

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC Drivers & Vessel Control	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

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 in the business of hauling freight to different companies through a third party broker and the worker was engaged from March 2015 to October 2015 as a truck driver who hauled loads. The firm believes the worker was an independent contractor while performing services for them because he had the choice to pick which load, what time, and what location he wanted, and he could determine how to get there. The worker performed services under a written agreement with the firm stating he would be an independent contractor for services he performed. The firm reported the worker's earnings on a Form 1099-MISC.

The firm provided no training or instructions to the worker. The worker's assignments were determined when he chose from available loads as determined by the dispatcher. The firm states the worker determined how he performed his services and if problems or complaints arose and he could not resolve them on his own, he would call the third-party dispatcher. The firm states the worker was not required to submit reports or attend meetings. The worker did not have a set routine or schedule or a set place in which to perform services. The worker was required to personally perform his services. The hiring and paying of substitutes or helpers did not apply in this case.

The firm provided the truck to the worker in order to perform his services. There was not a valid lease agreement for the truck the worker drove. The firm states the worker provided his commercial driver's license and Occupational Accident Insurance (OCC). The firm states the worker incurred expenses for tolls, fuel, and insurance and they did not reimburse the worker for those expenses. The clients paid the firm and the firm paid the worker a percentage (%) of the load. The firm states the worker could incur a loss due to damage to the truck he drove. The firm states the broker determined the level of payment for the services provided.

The worker was not eligible for employee benefits. The worker did not perform similar services for others nor advertised his services to the public as being in business to perform the same services. 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 firm provided the worker with freedom of action as his services were performed away from the firm's premises. However, 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 firm and for the firm's client rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their client. 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 client.

The firm states the worker could accept or reject any job assignment offered to him. However, the worker could not refuse an assignment without jeopardizing his relationship with the firm or jeopardize the assignment of future jobs.

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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own such as owning and operating his own truck or in a valid lease agreement leasing a truck. When there is a formal and valid lease agreement and the worker must pay a rental fee whether he works or collects fees, an opportunity to incur a loss is present. The worker did not have this in this case. 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.

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. The worker did not have a business license or business registration in the state which he performed services. While the obtaining and paying for liability insurance is a characteristic of an independent contractor, the total relationship needs to be analyzed to make an accurate decision of a worker's status. If a worker is required to provide insurance in order to obtain a job or as a condition of employment then the factor that the worker possesses insurance loses weight in determining the worker's status as an independent contractor.

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, co-adventurer, 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.

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.