

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC.163 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 initiated the request for a determination of his work status as a senior driver with duties that included unlocking car doors, fuel delivery, tire changes, jump starts, and occasional training of new employees in tax years 2012 through 2015. The firm's business is described as roadside assistance.

The firm's response was signed by the president. The firm's business is described as road side assistance. The worker performed road side assistance services.

According to the firm, the worker completed an application for the position. The worker was not given specific training or instructions; however, it should be noted that the firm provided copies of the company memos and policies as it pertained to the worker being prohibited from performing work on the side while on the payroll for firm with the firm prosecuting; the uniform shirts policy; rules of conduct, and etc. The work assignments were sent through as a text message. If the worker encountered any problems or complaints he was to forward to the firm for resolution. The worker was required to complete the paperwork and turn it into the firm. The worker performed the services at the customers' location for approximately 10 minutes. The worker was required to perform the services personally.

The worker, in essence, concurred with the firm, adding that he provided the services between 5 a.m. to 5 p.m. six days per week and was required to perform the services personally.

Both parties concurred that the firm provided the lockout set, jumper cables, gas can, phone, car logos, company badge and shirt, and a floor jack. The worker furnished nothing and he did not lease space, facilities, or equipment. The worker incurred expense for fuel. The firm paid the worker the greater of the commission or the weekly salary. The customers paid the firm. The worker was responsible for any damage done to customer's property. The firm stated that the firm and insurance companies established the level of payment for services provided.

The firm indicated that no benefits were extended to the worker; the worker stated that one time he was paid his entire week salary while on a vacation. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame.

During down times the worker was to go to gas stations and stores and drop off the firm's business cards.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

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.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.