

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.46 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 firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a marketing and experience design agency and the worker was engaged as a project manager for the firm's office move. The worker coordinated efforts with vendors and the firm's staff to ensure a successful move to the firm's new location. The firm states the worker was an independent contractor as she signed a contract to serve as an independent 1099 contractor with no entitlement to employment benefits, she negotiated an hourly rate, and she was in control of her schedule.

The firm provided no training to the worker. The worker received work assignments through email or in-person meetings at the firm's office. The firm provided the worker with a project plan which to execute throughout the duration of her assignment to manage their move. The firm states that the methods by which the worker performed her services were determined by her. The worker was required to personally perform her services and she performed her services from the firm's existing premises and at the firm's new office location. The worker was required to notify the firm if any problems or complaints arose for their resolution. The worker was required to submit hours worked to the firm to ensure they stayed on budget for the project. The firm states no other reports were required other than regular email communication updates. The worker generally worked during standard business hours. The worker sometimes performed services in the evening depending on the work that she needed to perform and to allow for better coordination between the firm's staff and vendors. The firm states the worker organized all necessary meetings on her own.

The firm provided computer equipment to the worker in order to perform her services. The firm states the worker incurred transportation expenses which they did not reimburse. The worker was paid at a negotiated hourly rate and the firm reported the worker's earnings on a Form 1099-MISC. The firm did not carry workers' compensation insurance on the worker. The worker did not have an investment in a business related to services performed and she did not have an opportunity to incur a loss as a result of her services.

The worker was not eligible for employee benefits. The worker was not prevented from working with any other companies during the time period she performed services for the firm. The worker did not advertise her 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. Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees. 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 her services should not be confused with the right to direct and control. Even when a company allows a worker considerable latitude in performing their services, the retention of the right to give instructions or directions, without exercising that right, is enough to make the worker an employee. In many instances, this retention is indicated by the requirement that the worker provide the firm with frequent reports of the project such as in the firm's offer letter to the worker. In some respects, a manager is free and is expected to exercise his or her own judgment and initiative as to the operation or running of a project and is many times hired due to their experience and knowledge. However, the worker's position was that of a supervisory employee overseeing the firm's project acting for and on behalf of the firm and not that of an independent contractor acting for and on her behalf. The firm alone had the right to determine what their project plan consisted of and they retained the right to issue general instructions as to the means to be used to reach those objectives.

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.

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. While the worker's services were not integral to the functioning of the firm's office per se, the worker was instrumental in overseeing and implementing the firm's project plan for their company move. In this investigation, we looked at whether the worker displayed characteristics of an independent contractor; such as the outpouring of money into a business offering those services to the public and the opportunity to incur a loss or realize a profit as a result of her services. The worker in this case did not have this. The worker did not have a business license or business registration in the state which she performed services and there was no evidence presented that the worker bid on the job with the firm. While the worker did perform services on a temporary basis, this in and of itself does not make the worker an independent contractor as both employees and independent contractors can be engaged by a company when the needs of a business warrants. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.