

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Manager	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is in the business of providing information technology consulting and technical services and the worker was engaged from August 2008 to November 2015 as an IT support technician for their client at their client's business location. The worker's duties included acquisition logistics and training, office relocation, support of end user computer issues, and manage and teach other technicians.

The firm believes the worker was an independent contractor while performing services for their client because the worker controlled the manner and means which he used to achieve his customer assignments, the worker was not reimbursed by their company for expenses which he incurred, the worker was free to seek other business opportunities, the worker received no benefits from them, the worker represented himself as an independent contractor/consultant, the worker received no formal training from their company, the worker was not required to take any formal training to perform assignments, the worker controlled his dress code and his own hours and work schedule, the worker was not given any performance evaluation by their company, and the worker and their company negotiated the worker's fees each time the assignment changed. The firm reported the worker's earnings on Forms 1099-MISC.

The firm states the worker performed assignments and handled issues which were presented by the firm's client. The worker determined his approach to solving the issues and achieving the assignments.

The firm states they provided no training or instructions to the worker in order to perform his services. The firm states the worker set his own hours and schedule, he performed tasks needed by the client according to due dates set by the client, and each day the worker's routine was different depending on issues which arose. The worker was required to personally perform his services and he performed those services 90% of the time at the client's location and 10% of the time at the worker's home or at an offsite location. The firm states the worker was not required to submit reports to them or attend meetings. The firm states they were responsible for the hiring and paying of substitutes or helpers. The firm states the worker was required to notify them if any problems or complaints arose for their resolution.

The firm states they provided no equipment, supplies, or materials to the worker in order to perform his services. The worker provided a cell phone and the firm's client provided a computer, an office, and office supplies to the worker. It is unknown to the firm if the worker incurred expenses while performing his services but the firm states their client reimbursed the worker for travel expenses he incurred for assignments. The clients paid the firm for services rendered by the worker and the firm paid the worker on a salary basis. The firm states both they and the worker agreed on fees for services rendered by the worker. It is unknown to the firm if the worker could incur a loss as a result of his services.

The firm states the worker was not eligible for employee benefits. It is unknown to the firm if the worker performed similar services for others. The worker did not advertise his services to the public. The firm states they represented the worker as a contractor for their company. Either party could terminate the work relationship at any time without either party incurring a liability.

A written agreement existed between the firm and the worker that states the worker would perform his services as an independent contractor and would be responsible for the payment of taxes on his earnings.

Analysis

As in this case and 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, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker was required to attend mandatory meetings as evidenced by the information provided in this case. The firm afforded the worker with a great deal of freedom while performing his services as the majority of his services were performed away from the firm's premises and at its client's location. However, the worker provided his services on behalf of and under the firm's business name and for the firm's client rather than for an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their client. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their client.

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.

If a worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees, that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed and, accordingly, the existence of an employer-employee relationship. There is no evidence presented or found in this investigation that the worker made any investment indicative of an independent contractor status.

A worker who can realize a profit or suffer a loss as a result of his or her services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but a worker who cannot is an employee. Because the worker did not have a financial investment in the firm or in a business of his own, he could not incur a loss or realize a profit, as would an independent contractor, thus indicating the existence of an employment relationship.

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.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

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.