

SS-8 Determination—Determination for Public Inspection

Occupation

09CME.5/Crew Member

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of providing jet aircraft management and contract pilot services. The worker was engaged as a co-pilot. She received a 2012, 2013, and 2014 1099-MISC for her services. There was a written agreement.

The firm noted that the worker was already trained and licensed as a pilot. The firm gave the worker her job assignments, such as when to be at the firm's hangar, when to perform maintenance, and when to take aircraft training; however, the firm indicated that no work was assigned. The worker noted that the firm determined the methods by which the assignments were performed and would be contacted if any problems or issues arose; the firm indicated that the chief pilot would determine the methods and would be contacted if any problems or issues arose. Both parties agreed that no reports were required from the worker. The firm noted that there was no daily routine, just show up an hour before the flight. However, the worker noted in detail that she arrived two hours before a scheduled takeoff, and followed the firm's directions in preparing the plane for flight, pre-flighting, loading the flight plan, and running a pre-start checklist. She provided second-in-command duties. Upon landing, she performed the shutdown checklist as well as cleaned and secured the aircraft. The firm noted that the worker had a home office for flight planning and FAA pilot logging; the worker added that her time was spent on an airplane, at the airport or coffee shop, at the hangar, as well as at her home. Only the worker mentioned that there were set scheduled meetings. Both parties agreed that the worker was required to provide her services personally. The worker noted that the firm would hire and pay any substitute workers; the firm mentioned that the chief pilot would hire any substitutes.

Only the worker responded that the firm provided the plane, computer, ipad, equipment chargers, cell phone, subscriptions, navigations equipment, and uniforms. She provided shoes and some clothing; the firm added that the worker provided an aviation headset. Both parties agreed that the worker incurred no significant expenses related to her duties for the firm. The worker noted she was paid a salary; she also received bonuses and day rate for specified flights. The firm noted that the worker was paid twice a month for ten days flying. Both agreed that she had no other economic risk. Both agreed that the customer paid the firm. The firm stated that the pay level was negotiated; the worker stated that it was established by the firm.

The worker indicated that there were paid sick days, and holidays; the firm disagreed. Both the firm and the worker agreed that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same time period. The firm noted that she did with the firm's approval; there was disagreement over whether this ever occurred. The worker provided her services under the firm's name. The relationship ended when the worker quit.

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 instructions and her assigned duties. She performed her services according to the firm's scheduled work hours and days. In fact, according to the agreement between the parties, the firm could assign her any flight crew position, as well as other duties and responsibilities. The worker had indicated that she provided services for two aircraft. Her services included travel, taking required training, performing maintenance, cleaning and stocking. She also assisted in flight planning, determining aircraft performance, ordering supplies, and office work from home as well. 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. In addition, the worker provided her 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.

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 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. The worker received a set bi-monthly payment as well as bonuses and a specific daily flight rate. 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.

In addition, the firm covered all the expenses incurred by the worker related to her services for the firm. 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.

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 a written agreement. However, the firm's belief 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. The worker was engaged as a co-pilot for the firm's business. It is acknowledged that the worker may have had a business presence; however, she was not engaged in an independent business venture when working for the firm. Instead, the worker was dependent on the firm for her job as she was to pilot only for the firm, unless the firm permitted otherwise. Her services were essential and integral to the firm's operations. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.