

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.31 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 manufacturing and selling utility-type trailers. The worker had been a dealer sales representative for 6/23/1998-12/19/2007, 12/20/2010-7/5/2012, and 2/9/2015-9/2/2015. For 3/9/2013-2/9/2015, he was engaged to provide inventory count services throughout the US at third party dealer locations. For the time periods when he performed services as a dealer sales representative, the worker received Form W-2 as an employee. However, for the time period when he provided inventory count services, he was given a Form 1099-MISC. This case will address the time period during which the worker received a Form 1099-MISC. There was no written agreement.

Both the firm and the worker agreed that the firm told the worker where to go to count inventory; he was given a weekly activity calendar. Both parties agreed that the worker received his work assignments from the firm’s supervisory personnel by email, text, phone, or in person. The worker did not routinely make sales calls but might do so at the firm’s request or at his own discretion. All orders were subject to and approved by the firm. Each party indicated that the other determined the methods by which the assignments were performed. But both agreed that the firm would be contacted if any problems or issues arose. Both parties agreed that the worker was to submit inventory count sheets and expense reports. The worker noted that his routine and schedule changed depending on the location. He traveled by air and/or car, inventoried dealerships, collected out-of-trust accounts and sent reports to the firm; he then traveled on to the next location. The firm noted that it did not determine the worker's schedule or time spent. The worker traveled to and worked at various customers’/dealership locations. There were only occasional meetings with the sales manager to discuss locations to inventory and, according to the firm, no meetings were required to attend. Both parties agreed that the worker was required to provide the services personally; the firm noted that only they could hire and pay any substitute workers.

Both the firm and the worker agreed that the firm provided the laptop, phone and all travel expenses. The worker incurred rental car, fuel, motel and food expenses for which he was reimbursed by the firm. The worker noted that he received a per diem for meals and had to use specific hotels. The worker was paid a salary plus a set amount for every location inventoried,. The firm agreed and noted that if the worker made an occasional sale, he was also paid commission. Both parties agreed that he had no other economic risk. Both also agreed that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits during the independent contractor time period and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The firm mentioned that the worker used previously issued firm business cards; the worker would let customers know that his services were being performed at the firm’s request. The relationship has ended.

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 work relationship had changed during the time period in question. The worker was given considerable latitude regarding his work schedule, time allocation, and supervision. The worker likely already had a positive work history with the firm and was offered the work/job because of the past employment relationship. However, the firm continued to provide the worker with instructions and his assigned duties. He performed his services according to the firm's scheduled weekly activity schedule. He no longer worked at the office and work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. Obviously the worker had to count the firm's inventory where it was located. He was to submit the reports to the firm. He also 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. Although the worker no longer worked at the firm's location, he was provided with a laptop and phone for his work on the firm's behalf. The firm provided and/or reimbursed all of the associated travelling expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. The worker received a base amount along with a per inventory count fee. 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.

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 no benefits involved and there was no written agreement. The worker was engaged to confirm and verify the firm's inventory at their customers' locations. When initially engaged, he was not in an independent business venture promoting his ability to provide those service. He did not maintain an office, advertise or hold himself out to the public. But instead his services were part of the necessary activities of the firm's 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 for the time period in question.

Please see Publication 4341 for guidance and instructions regarding firm compliance.