

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC.77 Driver	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 a trucking company that hauls mail. A third party trucking company has a contract for mail delivery services and part of the contract they had with their client called for services to a specific location and back. The third party trucking company leased this specific route to the firm under a lease agreement. The worker was engaged by the firm under a written independent contractor agreement to drive this specific route three (3) days per week. The worker also drove three days a week for the third party trucking company. The firm believes the worker was an independent contractor because the worker signed an independent contractor agreement agreeing he was being hired as an independent contractor and the only requirement they had for the worker was to complete the route within a certain time period and be lawfully licensed. The firm states that other than these requirements, they had no control over the worker's performance.

The firm provided no training to the worker. The worker was required to personally performed his services and he was required to notify the firm and/or the third party trucking company if any problems or complaints arose for their resolution. The firm states the third party trucking company was responsible for the hiring of substitutes or helpers and the firm was responsible for paying these individuals.

The firm provided the truck to the worker in order to perform his services and the worker provided truck logs. A third party provided gas and lodging. The worker did not lease any equipment or a truck. The firm states the worker was compensated on a set determined fee plus an hourly rate for breakdowns, etc. The clients paid the firm for services rendered by the worker and the firm did not carry workers' compensation insurance on the worker. The firm states the worker did not establish the level of payment for the services provided.

The firm states the worker was eligible for paid holidays. The worker performed similar services for others. Either party could terminate the work relationship at any time without either party incurring a liability.

Analysis

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.

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 his services should not be confused with the right to direct and control. Even when a company allows a worker considerable latitude in performing their services, the retention of the right to give instructions or directions, without exercising that right, is enough to make the worker an employee. An experienced worker is free and is expected to exercise his or her own judgment and initiative and is many times hired due to their experience and knowledge. The firm alone had the right to determine when and where the worker performed his services and they retained the right to issue general instructions as to the means to be used to reach that objective. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker. These factors 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 lease agreement with the third party trucking company.

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. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.

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.