

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.156 Tradesperson	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 initiated the request for a determination of his work status as a laborer in tax years 2014 and 2015. The firm's business is described as construction and stone design.

The firm's response was signed by the owner. The firm's business is described as a natural stone consulting firm and occasionally a general contractor. The worker performed services as a subcontractor framer. There was no written agreement or bid process; the worker answered an ad for framers.

According to the firm, the worker was contracted to provide framing services for a construction job. The worker was provided with the plans and was to complete the job as he saw fit. Any problems encountered by the worker were directed to the firm for resolution. The worker provided the firm with status updates. The worker not required to perform the services personally; he could hire additional help, if needed.

The worker stated that he was given specific instructions by the firm's owner on what had to be done on each job site. He indicated that the firm determined the methods by which the worker's services were performed. The services were rendered generally 7 am to 4 pm based on the progress of the job. The worker responded that he was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm acknowledged that the firm furnished heavy equipment; all tools were provided by the worker. The firm indicated the worker did not lease space, equipment, or facilities. The agreement was that the worker would be paid for time and materials; any materials would be reimbursed. The customers paid the firm. The firm stated that any tools and equipment damaged would be a loss to worker. The time and materials rate of pay was negotiated and agreed to by the firm and the worker.

The worker responded that the firm provided materials for the job and all equipment, except for the personal hand tools; the worker furnished small hand tools such as hammer, screw gun, and drill. The worker did not lease equipment and did not incur expenses in the performance of the job. The worker responded that he was paid an hourly wage, which the firm increased in January 2015; customers paid the firm. The worker stated that he never purchased materials; everything was on the job site. The worker indicated he was not covered under the firm's workers' compensation insurance policy and that he was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided or products sold.

Both parties acknowledged that there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm stated that the worker was free to work for others; the worker stated he was not performing same or similar services for others during the same time frame.

The worker provided copies of the checks he received from the firm, including one that references a bonus; the firm provided copies of illegible check stubs. The firm stated the worker was asked to help speed up the framing.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. 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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "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.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.