

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.180 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 painter in tax year 2010. He stated he painted all year long at one location. The firm's business is described as a construction business.

The firm's response was signed by the firm's president. The firm's business is described as a general building contractor. The worker performed services as a carpenter.

According to the firm, the worker was instructed as to what job location to go to, with the job assignments coming from the project superintendent. The firm indicated the worker determined the methods by which to perform the services; however, any problems were directed to the firm's president for resolution. The firm stated the worker submitted a typical weekly invoice; the copy provided was a hand written piece of paper with days/hours and signed by worker with a firm-stamped section as to job #, vendor, check number, date and amount paid. The worker's services were rendered at the project location. The firm noted that there were no required meetings. The worker was required to perform the services personally; hiring and paying of helpers/substitutes was N/A.

The worker stated he was assigned painting tasks at locations within the hospital. The job assignments were determined by the firm and hospital; however, it was the firm that determined the methods by which the worker's services were performed. He acknowledged that any problems or complaints were forwarded to the firm's owner for resolution. He arrived at the location to get assignments, painted, called in his hours, and left. He indicated he had a weekly meeting with his supervisor and hospital representative to turn in hours and get paid. He concurred that he was required to perform the services personally.

The firm responded that the worker was provided with mason tools/equipment and the worker provided regular carpentry tools. The worker indicated the firm provided the paint and tools. Both parties concurred that the worker was not leasing space, equipment, or facilities. They also agreed the firm paid the worker an hourly wage and that the customers paid the firm and the worker was not covered under the firm's worker's compensation insurance. The firm indicated the worker established the level of payment for services rendered; the worker disagreed.

The firm and worker acknowledged that no benefits were extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was performing same or similar services for others during the same time frame; the worker disagreed, stating that he was working 40 hours a week.

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.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. The parties did not agree to the actual services; however, in looking at the other elements of 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.