

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.43 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 worker submitted a request for a determination of worker status in regard to services performed for the firm from November 2013 to February 2016 as vice president of marketing and a co-founder. The work done by the worker included speaking to the news, attending events, and marketing and selling the business, in addition to serving as a co-founder. The firm's response indicates Form 1099-MISC were issued for 2014 and 2015. A copy of the 2013 tax reporting document was not provided. The 2016 tax reporting document is not yet due to be filed. The worker filed Form SS-8 as he has not received tax reporting documents. He believes that as an employee taxes should have been withheld from his earnings.

The firm's response stated it is an online e-commerce service market place for connecting concierge services. The worker was engaged as vice president of sales and responsible for building relationships with prospective partners. The worker signed a shareholder document referencing him as a co-founder. A copy of the shareholder document was not provided.

The firm stated it provided the worker specific training and instruction related to industry specific sales, marketing, and competitive knowledge. The firm provided work assignments to the worker. The firm provided the worker guidance in determining the methods by which assignments were performed. The firm was ultimately responsible for problem resolution as the worker worked with the founder for resolution. As an e-commerce business, results (reports) were seen online. The worker's routine consisted of 9 am to 6 pm, Monday through Friday. Services were performed at the firm's office, unless the worker was traveling for sales. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable.

The firm provided the office environment and required supplies. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses as the firm reimbursed him for travel related expenses. Customers paid the firm. The firm paid the worker salary; a drawing account for advances was not allowed. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided.

As required by state legal law, the firm provided the worker the benefit of sick pay. The relationship could be terminated by either party without liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as an employee and co-founder to its customers. The work relationship ended when the worker quit.

The worker was responsible for cold calls, personal visits, market research, and working with the product team in soliciting new customers. The firm provided leads to prospective customers and information was entered into the firm's reporting system. Terms and conditions of sale included a contractual agreement between the firm and vendor. Orders were submitted and subject to the firm's approval. The firm and worker determined the worker's territory. The worker did not pay for the privilege of serving customers. E-commerce services included parking, dining, and event tickets.

Analysis

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.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm provided the worker specific training and instruction related to services performed. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments, ultimately determined the methods by which assignments were performed, and ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the salary rate of pay arrangement the worker could not realize a profit or incur a loss.

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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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 can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.