

SS-8 Determination—Determination for Public Inspection

Occupation OFF02.258 OfficeWorker	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 submitted a request for a determination of worker status in regard to services performed for the firm from February 2012 to September 2016 as an appointment setter. The work done by the worker included cold calls to small business owners to secure sales appointments for customer service representatives. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated it is a bookkeeping, payroll, tax return preparation, and assurance service business. The worker performed services as a cold caller. She made cold-calls to set up appointments run by a customer service rep. The worker was classified as an independent contractor as she set her own work hours depending on personal needs, performed similar services for others, and was told to work from home; however, she refused to do so. Services were performed under an at-will relationship. The worker was paid twice a month based on the time sheets she submitted.

The firm stated it did not provide specific training to the worker. She was asked to call new businesses to solicit accounting services. The worker provided her own work assignments and determined the methods by which assignments were performed. According to e-mails provided by the firm, its resource consultant was contacted and assumed responsibility for problem resolution. The firm required the worker to complete time sheets. The worker's routine varied based on her children's schedule. Services were performed at the firm's office and worker's home. Meetings were not required. The firm required the worker to personally perform services. The firm's resource consultant was responsible for hiring substitutes or helpers. The worker stated the firm provided specific training related to its calling script, reports, and sales data sheets. The firm told her to call leads in specific counties. The firm provided work assignments and determined the methods by which assignments were performed. The firm was contacted and assumed responsibility for problem resolution. The firm required the worker to prepare an appointment report after an appointment was set, in addition to daily and weekly telemarketer reports. Services were performed only at the firm's premises on a regular, recurring basis. The worker averaged 35 hours per week, Monday through Friday, during the hours of 9 am to 6 pm. The worker was required to attend impromptu meetings with her CSR and the firm's managing partner.

The firm stated it provided a desk, personal computer, and telephone. The worker provided the call listing. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of procurement of business listings. Customers paid the firm. The firm paid the worker an hourly rate of pay and commission. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided or the products sold. The level of payment was negotiated between the firm and clients. The worker stated the firm also provided an email address, copier, paper, pens, and index cards. An email provided by the firm documents the worker was paid an hourly rate of pay and a fixed rate of pay per appointment and per sign-up.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others. The firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a contractor to its customers. Services were performed under the worker's name. The work relationship ended when the worker was fired. The worker stated she did not perform similar services for others. The firm represented her as an employee/representative to its customers. Services were performed under the firm's business name. The worker quit because there were no opportunities for growth and the firm refused to change her 1099 status to W-2 employee status.

The firm stated the worker was not responsible for soliciting new customers.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of its customer service representative needs, required the worker to prepare reports, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay and commission arrangement the worker could not realize a profit or incur a 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, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.