

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.104 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 worker initiated the request for a determination of his work status as a production manager in tax year 2013. The firm's business is described as design and manufacture of LED lights for cameras. The firm issued the Form 1099-MISC.

The firm's response was signed by the president. The firm's business is described as a motion picture production and post-production services business. There was an opportunity to relocate a motion picture lighting manufacturing business. The worker was hired to explore feasibility of bringing production to another location and establishing a production center or build out of this production center as a separate company with the goal of being an employee - production manager.

According to the firm, there was no training given to the worker as the worker had interviewed and claimed to be an expert in the field of logistics and production management. The firm stated there was one main goal – to evaluate and coordinate the reestablishment of a production facility. Any problems were directed to the firm for resolution. There was no set schedule; the services rendered at the firm's location and on extended trip to another state. The worker was to coordinate with others as to the move as to the move of the production facility; the firm was responsible for paying for the helpers. In essence the worker was in agreement; although, he stated the firm did provide him with specific training and instructions.

The firm provided the worker with use of an office and computer. The worker provided his expertise. The expenses incurred by the worker were reimbursed by the firm. Per the copies of the invoices the worker was paid the same amount every week based on 40 hours. The firm acknowledged there was no customer payments involved and that the worker was not at risk for a financial loss in this work arrangement. The worker was in agreement and stated his compensation was based on a salary.

Both parties concurred that there were no benefits extended to the worker; the worker indicated that he would have been entitled after his 30 day-probation. The firm terminated the worker's services.

Analysis

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. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business project.

CONCLUSION

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.