

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.45 Administrative Assist	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 sells real estate. The worker was engaged as an assistant who scheduled appointments, followed-up with sellers/listings for home showings, inspections, closing details, open houses, etc. as well as provided information to agents regarding available inventories. She received a 2013 Form 1099-MISC for her services. There was no written agreement.

Both the firm and the worker were in agreement with the facts of the case. The firm provided initial training and instructions either by the previous assistant and/or by the firm's constant direction. The firm agreed indicating that there was also a tour of the facility, computer files, and supplies provided to the worker. The firm/agent gave the worker her daily task assignments; the worker used her own initiative to complete as well as worked with the agent. Both agreed that the firm (and agents) determined the methods by which the assignments were performed and would be contacted if any problems or issues arose. The worker submitted required monthly reports such as a bi-monthly time sheet as well as the agent's expense report to be turned in to management. The worker noted that her work routine consisted of reporting to the office daily for set scheduled hours. The firm agreed but indicated that there was flexibility according to the workload and agents' schedule. The worker attended meetings according to both parties. The worker was required to provide the services personally with only the firm hiring and paying any substitute workers.

The firm provided the office, computer, phone and office supplies. The worker was reimbursed by the firm for key copies. She was paid an hourly rate and house-closing bonuses; she had no other economic risk. The customer paid the firm. The firm established the level of payment for services.

There were no benefits and either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The worker was represented as an assistant working for the firm. The relationship ended when the worker quit.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The firm provided the worker with instructions and training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

The worker performed her services according to the firm's scheduled work hours and days, even if her hours were somewhat flexible. While she might not have needed constant direct supervision, she worked in the firm's office and was dependent on the firm for her daily work assignments. 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. In addition, the worker provided her services on a continuous basis throughout the time period involved. 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.

Factors that illustrate whether there is 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. The worker simply received an hourly rate of pay with bonuses and had no other economic risk. 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. It was the firm that provided the workplace, the workspace, along with office equipment and supplies. 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.

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. There were no benefits and there was no written agreement. While the existence of benefits would have supported an employer-employee relationship, the lack of such would not solely determine that a worker is an independent contractor as many employees do not receive benefits.

Both parties agreed that the worker was an assistant. She was not engaged in an independent enterprise, but rather the services performed by the worker were part of the needed activities required by the firm/agent. 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.

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.