

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC.32 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 September 2011 to December 2014. The worker originally had the title of president and then president and CTO. Around May 2013, the worker's title was changed to vice president of sales. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response stated its business is host and cloud computing. The work done by the worker included design proposals; customer service and support. The firm believes the worker was an independent contractor as he worked from his home premises with his own equipment, set his own schedule without supervision, and provided the same services for other companies. The worker agreed to handle calls directed to him from the firm's 1-800 number.

The firm stated it did not provide specific training or instruction to the worker. If the firm's 1-800 number received a call and the worker could handle it, the operator forwarded the call to the worker. The worker determined the methods by which assignments were performed. The firm's managing member was contacted and responsible for problem resolution. Reports and meetings were not required. It is unknown the worker's daily routine or schedule. Services were performed at the worker's home office. The firm did not require the worker to personally perform services. The worker hired and paid substitutes or helpers. The worker stated the firm informed him of his job responsibilities and required him to attend weekly calls with its customer. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The firm required the worker to prepare project status reports and to attend a weekly sales meeting. Daily meetings were held with partners and customers on project status and sales calls. The worker's daily routine consisted of reviewing and documenting project issues, updating partners and the managing member via e-mail and calls, leading calls with customers as the project manager, attending multiple weekly sales calls with partners on sales status, demonstrating the firm's technology, and providing sales support to partner sales. 90% of the worker's time was spent in his home office; 10% traveling to partner and customer locations for sales presentations, demos, and partner meetings. The firm required the worker to personally perform services. The firm hired and paid substitutes or helpers.

The firm stated it provided cell phone service. The worker provided everything else. It is unknown if the worker leased equipment, space, or a facility. The worker incurred all expenses with the exception of the cell phone service. Customers paid the firm. The firm paid the worker a flat rate; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker incurred all risk of loss. The firm established the level of payment for the services provided. The worker stated the firm also provided software and a laptop. The worker provided his home office and home office phone. The worker did not lease equipment, space, or a facility. The worker did not incur expenses as the firm reimbursed him for his home office phone service and broadband. The firm paid the worker salary.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others. The firm's approval was not required for him to have done so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. A letter from the worker's attorney references the firm terminated the worker. The worker stated the firm provided him the benefits of paid vacations and holidays, sick pay, personal days, and insurance. The worker did not perform similar services for others. Finished deliverables were sent to customers, partners, and/or the firm's managing member. The firm represented the worker as an employee to its customers. The parties signed a Membership Interest Redemption Agreement on December 30, 2014.

The firm stated the worker was not responsible for soliciting new customers. The worker provided customer service and proposals. The worker stated he directly solicited new customers in a specific market and supported partners to solicit new customers. The firm, through its partnership with its partner, provided leads to the worker. Weekly sales calls with the firm's managing member and partner were held to discuss leads. Additional calls and e-mails throughout the week updated the firm's managing member. Orders were submitted and subject to the firm's approval. The worker did not pay for the privilege of serving customers. Products and services included virtual desktops, virtual servers, hosted e-mail, and IT services.

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.

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 design proposals, customer service, and support services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, collected customer payment for services performed, and assumed responsibility for problem resolution. These facts evidence 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. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Based on the flat rate or salary rate of pay arrangement the worker could not realize a profit or incur a loss.

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 independent business services to the general public during the term of this work relationship.

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.