

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC.96 Truck 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

The worker submitted a request for a determination of worker status in regard to services performed for the firm from 2012 to 2014 as a CDL driver. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it transports oil field material and equipment to different locations when needed by oil field companies. It operates 24/7 and whoever is available to drive that day will take a load. The firm believes the worker was an independent contractor as his services were utilized on an as-needed basis. When applying for the job, the firm informed the worker he would be considered an independent contractor. There was no written agreement between the parties.

The firm provided safety training to the worker and instructions on where and when to deliver loads. The firm contacted the worker by phone to see if he was available to perform services. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required the worker to keep a log book documenting the runs performed and fuel receipts which were turned in to the firm. The worker performed services on an as-needed, as-available basis. Services were performed at the firm's yard and over-the-road. The safety meeting was the only required meeting. There was no penalty assessed if the worker was unable to attend. The firm required the worker to personally perform services.

The firm provided the truck to pick up and deliver loads to job sites. The worker provided his personal vehicle to get to the firm's yard so that he could pick up the firm's truck to do the run. The worker did not incur expenses in performing services for the firm. Meal expenses were sometimes reimbursed to the worker on discretion of the firm. Customers paid the firm. The firm paid the worker a percentage of the invoice bill per load; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others; the firm's approval was not required for him to do so. The worker did not advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as an independent contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker found and decided to move to a different company that was giving him more business.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a verbal 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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments, determined the methods used, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "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. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As the worker's vehicle was utilized for his personal needs, it is not considered a significant investment. Based on the percentage per load rate of pay arrangement and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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. There is no evidence to suggest the worker advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.