

SS-8 Determination—Determination for Public Inspection

Occupation 03PMW.87 RepairMaintenanceWorker	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/payer/worker 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 scuba diving under boats and scraping barnacles and they offer yacht and boat maintenance bottom cleaning and one-time bottom cleaning services; hydraulic underwater hull cleaning, underwater repairs, and zinc inspections and replacement services. The worker was engaged as a scuba diver. The firm believes the worker was an independent contractor because they paid for the finished product, the worker's methods were determined at this discretion, they had little or no control over the diver, the worker used his own equipment, and the worker was already certified. An independent contractor agreement existed between the firm and the worker.

The firm provided no training to the worker as he was already diver certified. The worker received his assignments via work orders and the firm states the worker determined how to complete his assignments. The worker was required to notify the firm or the customer if any problems or complaints arose for their resolution. The worker filled out work orders as to what work he felt needed to be done and then he completed the work. The worker performed his services at the firm's clients' locations. The worker was not required to attend meetings.

The firm provided scrapers and brushes to the worker in order to perform his services. The worker provided a wet suit and scuba equipment. The firm states they did not reimburse the worker for these expenses. The clients paid the firm for services rendered by the worker. The firm paid the worker on an hourly and per foot cleaned basis. The firm states the worker could incur a loss if he was required to re-clean a surface at his own expense if a customer complained.

The worker was not eligible for employee benefits. He worker did not perform similar services for others and he did not advertise his services to the public. The firm states the worker was prohibited from scraping barnacles for any other entity after the relationship ended with them but he may be hired as a diver in any other paying capacity. The firm represented the worker as a contractor to their clients. Either party could terminate the work relationship at any time without either party incurring a liability. The worker obtained the job with the firm via an application process.

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.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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 training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the firm's business name rather than an entity of his 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 his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to how he performed his services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and 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. While the worker provided his wet suit and scuba gear, this is not considered a significant investment. 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. Special scrutiny is required with respect to certain types of facilities, such as home offices.

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.

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.

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.