

SS-8 Determination—Determination for Public Inspection

Occupation

09DVC.162 Truck Driver

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The worker initiated the request for a determination of his work status as a truck driver in tax years 2012 and 2013. The firm's business is described as a trucking company.

The firm's response was signed by the owner. The firm's business is described as long distance truck driver. The worker performed services as a long distance truck driver. The firm responded that the worker used one of the firm's trucks to haul for carrier's he contacted and made arrangements with and decided which jobs he would do. The firm indicated there was a verbal agreement between the firm and worker; they would split 50/50 of the net pay for the hauls while the worker was using the firm's truck for two years. At the end of the first two years the worker could lease-to-own the truck for the next two years – he did not make it to the end of the first two years.

According to the firm, there was no training or instructions given to the worker. The worker contacted the carriers he wanted to haul for; the worker determined the methods by which the job was done. The worker was responsible for any problems he encountered with each haul and communicated these to the carrier. The worker turned all logs and paperwork over to the carrier; the carrier deducted all expenses they routinely deduct before payment is made. The worker used one of the firm's trucks for hauls; the worker was required to perform he services personally.

The firm responded that the firm provided the truck; the worker provided incidentals, fuel, and maintenance on the truck. The carrier deducted fuel, and miscellaneous expenses from the gross pay from each haul. The firm indicated the worker leased equipment and the terms the lease was that ½ of the net pay was retained by the firm for truck use. The firm reimbursed for repairs to the truck; the carrier offset for fuel, dray fees, and occupational insurance. The carrier paid the firm because the firm was the owner of the truck and the worker was the driver. The firm indicated the worker established the level of payment for services provided.

The worker concurred that the firm provided truck; but, responded that he did not lease equipment and did not incur expenses in the performance of the job and that he was paid a settlement amount. The worker indicated he was not at risk for a financial loss in this work relationship and that he did not establish the level of payment for services provided or products sold.

Both parties acknowledged that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker stated he was not performing same or similar services for others during the same time frame. The firm indicated the worker was free to change carriers and to drive other trucks without notifying the firm.

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.

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.

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.

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.