

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.21 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

The firm is in the business of developing marine renewable technology. The worker was initially engaged as a consultant; then, became the firm's Chief Technology Officer who directed the engineering team, reviewed designs, located suppliers, met with customers, wrote grants and gave presentations. The worker received a 2012 Form W-2; he also received Form 1099-MISC for his services in 2013 and 2014. From information provided, the worker provided services prior to becoming an employee; however, no other pay document was located. There was a written employment agreement signed and dated 5/14/2012; also provided was a Consulting agreement signed and dated 5/14/2014. Though the firm stated that the worker had become a full-time employee, it did not treat the worker as such when it issued him a 2013 and 2014 Form 1099-MISC for his services as a Chief Technology Officer.

The worker noted that all of his activities were approved by the Chief Executive Officer (CEO.) Both parties agreed that the worker was self-directed; the worker also indicated that a work assignment/task could be requested by the CEO. Both parties agreed that the worker determined the methods by which the assignments were performed; the worker included the CEO as well. Both agreed that the firm's CEO would be contacted if any issues or problems arose. Only the worker mentioned that he submitted cost estimates, program management progress reports, and government quarterly engineering reports. Both parties agreed that the worker worked regular scheduled hours; the worker added that he sometimes worked up to sixty hours a week. He self-managed his time between the many facets of his job. Both the firm and the worker agreed that he worked at home or at the office; the worker included the firm's lab as well. Both agreed that there were meetings to attend. The worker noted that he was required to provide the services personally; he could hire but the firm would pay.

The firm provided the office; the worker noted that it also provided the cell phone, home internet, home office supplies, lab equipment, conference room, lab and tools. The worker provided a computer and home office. Both parties agreed that the firm would reimburse the worker for travel expenses. Both also agreed that he was paid a salary and had no other economic risk. The customer paid the firm. The firm carried workers' compensation insurance on the worker. The firm established/negotiated the level of payment for services.

Both the firm and the worker agreed that there were insurance benefits with the worker including paid sick, personal days, holidays and vacation as well as stock options. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. Both agreed that there was a non-compete agreement in place. The firm indicated that the worker was issued business cards showing his title and contact information at the firm. Both agreed that the worker was represented as an employee of the firm for the time period in question. The relationship ended when the worker quit.

Analysis

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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. It is acknowledged that the worker was a skilled and experienced professional. When he was engaged to provide his services, he was given considerable latitude in the performance of his services as he was engaged to plan and execute all engineering, manufacturing and project management activities as well as assist in fund raising. He was to devote his full business time and energies to the firm. The worker remained reportable to the firm. He worked set scheduled hours, essentially full-time and continuous throughout the time period involved. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

Also, 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. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. In addition, the worker provided his services on a continuous basis throughout the time period involved. 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.

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. The worker received an annual salary and was to be paid bi-weekly though this apparently did not happen; however, he had no other economic risk other than the loss of his compensation. 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.

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. There were benefits; and there were written agreements. One addressed the worker's employment situation; the other addressed the termination of employment and retention as a consultant/independent contractor. The worker was engaged as the Chief Technology Officer for the firm. He was not engaged in an independent enterprise, but rather his services were essential and integral to the firm's continuing operations. 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.

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.