

## SS-8 Determination—Determination for Public Inspection

Occupation

04FSC.12 Overseer

UILC

Determination:

☒ Employee

☐ Contractor

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The firm offers shark tours, placing customers in cages for underwater viewing of sharks and other sea creatures. The worker was engaged by the firm as a boat captain. The firm reported the worker's remuneration on Forms 1099-MISC for 2006-2011.

The parties signed an "Independent Contractor Agreement" stating among other things, the agreement could be terminated by either party with a two-week notice; the firm was not responsible for withholding taxes; the worker was not eligible for benefits; and the worker was free to seek other employment and/or contracts as long as they do not compete or interfere with the business of the firm. Attached exhibits state the worker's duties and rate of pay.

Information from the parties supports that the firm trained the worker. It provided him with his work assignments. The worker performed his services according to the firm's training and expectations. He was required to wear the firm's hat and shirt. The firm provided a written speech the worker was required to memorize. If problems or complaints occurred, the worker contacted the firm for resolution. The worker was required to complete daily captain's reports. He submitted itemized time sheets. The worker followed a routine schedule dependent upon the weather and charters scheduled. He performed his services on the firm's boat. The firm stated that the worker was not required to perform his services personally.

The firm provided the boat and supplies. The worker was responsible for maintaining his coast guard license. The worker did not lease space or equipment or incur expenses in the performance of his services. The firm paid the worker a set rate per trip. It did not cover him under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm stated that the worker performed similar services for others during the same time period. There is no evidence presented that the worker advertised his services or maintained a business listing. He provided his services under the firm's name. The work relationship ended when the parties did not agree on a pay rate for the worker.

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**Analysis**

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Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded. Therefore, the firm's 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm trained the worker. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Training a worker indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. The worker followed the schedule set by the firm. He performed his services on the firm's boat. 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. Although the firm stated that the worker was not required to perform his services personally, there is no indication that the worker could engage and pay others to perform services for the firm on his behalf. Presumably the person or persons for whom the services were performed were interested in the methods used to accomplish the work as well as in the results. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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 firm paid the worker at a set rate and the risk of loss was absent. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. He performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a boat captain were a necessary and integral part of the firm's shark tour business. 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 stated that the worker performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, the work relationship terminated with neither party incurring a liability, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.