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 as they pertained the services rendered to the firm. 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.

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.