

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.52 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 payer concerning this work relationship. The payer responded to our request for completion of Form SS-8.

From the information provided the payer is a not-for-profit corporation that works with a city mayor's office of [REDACTED] to support civic life through public programming. The worker performed services for the payer as a lighting supervisor. The worker's duties included making sure stage lighting was installed for performances, supervising any and all stage hands working on the stage, bringing in the stage crew that was needed, and recommending vendors if additional supplies were needed. The payer believes the worker was an independent contractor (IC) because his hours were based on a per show schedule, he was paid by the client on an invoice for services, he always had the option to refuse work and sometimes had someone else cover his hours if he was working his other job, and he didn't have to work if the client had a lighting supervisor.

The payer provided no training to the worker as the worker came in to work on a project with the necessary skills needed. If the payer's client was not confident the worker was able to do what was needed, the client could bring in their own person. The worker's assignments were based on client needs and the worker was supposed to talk to the client to determine what the clients' needs were. The payer states the worker determined how he completed his assignments. If problems arose on the job site, the worker was required to notify the general manager and the general manager discussed the problem with the client. If the problem had to do with lighting, the worker was expected to resolve the issue to the best of his knowledge and resources. The worker was not required to submit reports to the payer. The worker was required to personally perform his services at the city theatre; his time spent there was based on client needs. The payer states the worker was expected to arrive at the theatre 30 minutes before the client arrived to get the lights in the building on and to meet whoever the worker hired as a stage hand. The worker was to perform whatever was needed to make sure his stage hands cleaned up, loaded-out and locked down the building. The payer states stage hands were hired by the worker and for the first five (5) years, the worker paid the stage hands from his earnings but ultimately all hours were paid for by the client.

The payer provided in-house installed lighting to the worker in order to perform his services. The payer states sometimes the worker brought in additional lighting or equipment from the lighting company he worked for. The clients provided any special lighting that was required. The worker did not incur expenses and he was usually paid at an hourly rate but the payer states that sometimes the worker was given a direct fee. The customer paid for all independent staff along with rental of the space. The worker agreed to a specific per hour rate to charge clients.

The worker performed similar services for others and he was not required to seek the payer's approval to do so. The payer states the worker advertised his services via a business card and worker performed his services under his own name. The payer represented the worker to customers as the contracted lighting supervisor or technical director. 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. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the payer. 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 the payer and for the payer's clients. There was no evidence presented that the worker owned or operated his own business and that he performed his service on behalf of an entity of his own. The payer was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the payer the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The worker's services were integral to the functioning of the payer's theatre and he was instrumental in overseeing and implementing the payer's clients' projects. 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 his 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 he performed services. While the worker did perform services on a sporadic 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.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the payer and their clients.

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 performed services for another entity while performing services for the payer, it is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting oneself and be an employee of one or all of whom engages him. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

Based on the above analysis, we conclude that the payer 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.