

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.186 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 finds the firm is a residential and Commercial Electrical Contractor. The worker had been retained for tax years 2014, 2015 and 2016 as an electrician for the firm. The firm reported the income earned on Form 1099-MISC each tax year, stating he was hired as an independent contractor, had his own tools and his own help. He had worker's compensation insurance and completed a W-9. The firm stated they would let him know where to work, and he would let them know what work he needed to do. He primarily determined how he performed the work. The firm indicated there was no set schedule, he arrived at various hours to jobs and worked until he was ready to go home. Services were performed at customer locations 95% of the time. He would often come to the firm's location first to determine the job location. He was required to perform his services personally. The firm stated he would often have his own helper, or the firm would send someone. The firm indicated they provided the pipe bender, Knock-out set and materials. The worker provided his own drills, hand tools and testing equipment. He was responsible for paying for his insurance but had difficulty so the firm helped. He was occasionally given fuel also. He was reimbursed for job materials he had to occasionally purchase to complete a job. The firm indicated he was paid by the hour, the customer paid the firm. The firm stated they negotiated the rate of pay with him. The firm stated they did not represent him, customers knew he was their subcontractor. The worker had a health condition that prevented him from continuing to work.

The worker indicated there was no training, he had prior experience. He was given instruction as to what projects to work, which customer to handle, which supply houses to use and what other employees would be working with him. The firm scheduled all work usually via a morning meetings, phone or text. He provided hand written reports, time sheets (on company provided time sheets, samples provided). He arrived at the shop at eight-thirty am, received assignments, or waited for calls while cleaning the shop. He was paid for all hours worked. Services were performed at the firm's customer location and at the shop. He was required to perform his services personally. He indicated the firm hired and paid all employees. The firm provided the vehicles, uniforms, materials tools, ladders, rental equipment etc. He used his own personal hand tools. He agreed fuel was occasionally given. He was paid \$20.00 per hour, the firm withheld 10 % for taxes and insurance. The customer paid the firm. The firm handled all customer and contract billing. The worker indicated he was given pay when work was slow. Either party could terminate the work relationship without incurring a penalty or liability. He indicated all services were performed as an employee, under the firm's business name. He became disabled due to an amputation.

ANALYSIS

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

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.

The term “full-time” may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

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.

requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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.

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. The term “significant investment” does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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. The worker performed services on a continuing basis, utilizing the firm’s vehicles, company uniform, equipment and supplies. The worker was paid by the hour, indicating no opportunity for profit or loss. The worker submitted a company provided timesheet to record the hours worked. The firm billed and collected payment from it’s customers.