

SS-8 Determination—Determination for Public Inspection

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| Occupation 03PMW.127 RepairMaintenanceWkr | 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 provides cleaning services. As the owner of the firm, you initially engaged the worker as a house cleaner to provide services on Wednesdays and to fill-in for other workers as needed. You reported the worker's remuneration on Forms 1099-MISC for 2014 and 2015.

Information provided shows you provided the worker with your clients' information and a list of contracted cleaning duties requested by your clients. You stated that once the worker accepted a contract, she fulfilled it on the day requested in whatever order seemed right to the worker. If the worker decided she no longer wanted a particular property, she could return it and choose to replace or not replace it as desired. If problems or complaints occurred, the worker contacted you for resolution. The worker performed her services on your clients' premises; she did not report to your location unless she chose to carpool. The worker was required to perform her services personally. If substitutes were needed, you called your fill-ins.

You stated that the worker provided her preferred cleaning supplies and your clients could furnish specific products. The worker incurred vehicle expenses, and expenses for supplies, excise taxes, business license fees, and federal taxes. You paid the worker a percentage of your contracted fee. You did not cover the worker under workers' compensation. Clients paid your firm directly at prices that you negotiated. The total amount of any payments collected by the worker were turned over to you. The worker could have been responsible for any property she damaged; however, you stated that in the interest of good will, you could choose to pay for damages while opening the contract for a different worker to retain the contract overall.

You did not make benefits available to the worker. You stated that the worker provided similar services for others during the same time period, but that she was prohibited from approaching your clients. There is no evidence presented that the worker advertised her services or maintained a business listing. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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, 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. If a firm has to make a worker “understand” or even if a worker “agreed to” being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker’s status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, you provided the worker with her work assignments. You were responsible for resolving any problems or complaints that may have occurred, showing you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment and ensure your clients’ satisfaction. The worker performed her services on your clients’ premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. The worker was required to perform her services personally. 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 you 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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. You paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that you 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 your firm’s name, enabling you to fulfill your contracts with your clients. The worker was not engaged in an independent enterprise, but rather the cleaning services performed by the worker were a necessary and integral part of your firm’s business of providing cleaning services. 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. You stated that the worker 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. Although you did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.