

SS-8 Determination—Determination for Public Inspection

Occupation 05COU Counselors	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 firm provides tutoring and mentoring services to students. The worker was engaged by the firm as an academic mentor, student support specialist, and program coordinator throughout her work relationship with the firm. The firm reported the worker's remuneration on Forms 1099-MISC for periods of time in 2014 and 2015. It issued the worker Forms W-2 for 2011 through 2016.

The firm submitted the Student Support Facilitator job description for which the firm treated the worker as an independent contractor. It includes the requirement that the worker submit weekly updates. Its core competencies for staff members required the worker to take proactive actions to maintain the program's integrity, develop specific goals and plans to organize and accomplish work, manage her own time and the time of others, and prioritize her workload. It further states that the Student Support Facilitators are independent contractor positions, with the specific work schedule, student caseload, and support duties to be determined collaboratively with the assigned partner school site.

The worker provided the agreement between the parties stating, among other things, that the worker is acting as an independent contractor and the firm will not treat her as an employee for tax purposes, workers' compensation, unemployment compensation, etc.; the worker is expected to use her own equipment, supplies, and tools, except those offered by the firm; the worker will determine, in her reasonable discretion, the manner and means by which the terms of the agreement are accomplished, subject to the requirement that the worker comply with the agreement, applicable laws, proper business practices, and accepted professional and industry standards; the agreement does not preclude the worker from engaging in other pursuits or providing services to others; the worker shall not delegate, assign, or subcontract any part of her obligations under this agreement without the express written agreement of the firm; the firm shall pay the worker a flat rate, biweekly; the worker may terminate the agreement upon 21 days written notice, the firm may terminate the agreement without cause or for any reason upon 14 days written notice to the worker, and the firm may terminate the agreement effective immediately if any of the stated events occurs; and upon termination of the agreement, the worker may not provide tutoring services to the firm's clients. Exhibit A states the scope of work to include attending professional development with the firm and weekly status reports.

The worker also submitted emails between the parties including discussions about the benefits the worker would receive as an independent contractor, to include write-offs to decrease the amount of her income and not having taxes withheld. The emails show the firm's scheduled monthly professional development trainings, and the firm's request that its workers share best practices with each other during a monthly meeting. An email shows the worker's schedule with specified students at set sites, her biweekly pay, and reporting periods. On July 1, 2015, it shares its great news for its workers and offers two major positive changes in their employment: Effective immediately they are being switched from independent contractors to part-time employees which means taxes will be taken out, an on-line timesheet, new paperwork, and an employee handbook; however, some things remain the same: Workers will still need to do attendance, and they will still need to clear days off with the firm and notify their sites. The worker also provided an example of her weekly check-in report.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The firm stated that the worker was not supervised on-site. If problems or complaints occurred, the worker contacted the firm for resolution. She submitted her hours worked for payment. The worker was required to perform her services personally.

The worker incurred expenses for mileage, home office space, health insurance, a cell phone, and supplies. 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.

Analysis

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, coadventurer, 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. If a firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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 and experience to perform her services, it provided the worker with professional development trainings and monthly meetings, showing 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 worker followed the schedule set by the firm. She performed her services on the firm's clients' sites. 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 submit various reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. 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. The firm paid the worker at a set rate, and the risk of loss was absent. 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 on a continuing basis. She performed her services under the firm's name, enabling the firm to fulfill its obligations to its clients. 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. 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 could have performed similar services for others during the same time period; 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. The worker was prohibited from performing services for the firm's clients. Generally a non-compete agreement indicates the employer is exercising the kind of control over the worker that an employer would exercise over an employee rather than an independent contractor. These facts show that the firm retained control over the work relationship and services of the worker.

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.

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.