

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.26 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

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The worker initiated the request for a determination of his work status as maintenance, management, and corporate officer in all of the employer's corporations in tax years 2000 through 2014. The firm's business is described as marina ownership and management/property ownership and management.

The firm's response was signed by the CFO and Vice President. The firm's business is described as management of various subsidiary corporations, including but not limited to, real estate investments. The worker performed services as a business development consultant. He provided construction services, property management services, occasional services as a licensed pilot, and other related services.

According to the firm, the worker was not given training or instructions – the assignments came from the firm. The worker determined the methods by which the services were performed. The worker was instructed to resolve any and all problems that might arise. The firm responded that the worker did not have a regular routine. The worker was not required to perform the services personally.

The worker indicated he was instructed to study and learn about specific duties. The job assignments came directly from the firm; and, it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to provide verbal reports and photographs. The services were rendered from 7:30 a.m. to 4:00 p.m., Monday through Friday, and on-call, if needed. The worker indicated he was required to perform the services personally with any additional personnel were hired and paid by the firm.

The provided responded that office supplies, tools, phone, and computer, office support services, and lawn equipment were furnished by the firm. The worker provided the truck and cell phone and incurred expenses for truck maintenance, cell phone service. The firm reimbursed for gasoline expenses. The worker was paid an annual consulting fee in monthly installments. The customers paid the firm. The firm and worker negotiated the amount of the annual consulting fee.

The worker responded that the firm provided offices, computers, tools, equipment, all materials, and the shop. The worker furnished his truck; but, the firm paid for fuel, tires, and oil changes. The worker was paid a salary and a yearly bonus. He did not incur expenses in the performance of the job. He concurred that the customers paid the firm. The firm established the level of payment for services provided or products sold.

The firm stated that insurance benefits were offered; the worker responded that other benefits extended to the worker consisted of paid vacations, sick pay, and travel and meal expenses when needed. The parties disagree as to whether the the worker performed same or similar services for others during the same time frame. The firm and worker did not agree as to which party provided the business cards with the title of Director of Business Development.

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.

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.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

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.

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.

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.