

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.27 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 firm is in business as a private non-profit corporation assisting entrepreneurs through business consulting, training, and lending. The worker was engaged by the firm as a project manager in an economic recovery position to oversee the loan and grant applications received for [REDACTED] businesses affected by Hurricane [REDACTED]. The firm reported the worker's remuneration on Form 1099-MISC for 2013 and 2014.

The agreement between the parties states that the firm will compensate the worker at the rate of \$1,175 bi-weekly for 35 hours of work per week. It will pay all documented and reasonable work related expenses incurred, including mileage. Monthly reports and receipts are required for payment. Time records to document hours worked and expense forms are due on the last day of the month. The firm designates the stated person as the worker's contract officer; all matters relative to the agreement shall be coordinated through the contract officer. If any disputes or claims arise, the worker will perform in accordance with the contract officer's decision. The firm may terminate the performance of work under the agreement in whole, from time to time, or in part whenever it is in the best interests of the firm. If the worker fails to fulfill her obligations, the firm may terminate the agreement by written notice to the worker specifying the acts of omissions.

Information from the parties supports that when the worker was hired she met with the firm's CEO, loan officer, and the executive director, who was also in charge of overseeing the project. The worker received her work assignments through [REDACTED] County Economic Development and the [REDACTED] Department of Economic Development, as well as through the firm. She performed her services according to the [REDACTED] Department of Economic Development. If problems or complaints occurred the worker contacted the above entities. The worker was required to submit time sheets verifying her activities. The worker's schedule was 8:30 to 4:00, Monday through Friday and consisted of meeting with applicants and processing loan and grant applications. The worker's office was located in the [REDACTED] County Economic Development Department. The worker was required to perform her services personally.

The firm supplied the office supplies and designated the office space. The worker did not lease space or equipment. The firm reimbursed her for mileage and work related expenses. The firm paid the worker a bi-monthly salary. It did not cover her under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. The worker did not advertise her services or provide similar services for others during the same time period. She performed her services under the firm's name. The worker was prohibited from engaging in any activity that would give rise to a conflict of interest. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

Analysis

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, coadventurer, 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. If a firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her service, the firm designated a contract officer to oversee the project and to whom the worker reported. The officer retained the right to change the worker's methods and to direct the worker to the extent necessary to protect the firm's financial investment. The firm required the worker to work 35 hours per week. It specified the location at which the worker provided her services. 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. The worker was required to submit time records and monthly expense reports. 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. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The firm paid the worker on a salary basis. Workers are assumed to be employees if they are guaranteed a minimum salary. The firm reimbursed the worker for work-related expenses. 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. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a project manager were a necessary and integral part of the firm's mission of assisting entrepreneurs. 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 business. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.