

SS-8 Determination—Determination for Public Inspection

Occupation 02ENG.6 Engineer	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 an engineer in tax years 2013 and 2014. The worker provided a copy of the 2013 Form 1099-MISC, well as the offer letter dated May 6, 2013 for the position as a software engineer.

The firm's response was signed by [REDACTED]. The firm's business is described as research and development, primarily involving software development. The firm's business is described as software engineering. The worker performed services as a software engineer. The firm provided a copy of the offer letter.

The following was contained in the letter: worker was an independent contractor; he would be paid at the rate of \$37.00/hour for 40 hours per week Monday through Friday to be paid bi-weekly; responsibilities included participation in a daily stand-up conference call and providing status and completing assigned software development tasks in a timely manner; firm is a drug-free workplace; firm looking forward to him joining the team.

According to the firm, the worker was retained because of his existing expertise – no training or instructions were provided. There were daily meetings to assess software development tasks. The worker determined the methods to use to perform the services. In addition to providing verbal reports to the team leader, the worker also entered into an online reporting tool as to the resolution of the task. The worker generally worked from the firm's offices. The worker was required to provide the services personally.

The worker indicated he was given HIPAA certification. The job assignments came from the project manager via daily meetings; and it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. He stated he was required to provide weekly status reports to the project manager and director of engineering. His services were rendered on the firm's premises. He acknowledged that he was required to perform the services personally and that any additional personnel were hired and paid by the firm.

The firm provided the worker with a laptop; the worker had other equipment, according to the firm. The worker did not lease space, equipment, or a facility. The firm paid the worker an hourly rate. The customers paid the firm. The worker did not establish the level of payment for products sold or services provided. The worker responded that he provided nothing.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. It was unknown to firm if the worker was performing same or similar services for others during the same time frame; the worker responded that he was not. The firm responded that the agreement was temporary, for the duration of a specific project.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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, although the worker came into the work relationship with knowledge of the work processes, 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 your customers' satisfaction and that the firm's contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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.

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.