

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE.90 Instructor/Teacher	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

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 an educational tutoring business and the worker was engaged as a tutor. The worker worked with students to improve their reading ability. The firm believes the worker was an independent contractor because she determined her own hours, she worked on an as-needed basis, and she prepared her own lesson plans.

The firm states the worker was given the opportunity to attend training classes which were unpaid. The firm states the worker let them know what hours she was available to work and she would be assigned to work with students based upon the schedule she provided. The worker prepared her own lesson based on her instruction assessments. The firm states the worker determined how she performed her services and the worker was required to notify their office staff if any problems or complaints arose for their resolution. The firm states the worker did not have a set schedule and students were assigned in one hour blocks. The worker was required to personally perform her services and she performed her services at the firm's premises and at public schools. The firm states the worker attended periodic tutor meetings around every six months with no penalties for not attending.

The firm states they provided all folders and papers to the worker in order to perform her services and the worker provided candy, toys, stickers, and games. The worker did not incur expenses, she was paid at an hourly rate, and she did not have an opportunity to incur a loss as a result of her services. The firm states the worker did not establish the level of payment for the services provided.

The worker did not perform similar services and she did not advertise her services. The firm states there was a covenants and confidentiality agreement between themselves and the worker and the worker was represented as tutor/representative to their clients. Either party could terminate the work relationship at any time without either party incurring a liability. The worker terminated the work relationship.

Analysis

As in this case and 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 firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm 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.

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. While the worker may have performed services on an as-needed 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.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the clients and whom did the clients pay. In this case, that relationship was between the firm 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, but rather the services performed by the worker were a necessary and integral part of the firm's business. 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 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.