

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.19 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

Information provided indicates the firm's business is to provide security consulting, security equipment technology recommendations, vulnerability assessments, physical security audits, seaport security operations, general seaport operations, counter drug training to host nation police and coast guard, logistics support, and field support services. [REDACTED], a manufacturer of cargo and personnel security screening systems, has a contract with the [REDACTED] to provide these systems for use in [REDACTED]. [REDACTED] entered into a contract with [REDACTED] to supply technical support services to maintain and service [REDACTED] cargo and/or personnel security screening systems in the Country of [REDACTED]. The firm engaged the worker as a Logistics Manager responsible to maintain inventory for maintenance of [REDACTED] equipment in [REDACTED]. The firm and worker executed a written Independent Contractor Agreements at the beginning of the work relationship for the term of one year, to include a 90 day probationary period and non solicitation, non compete clause. The firm reported the worker's 2006-2012 earnings on a Form 1099-MISC. Prior determination have been performed for this firm finding field service engineers to also have been employees, performing services under the same contract.

This worker indicated he received instructions from his supervisor, who received his direction from the Vice President who was in the [REDACTED] Corporate office. His employer, [REDACTED] and the customer determined the methods by which assignments were performed. He reported to his supervisor. [REDACTED], the customer and the [REDACTED] are responsible for resolutions. He was required to provide inventory reports, work orders, monthly inventory, logistic reports, hand receipts, radiation meter trackers etc. He performed services seven days a week, starting at 7:30 am, working until the work was completed. Services were performed in [REDACTED]. He stated he was required to attend a weekly phone conference with [REDACTED] Corporate office. Services were to be performed personally. The firm provided all equipment and supplies. He was paid a set salary and reimbursed for supplies. The customer paid the firm for the services provided. The worker indicated he was given paid vacations, sick pay and bonuses. Either party could terminate the work relationship without incurring a penalty or 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 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 provided his services on behalf of and under the firm's business name rather than 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 clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment and their contract with their client.

The services performed by the worker were integral to the firm's normal, daily business operations and fulfillment of the agreement they had with [REDACTED]. The firm instructed the worker and retained the right to terminate the worker's services for unsatisfactory job performance. Based on these facts, the firm retained overall control over the worker and his services to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

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.

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 was paid a fixed monthly salary. Based on this pay arrangement, the worker did not have the opportunity to realize a business profit or incur a business 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.

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.