

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.23 Overseer	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 2014 to June 2014 as a business development specialist. The work done by the worker included providing one-on-one counseling to potential and existing borrowers; marketing the firm's lending program and originating loans to businesses; networking, outreach, and marketing; working with the development director to determine funding opportunities. The firm issued the worker Form 1099-MISC for the year 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 small business lender doing small business loans for start-up businesses or existing businesses. As a business development specialist, the worker sought out potential borrowers for small business loans. The firm believes the worker was an independent contractor as she independently identified potential borrowers and funders, in addition to increasing the firm's brand awareness. The worker was not required to have fixed office hours. A Consultant/Retainer Agreement was signed by both parties.

The firm stated it did not provide specific training to the worker other than general guidelines for promoting brand awareness and loan products within the firm's policies. The worker received work assignments based upon the scope of work which she developed. The worker set the pace by which assignments were performed. The firm's project manager monitored the work performed by the worker. The worker was required to submit monthly reports for payment consistent with the contract requirements. The worker occasionally attended meetings at the firm's premises. The worker's day-to-day schedule varied depending on the area covered. The worker performed services from home, in the field, and at the firm's satellite office to meet with clients. The firm required the worker to personally perform services. Substitutes or helpers were not allowed per the contract. The worker stated on Monday morning each week the firm's supervisor called her to assign tasks and direct weekly activities. If things were not done as directed, more frequent follow ups would occur with more detailed instruction provided. The firm's vice president of business services determined the methods by which assignments were performed and assumed responsibility for problem resolution. Daily logs were to be entered into an Excel spreadsheet and sent bi-monthly to the firm. The work week was described as 40 hours; 9 am to 5 pm. After hours events required longer work hours. Time off was subject to the firm's approval and the time off was made up. The firm controlled the worker's schedule. The firm required the worker to attend monthly staff meetings, in addition to lunch and learn, loan, inspection, and personality meetings. Penalties were severe for non-compliance.

The firm provided office equipment, laptop, and marketing materials. The worker provided her car. The worker did not lease equipment, space, or a facility. The worker did not incur unreimbursed expenses as the firm reimbursed her for travel. The firm paid the worker a monthly consultant retainer; 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. The worker submitted a proposal fee which was negotiated with the firm. The worker stated the firm paid her salary.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm provided the materials used by the worker to market the firm's products and services. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the contract ended. The worker stated the firm provided her the benefit of paid vacations and holidays. The worker had the same days off as other employees and she was not required to work on holidays. The firm provided her business cards for advertising purposes. The firm represented her as an employee to its customers.

The written agreement states, in part, the worker was retained as a consultant for the period February 1, 2014 to June 30, 2014. The position description stated the worker was to market the firm's brand, network to include some training element, provide one-on-one financial education to potential borrowers, package and submit loans, identify potential funders, and to work with the development director with grant assistance, as needed. The worker would work with and report directly to the firm's vice president of business services. The worker would submit activity reports to the vice president on the 15th and 30th of each month. The worker was required to attend staff meetings upon request and any firm-provided staff trainings. A detailed work plan outlined the expected services to be performed February through March 2014 and April through June 2014. The worker would be compensated at a fixed monthly rate of pay, based upon the approval of all reports and documentation submitted. Travel and other reimbursements would be paid based on the firm's prior approval and upon receipt of a monthly invoice with documentation. The worker would observe all policies and directives promulgated and provided to the worker by the firm.

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, the firm's statement that the worker was an independent contractor pursuant to a written 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 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 written agreement documents 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. Based on the fixed monthly rate of pay arrangement and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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.