

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.15 Overseer	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 indicated the firm provided pilot cars, drivers and flaggers for oversized loads. The worker performed services for the firm for tax year 2013 and 2014. The firm reported the income on Form 1099-MISC.

The firm stated the worker approached ██████████ in February of 2013. He stated he had a strong relationship with an individual who was instrumental in the oil and gas industry in moving the oil and gas drilling equipment from one site to another site. (i.e. that they were required to have flag cars, police escorts etc. He had explained he was previously affiliated with ██████████ of ██████████. After investigating the parties determined they would need to buy approximately 15 vehicles and line up drivers who would be available on a per diem basis. ██████████ was not able to obtain financing on his own due to a felony record. They reached an agreement that they would form a partnership (LLC). It was also agreed ██████████ would be responsible for obtaining financing in order to purchase the 15 vehicles. He would also be responsible for accounting, bookkeeping and billing. The worker was responsible for finding drivers, arranging through his contacts with the drilling companies, and setting up the routes and times and scheduling the drivers. The LLC was then formed, but ██████████ procrastinated on becoming a member. Distributions were made to him based on his representation he was going to become a member of the LLC. He then decided he did not want to become a member or owner of the business. The relationship between ██████████ and the firm ██████████ deteriorated. On December 20, 2014 he took his contacts and the drivers and went with ██████████. The firm has had no active business with ██████████ since.

The firm supplied the vehicles to the drivers; they considered them employees and gave them W-2 forms. The firm also utilized workers who supplied their own vehicles; they were treated as independent contractors at the end of the year and received a 1099-MISC. ██████████ was one of those individuals. The firm stated the owner's draw was \$1,500.00 per week plus gas and plus share of profits. The customer paid the firm. He could have suffered damage and wear and tear to his vehicle. The worker also received bonuses. The worker terminated the relationship on 12/20/2014.

The worker stated he was to coordinate, communicate and orchestrate the work at the job site and provide the information to the office for billing and payroll processes. All parties involved are responsible for resolution of any issues. He was to perform the services personally. He could hire the individuals, but the company paid them. The company reimbursed for all expenses. The firm provided all necessary equipment, gas, hotels etc. He agreed he provided his own vehicle. He was given a set salary. The customer paid the firm. He agreed he could have incurred damage to his vehicle. He agreed he also received bonuses. He was represented as an employee of the company.

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 services are performed.

Analysis

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 firm has provided it was the intent he and the worker were partners in this firm. Although, the worker did not commit the services performed were done so under the firm's business name, to promote the growth of the firm. Drivers drove the pilot cars owned by the firm or their own cars, but they all performed the same job, to pilot the over size load, the firm had taken on as a client. The fact they used their own vehicle, did not make them in business for themselves. It was a tool of the trade, and not a significant investment in their own pilot business. The worker was given a guaranteed weekly salary for the work he performed. The client paid the firm for the services received.