

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.14 Manager

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**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 payer concerning this work relationship. [REDACTED] from [REDACTED] responded on behalf of the payer in letter form and a completed but unsigned Form SS-8.

From the information provided, the payer states they are not a business but instead, are an unincorporated association consisting of the families that own private summer homes on [REDACTED]. The payer maintains the common areas of the island and they administer joint payments of insurance, utilities, and other common expenses on behalf of the owners. The worker was engaged as an island manager and his duties included providing caretaker services for the owners of [REDACTED] as described in a written contract. The payer did not withhold employment taxes from the worker's earnings and they state they are not required to issue Forms W-2 or 1099-MISC to the worker in connection with the payments he received for these services as they are not in a trade or business.

The written contract between the payer and the worker states the worker would be treated as an independent contractor for services he provided to the payer.

The payer provided no training or instructions to the worker. The payer states the worker used his own judgment to determine what tasks he should undertake and how he should carry them out. On occasion, an individual owner asked the worker to perform a specific task and the worker determined how he performed this task. The worker was required to personally perform his services and his services were performed on [REDACTED]. The worker was not required to submit written reports to the payer but he reported orally to individual owners from time to time concerning the status and progress of ongoing projects. The worker determined his own schedule and he was not required or expected to work a set number of hours. The worker was not required to attend meetings. The worker was required to seek one or more of the owners of [REDACTED] if any substitutes or helpers were needed and these owners were required to pay these individuals.

The payer provided all equipment, supplies, and materials to the worker in order to perform his services. The worker incurred the expense of buying and maintaining his own tools. The payer reimbursed the worker for expenses directly related to the worker's services on the island such as paint for the common buildings. The payer paid the worker at a fixed annual fee and the worker occasionally received additional compensation as agreed for special projects. The payer did not carry workers' compensation insurance on the worker but due to the expense of the insurance and the fact that the worker only obtained the insurance for the services performed for the payer, the payer reimbursed the worker for this expense. The payer feels the worker could incur a loss due to a work-related injury and the loss or damage of the tools and equipment he provided.

The payer states the worker's contract permitted him to provide services to others while he serviced as the caretaker of [REDACTED]. The worker did not advertise his services. Either party could terminate the work relationship at any time without either party incurring a liability.

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.

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 instructions from the payer. The need to direct and control a worker and his services should not be confused with the right to direct and control. Although the worker was afforded with freedom of action while performing his services and could seek work for others, this could only be done if he ensured that the island appeared inhabited and as long as his island projects were timely completed. This indicates the association had priority over the worker's time. The worker was required to personally perform his services. While the worker was not required to submit written reports to the payer, the worker reported orally to individual owners from time to time concerning the status and progress of ongoing projects. There was no evidence presented or found in this investigation that the worker operated his own property management company offering his services to the general public. These factors gave the payer the right to direct and control the worker and his services in order to protect their financial investment and to fulfill their association's purpose.

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.

While the worker provided his own hand tools in order to perform his services this is not considered a significant investment. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. The worker did not incur expenses or have the opportunity to incur a loss as someone in business can as the payer provided all supplies and equipment in order for the worker to perform his services. The firm also reimbursed the worker for the expense of workers' compensation insurance.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

The payer states that their association is not a business but an unincorporated association that maintains the common areas of their island and administers joint payments of insurance, utilities, and other common expenses on behalf of the island owners. The worker was engaged to perform services in connection with the maintenance and care of [REDACTED]. His services, therefore, promoted and advanced the purpose for which the payer's association was established. When an individual is performing services in alignment with the purpose or mission of an organization or association, services are performed in the course of that organization's or association's "trade or business" within the meaning of that term as used in the Federal employment tax statutes. As a result, the worker was performing services in the course of the association's "trade or business".

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 payer'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 payer 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.