

SS-8 Determination—Determination for Public Inspection

Occupation

09DVC.183 Driver

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm provides airport shuttle and door-to-door transportation. The worker was engaged by the firm as a driver. The firm did not withhold taxes from the worker's remuneration for 2014 through 2016.

The parties signed an "Independent Contractor Agreement" stating, among other things, that the firm will provide the worker with runs, and the worker has the full right to select runs based on his own schedule; for any work accepted by the worker, the worker must complete the job safely, courteously, and promptly while following regulations of the [REDACTED] as well as the firm's policies; the firm must make payments in the agreed-upon amounts to the worker promptly; the worker may use his own vehicle and other equipment that satisfies all legal and the firm's requirements, or rent the firm's vehicle and other equipment, to perform the work accepted; if the worker experiences any difficulty or problems while performing the work accepted, both the firm and worker must meet to solve these issues immediately based on the firm's company policies and [REDACTED] regulations; the worker is responsible for any loss or damage incurred due to a mistake on the worker's part; and the firm is responsible for any loss or damage incurred due to a mistake on the firm's part.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The worker's schedule was dependent upon the firm's customers. He provided his services using the firm's vehicles. The firm stated that the worker was not required to perform his services personally; if additional personnel were needed, the worker was responsible for hiring and compensating them.

The firm provided the vehicle and fuel. The worker provided his cell phone and GPS. Both parties stated on Form SS-8 that the worker did not lease equipment or incur expenses in the performance of his services. The firm paid the worker a flat fee per job completed. It did not cover him under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business.

The firm did not make benefits available to the worker. The worker stated that he did not advertise his services or provide similar services for others during the same time period. He provided his services under the firm's name and solicited customers by handing out the firm's business cards. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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, 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training and experience to perform his services. 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. The worker was required to follow the firm's policies, showing 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 ensure its customers' satisfaction. The worker's schedule was dependent upon the firm's customers' requirements. Once accepted, the worker was required to fulfill the job. 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. Although the firm stated that the worker was not required to perform his services personally, there is no indication that he engaged and paid others to perform services for the firm on his behalf, presuming the firm was interested in the methods used to accomplish the work as well as in the results. These facts show that the firm 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 have a lease agreement with the firm, he 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. There is no evidence to suggest the worker's cell phone and GPS system were purchased exclusively for business purposes. Presumably these items were also used by the worker for his personal needs. Therefore, they are not considered a significant business investment. The firm paid the worker at a set rate and the risk of loss was absent. These facts show that the firm 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 his services on a continuing basis. He performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a driver were a necessary and integral part of the firm's transportation business. 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. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.