

SS-8 Determination—Determination for Public Inspection

| | |
|---------------------------------------|---|
| Occupation 06AAS.13 Aide/Assistant | 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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. [REDACTED] and [REDACTED], controller and vice president of the firm, respectively, responded to our request for completion of Form SS-8.

From the information provided the firm is a private equity management company and the worker assisted staff personnel on one-off projects on an as needed basis for [REDACTED]. The [REDACTED] acquired [REDACTED] on or about January 1, 2013. As a result of the acquisition, the employees of [REDACTED] were transferred to [REDACTED]. The [REDACTED] is a disregarded single member limited liability company with [REDACTED] as its member. The assets and business of [REDACTED] were transferred to [REDACTED].

The worker performed services under a written contract with [REDACTED] as an assistant for one-off projects from May 21, 2012 through June 1, 2013 while she was attending classes at [REDACTED]. After the worker graduated from the University, she became a full time employee of [REDACTED] from June 2, 2013 through October 29, 2013. The worker was treated as an independent contractor during the time she was attending classes at the University and [REDACTED] reported the worker's earnings on a Form 1099-MISC in 2012. From January 2013 to June 1, 2013, [REDACTED] paid the worker and reported the worker's earnings on a Form 1099-MISC. The firm states the worker was an independent contractor because the worker did not have a set schedule with the company, she worked a limited number of hours, and they did not preclude the worker from working for other companies while performing services. The firm states they did not specifically provide training to the worker other than guidance when required from staff personnel related to the one-off projects and the worker was not required to provide any regular or written reports. The firm states the worker's services were not integral to the business of [REDACTED].

The worker received work assigned from staff personnel and the staff personnel provided the worker with general guidelines on completing the tasks. The worker was required to personally perform her services at [REDACTED] office in [REDACTED] due to date security policies and restrictions. The worker reported any problems or complaints to the firm for their resolution. The worker submitted time sheets to the firm. The firm states the worker was not required to attend meetings but was encouraged to do so to the extent her schedule permitted it.

The firm provided office supplies, a laptop computer, and badge to the worker in order to perform her services. The firm states the worker also provided office supplies and she incurred transportation expenses to the office and for meals. The worker was paid on an hourly basis and the firm states they established the worker's rate of pay as part of the negotiation with the worker at the onset of the engagement. The firm did not carry workers' compensation insurance on the worker. The worker did not have an investment in a business related to services performed and therefore, she did not have an opportunity to incur a loss or realize a profit as a result of her services.

The worker was not eligible for employee benefits prior to June 2, 2013. The worker was not prohibited from performing services for others firms while performing services for the firm. The worker did not advertise her services. Either party could terminate the work relationship at any time without either party incurring a liability.

Analysis

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was a student at a local university while she performed services for [REDACTED]. The worker applied for the job as trading intern with [REDACTED] through a third party's website. The worker was inexperienced in this line of work and she reported to a supervisor. The worker was required to submit time sheets to the firm to justify the hours she worked. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. These factors gave the firm the right to direct and control the worker and her services in order to protect their financial investment and business reputation.

The firm's statement that the worker performed services on an as-needed basis and therefore, an independent contractor is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants. A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

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 did not have an opportunity to incur a loss or realize a profit as a result of her services as someone in business can. "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.

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, both parties retained the right to terminate the work relationship at any time without incurring a liability. The worker was not engaged in an independent enterprise. While the firm may be right in saying that the worker's services were not integral to the functioning of the firm's office as an intern, however, the worker was engaged to perform services and she was paid for those services. So a work relationship existed. We then need to look at whether the worker displayed characteristics of an independent contractor; such as the outpouring of money into a business offering those services to the public and the opportunity to incur a loss or realize a profit as a result of her services. The worker in this case did not have this. The worker did not have a business license or business registration in the state which she performed services. While the worker's schedule with the firm worked around her school schedule, the total relationship needs to be analyzed to make an accurate decision of a worker's status. 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.