

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.230 AdministrativeAssist	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 firm is in the business of real estate development. The worker was engaged by the firm to perform administrative tasks as a project manager, marketing coordinator, and social media facilitator. The firm reported the worker's remuneration on Forms 1099-MISC for 2013, 2014, and 2015.

The agreement between the parties stated, among other things, that the worker performed services as an independent contractor; while performing services for the firm and for one year after, she will not solicit the firm's investors or workers; or engage in any business that is in competition with the firm within the stated area; and the agreement does not constitute an employment agreement, does not confer any right to continue as an independent contractor, or prevent the right of the firm to terminate the position at any time, for any reason, with or without cause. According to the general release agreement provided by the worker, the firm provided the worker with a severance payment and she released the firm from all potential lawsuits in the future.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The firm gave parameters of tasks to the worker, and the worker determined how and when tasks would be accomplished. If problems or complaints occurred, the worker contacted the firm but she was responsible for their resolution. The worker's hours and schedule fluctuated. She generally provided her services on the firm's premises, but at times from her home and on customers' premises. The worker was required to perform her services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the office equipment and supplies, and the property. The worker used her personal computer and cell phone. She incurred the cost of replacing her computer, commuting costs, and cell phone costs. The firm paid the worker the monthly contracted amount. It did not cover her under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm stated that it did not make general benefits available to the worker. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. The firm stated that the worker provided similar services for others during the same time period. There is no evidence presented that the worker advertised her services or maintained a business listing. She provided her services under the firm's name.

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 her 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 firm must have retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker generally performed her services on the firm's premises, but occasionally worked off-site. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm 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 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 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 used her personal computer and cell phone. There is no evidence to suggest the worker's computer and phone were purchased exclusively for business purposes. Presumably these items were also used by the worker for her personal needs. Therefore, they are not considered a significant business investment. The firm paid the worker according to the contracted amount 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 her services on a continuing basis. She performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the administrative and related services performed by the worker were a necessary and integral part of the firm's real estate development 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. The worker could have performed 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. 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.