

## SS-8 Determination—Determination for Public Inspection

Occupation

09DVC.80 Driver

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The firm is in the business of providing expedite transportation services with cargo vans. The worker was a driver. He received a 2013 Form 1099 for his services even though taxes were withheld. There was no written agreement provided.

Both the firm and the worker agreed that the worker received instructions, via a safety video, on how to drive a cargo van and lift heavy items. The firm added that the logistics' company trained him regarding the picking-up of items and filling out paperwork. Both parties agreed that the logistics company assigned the worker his jobs via a cell phone which the worker indicated was provided by the firm. The worker noted that the firm determined the methods by which the assignments were performed; the firm noted the logistics' company did. Both agreed that the worker contacted the firm if any issues or problems arose with the logistics' company. Both also agreed that the worker submitted mileage logs and days worked to the firm; the firm noted delivery paperwork went to the logistics' company. The worker noted that he worked 12 hours at a time, seven days a week; the firm noted that there was no set schedule or hours. The worker was at home until he received an app alert that his services were needed, so the worker's services were mostly on the road. Both parties agreed that the worker was to provide the services personally.

The worker noted that the firm provided the van and gas; the firm indicated that it provided guidance, a pay check, and a credit card. The firm noted that the worker provided a van and a phone and that the other party provided directions and a uniform. The firm also noted that the other party reimbursed for a gas surcharge and tolls; and that the worker incurred gas expenses and vehicle maintenance as well. The worker noted that he was paid by commission and could be liable for minor vehicle damage. The firm indicated that the worker received a paycheck for the number of miles driven. Both agreed that the customer paid the firm. Each indicated that the other party established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. Both also agreed that the worker did not perform similar services for others. The relationship ended when the worker was fired.

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## Analysis

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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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

However, in this case, evidence was submitted indicating that taxes had been withheld. The withholding of income tax or the Federal Insurance Contributions Act (FICA) tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government. The filing of an employment tax return and Form W-2 for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period. In this case, the withholding of taxes on income for an individual would be considered treatment of the individual as an employee, and would apply.

In addition, factors that illustrated whether there is a right to control how a worker performs a task, which include training and instructions, existed. 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.

There were also factors that illustrated whether there is a right to direct and control the financial aspects of the worker's activities such as a 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. While it is acknowledged that there was disagreement on which party provided the van, the firm indicated that it had cargo vans, and had the worker under go training in driving a van. Therefore it is reasonable to assume that the van belonged to the firm which provided both the cargo van and driver to its contracted customer.

Factors that illustrated 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's services were part of the firm's regular business activities. There was no written agreement; however, 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 information, we conclude that the worker was a common law employee, and not an independent contractor operating a trade or business.