

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.36 Manager

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is in the business of residential real estate development. The worker was engaged by the firm as a sales broker. The firm reported the worker's remuneration on Form 1099-MISC for 2013. The firm and worker signed an Employment Agreement effective February 4, 2013 stating the worker's status as that of an "employee".

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The worker's assignments were outlined in the agreement. If problems or complaints occurred, the worker contacted the firm for resolution. The worker followed a routine schedule. She generally performed her services on the firm's premises. The worker was required to perform her services personally.

The firm provided the business cards and keys to the model home. The worker provided her cell phone and lap top. The worker did not incur expenses in the performance of her services. The firm paid the worker on a commission basis with a bi-weekly draw. It did not cover her under workers' compensation. Customers paid the firm directly at prices established by the firm. 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 provided the worker 10 paid time off days per year. Both parties reserved the right to terminate the work relationship with a two-week notice without incurring a penalty or liability, beyond the worker's requirement to pay back any outstanding draws not recovered by commissions earned. The worker did not provide similar services for others during the same time period. She advertised her services with the firm's business cards. The work relationship ended when the worker resigned.

Analysis

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 to perform her services, the firm was responsible for resolving any problems or complaints. It is only reasonable to assume that it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker followed a routine schedule and performed her services on the firm's premises. 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 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 commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. Draws are considered salary and taxable. 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 under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a broker were a necessary and integral part of the firm's residential real estate development business. 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. 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.