

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC.110 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 payer is contracted with [REDACTED] as a [REDACTED] Carrier. As the payer, you engaged the worker as a relief carrier when you needed a replacement. You reported the worker's remuneration on Form 1099-MISC for 2012.

Information from the parties supports that as the worker had prior training and experience, you only had to familiarize her with the mail route. She followed standard postal procedures. The worker provided services on the days that you scheduled her and followed the routine [REDACTED] delivery schedule. The worker attended safety meetings and announcement meetings at [REDACTED]. She was required to perform her services personally.

You provided the vehicle the worker drove each day for which you charged her a daily fee. You covered the fees for the worker's drug testing and finger printing checks. The worker furnished her own uniform. You paid her at a daily rate. You did not cover the worker under workers' compensation.

You did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability. You stated that the worker performed similar services for others during the same time period. The worker is no longer performing services for you.

Analysis

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, your 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while you relied upon the worker's prior training and experience to perform her services, it is only reasonable to assume that you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. The worker followed the schedule that you set. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for you on her behalf. 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. These facts show that you retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 bid on a contract, 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 worker furnished her own uniform and paid you a daily rate for the use of your vehicle. 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. You paid the worker at a daily rate. Payment by the day generally points to an employer-employee relationship. These facts show that you retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. 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. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a relief postal carrier were a necessary and integral part of your ability to fulfill your contract to deliver mail. 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. The worker could have provided similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although you did not provide benefits to the worker, both parties retained the right to terminate the work relationship without incurring a liability, a factor indicating an employer-employee relationship. These facts show that you retained control over the work relationship and services of the worker.

There are significant similarities between this case and Revenue Ruling 69-362, 1969-1 C.B. 254. In the ruled case, the contractor, who is entered into a contract with the Postmaster General, and his employees are subject to the taxes imposed by FICA and FUTA, and the withholding of income tax from the wages paid to his employees.

Based on the above analysis, we conclude that you 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.