

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.45 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 a limited liability company in the construction/remodeling business. The firm engaged the worker as a project superintendent/construction worker. The worker filled out an application for the position. There was no written agreement between the two parties.

The worker received no training for the services he performed. The worker received his assignments from the firm. The worker stated the firm determined how the assignments should be performed and the firm stated the worker decided how the assignments should be performed. The worker relied upon the firm to resolve problems and complaints. The firm stated the worker was required to submit weekly invoices. The worker stated he was required to perform his services from 7:00 a.m. to 4:30 p.m. and was instructed where to perform his services. The firm stated the worker set his hours according to the requirements to complete the tasks. The worker performed his services on the job site. The worker was required to attend safety meetings. The worker was required to perform the services personally.

The firm stated they provided the materials needed for the worker to perform the services and the worker stated the firm also provided the large tools needed for the services. The worker provided his personal hand tools. The worker was paid on an hourly basis. The customers paid the firm directly. The worker stated the firm established the level of payment for the services provided and the firm stated the worker established the level of payment.

The worker received no benefits. Either party could terminate the relationship without incurring a liability. The worker stated he did not perform similar services for others and the firm stated the worker did provide similar services for others. The worker stated he was represented as an employee and the firm stated the worker was represented as an independent contractor. The worker stated the firm terminated his services and the firm stated the worker could no longer fulfill his job requirements.

The worker provided testimony the state of [REDACTED] as determined him to have been an employee. The firm provided a weekly record of payment to the worker for the services he performed.

Analysis

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.

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. In the instant case the worker was performing construction services for the firm's remodeling business which demonstrated the worker's services were integrated into the firm's daily operations.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In the instant case the firm did require the worker to perform his services personally.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. In the instant case even though the firm stated the worker invoiced him weekly the worker was required to provide the hours he performed services on a weekly basis which is indicative of a time sheet in an employer-employee relationship.

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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm.

The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. In the instant case the firm did discharge the worker as a result of the fact the worker could no longer perform his services.

The worker was an employee according to common law. The fact the worker was required to fill out an application demonstrated the firm was looking for an individual that was qualified to perform the services the firm needed without being trained. The fact the firm required the worker to perform his services personally demonstrated the firm was interested in the methods used as well as being interested in the end result as an employer. Control by the firm was also shown since the firm required the worker to attend safety meetings. It was the firm that had the financial investment and had the potential to suffer a significant loss as the firm provided the worker with the materials, large tools, set the rate to charge the customers and was responsible to collect the amount they charged to their customers. The worker was paid by the hour and did not have a significant investment in the performance of his duties. The worker did provide his own personal hand tools but this is a common practice for this type of industry. The fact the firm retained the right to discharge the worker showed control by the firm through the threat of dismissal.

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.

Please go to www.irs.gov for further information.

Firm: Publication 4341

Worker: Notice 989