

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.3 Manager	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 initiated the request for a determination of his work status as an assistant project manager, alternate QC manager, alternate safety officer from November 2010 to January 2012. The firm's business is described as construction; government contracts received by [REDACTED] status.

The firm's response was signed by [REDACTED], president. The firm's business is described as logistics, construction, and IT work. The worker performed services as a subcontractor on the job and as an assistant safety officer on site. The work performed was primarily remodeling and repairing existing structures at a National Park. The firm indicated the worker bid the job and worked as an Independent Contractor in tax years 2010, 2011, and 2012.

According to the firm, there was no training or instructions given; the worker was required to follow the requests/work assignments of the Park Service Contracting Officer ([REDACTED]) regarding which sites to work on. The worker determined the methods to use to perform his job duties and was required to provide daily reports. The firm responded that the worker was to contact the PSCO if he encountered any problems that required resolution. The worker was required to provide the services personally and was responsible for hiring and paying for helpers/substitutes.

The worker indicated that he was told what sites he would be working on and when and the completion of daily progress reports. He stated the job assignments came via a daily phone conversation with the firm's home office and the firm's project supervisor. The firm determined the methods by which the worker's services were performed. He stated that any problems or complaints encountered were directed to the firm. His daily routine consisted of sending and receiving emails and faxes to and from the firm's home office and then to the job site. He indicated that he was not required to perform the services personally; any additional personnel were hired and paid by the firm.

Both parties agreed that the firm provided building materials and a storage container; worker furnished personal tools of the trade and his vehicle. The worker did not lease equipment, space, or facilities and did not incur expenses in the performance of the job. The worker was paid an agreed upon amount on a biweekly basis. The customer paid the firm based on their contractual arrangement. The firm indicated the firm did not carry workers' compensation insurance on the worker. The firm responded that the worker was at risk for a loss or damage to his tools, equipment, vehicle maintenance and expenses, repair of improperly completed work performed at the worker's expense; the worker did not agree, stating he had no financial risk.

The firm and worker acknowledged that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. There was no written agreement between the firm and worker. All work was performed under the firm's name and the firm's contractual relationship with the Park Service.

Copies of the quality control plan that listed worker as an Alternate Quality Control manager, as an Alternate Safety Officer, and as the Alternate Project Superintendent. The worker provided numerous emails to and from the firm as to details of the project as well as copies of Daily Reports to the inspector.

The firm provided a list of payments issued to worker in addition to a list of checks issued for per diem paid between November 2010 and January 2012. Copy of [REDACTED] in which the worker is identified as a subcontractor, a copy of the contract awarded to the firm that included reference to the [REDACTED], EEO poster/letter, specifications as to materials to be used, payments, required reporting, and etc.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

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.

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.

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 fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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 opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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 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 and the fulfillment of its contract for services.

CONCLUSION

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.