

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.197 Office Worker	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8 .

From the information provided the firm is in the business of providing residential home care for individuals with post-traumatic stress, traumatic brain injury, spinal cord impairment, the developmentally delayed, and those suffering from other injuries as a result of an automobile accident with compassionate, skilled professionals in the comfort of their own homes. The worker was engaged as a personal and administrative assistant under a written agreement.

First Aid training was provided to the worker by the firm and billing and routing training was provided by another worker at the firm's expense. Daily task lists were provided to the worker via email, orally, or written and left on the worker's desk by the firm. Methods and order in which the worker's assignments were performed were determined by the firm. The worker was required to personally perform her services at the firm's premises. Daily oral or written reports of tasks completed or orders placed were required to be submitted to the firm. The worker's routine was to sign in, respond to phone calls and emails, call prospective providers, audit client files, compose documents, run errands, mail interest packets, attend group meetings, provide client transportation, plan and execute events, submit a task list report, and look after patients. The worker was required to attend mandatory monthly meetings for support groups. The firm was responsible for the hiring and paying of substitutes or helpers.

The firm provided office supplies, a computer/laptop, a fax machine to the worker in order to perform her services. The worker provided a laptop computer when working from home. The worker incurred expenses for mileage when transporting clients or running errands with her personal vehicle and the firm reimbursed the worker for these expenses. The clients paid the firm for services the worker rendered and the firm paid the worker at an hourly rate. The firm established the rate for payment of services. The firm did not withhold employment taxes from the worker's earnings. The worker did not have an investment in a business related to services performed and therefore, she did not have an opportunity to incur a loss or realize a profit as a result of her services.

The worker was not eligible for employee benefits. The worker did not perform similar services for others. The worker performed her services on behalf of the firm. Either party could terminate the work relationship at any time without either party incurring a liability.

The Independent Contractor Agreement the firm had with the worker, effective May 26, 2014, provided the worker's job description and scope of services provided. It states:

- All work is performed at the firm's premises unless approved by management to take work home.
- The worker's services are on a non-exclusive basis.
- The worker will serve as an administrative assistant for [REDACTED].
- The firm will review the worker's performance every thirty (30) day period to assess the worker's performance, attitude, skills, punctuality, attendance, integrity, social skills, employment related attributes, and characteristics.
- The firm expects all duties/assignments/work to be completed on the assigned day unless approved by management. All work is to be completed in a timely manner. If work is not completed on the assigned day, management will not pay for the completion of work the next day.
- The worker must attend all applicable staff meetings and Brain Injury support meetings. Fund raisers and outings for the client(s) shall be attended on a rotational basis. No outings/fund raisers shall be paid time unless such payment is provided by sponsoring party.
- Place of work will be determined by the various client location(s).
- The worker declares to be an independent contractor and the relationship between the firm and the worker will not be construed as an employer-employee relationship.
- All payments to the worker will be on a fee for service basis and will be reported on Form 1099.
- If requested, the worker will obtain and keep in force, a public liability policy of insurance against public liability arising out of activities. In addition, if requested, the worker will keep in force and at her expense, worker's disability compensation insurance.
- Exhibit A / Administrative Assistant of the agreement: lists the worker's responsibilities and qualifications she must hold to qualify for the job with the firm.

Analysis

As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require extensive training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The firm did, however, retain the right to review the worker's services every thirty days for performance as well as the methods of how she was performing those services. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

Factors that illustrate whether there is 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 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.

The worker did not have an investment in a business related to services performed, she did not incur expenses that were not reimbursed by the firm, and she did not have an opportunity to incur a loss as a result of her services. "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.

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.

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, co-adventurer, 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.

Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.