

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.50 Manager

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of operating an online newspaper. The worker was engaged to provide technical, reporting, and editing services during the start-up of the firm. He was part of a management team and was in charge of overseeing website content, production, and staff. He received a 2011 and 2012 1099-MISC for his services. There was a written agreement; however, a signed and dated copy was not available. There was, however, an email from the firm to the worker offering him the position. It indicated that the worker would be the chief newsroom executive in charge of content and production. His responsibilities would include hiring and evaluating staff performance as well as budget management. He was offered an annual salary, and eventually, a benefits package once one was established.

The firm gave the worker instructions outlining his responsibilities and the firm's expectations regarding the execution of the worker's job which included the management and hiring of new employees along with the website's daily content. Both parties agreed that the firm gave the worker his task assignments which included strategic objectives and performance expectations regarding quality standards and quantity productivity. Both agreed that the publisher determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The firm indicated that there were no required reports however the worker noted that he submitted new stories, updates on website progress, information on new hire interviews as well as production and employee updates. The firm noted that he was expected to be at work early in the morning; the worker noted he arrived at work between 8-9am, posted new stories to the website, discussed upcoming projects with reporters and producers, relayed information to the publisher, and left between 5-6pm. The worker noted that all his work was performed at the firm's office; the firm, however, indicated he could work at home or at the office. There were various required meetings with the staff and with the publisher along with production meetings. Both parties also agreed that the worker was to provide the services personally with only the firm hiring and paying any substitute workers.

The firm indicated that it provided the worker with a cell phone and office computer; the worker also included the office, desk, parking passes and miscellaneous office supplies. Both agreed that the worker provided cameras, with the firm adding that the worker provided a laptop as well. The worker incurred transportation costs and other minor supply expenses; he was reimbursed for mileage by the firm. Both agreed that he received a salary, was paid twice a month, and had no other economic risk; the firm added that he could incur a loss or damage to his equipment. Both agreed that he received advances. Both agreed that the customer paid the firm. The firm noted that it carried worker's compensation insurance on the worker. Each indicated that the other party established the level of payment for services with the firm adding that it was mutually agreed upon.

There was disagreement over whether there were benefits as the worker listed paid vacations, sick pay, personal days, and insurance benefits. Both agreed that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm indicated that he did. The firm indicated that the worker sold photos on-line at several sites, abusing media privileges. The worker noted that the firm provided business cards. The firm noted that he was represented as part of the firm's team; the worker noted as an employee. The relationship ended when, according to the worker, he was fired. The firm noted that he rejected the new extended contract offer; however that renewal contract did not appear to be for the same position for which the worker was initially hired.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm provided the worker with his instructions and assigned his duties/responsibilities. Though his work schedule was flexible, he performed his services according to the firm's work hours and days. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The firm indicated that the worker could work from home but as a supervisor of other workers, this would not be reasonable. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

The worker also provided his services on a continuous basis throughout the time period involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. In addition, according to information provided, the worker filled out an application and submitted a resume. The firm presumably hired the worker because of his skills in this line of work and undoubtedly expected him to provide the services. 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.

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. The firm provided the office, furnishings, equipment and supplies. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. In addition, the worker was paid twice a month based on an annual salary. 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.

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. There was disagreement regarding the actual provision of benefits and the initial signed agreement was not available. However, the worker was engaged to provide his services in starting up the firm's online newspaper. When working for the firm, he was not engaged in an independent enterprise, but rather the services performed by the worker were part of the necessary activities of the firm's business activities. In this instant case, whether or not the worker's performance met with the expectations of the firm, would not be a determining factor of the type of relationship that occurred. 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.

It is acknowledged that the worker may have worked for others providing services as a photographer or engaged in other ventures. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them.

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.