

Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Dirks Construction LLC
101 Nasinus Rd.
Anamosa, IA 52205

Appellant,

v.

Iowa Workforce Development,

Respondent.

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Case No. 20IWD0011

**ADMINISTRATIVE LAW JUDGE
DECISION**

STATEMENT OF THE CASE

Brian Dirks, the appellant, appealed from a decision by Iowa Workforce Development (IWD) that an employer-employee relationship existed between his firm, Dirks Construction, and Ivan Potts and others. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. A telephone hearing was held on December 20, 2019. IWD was represented by its attorney, David Steen. Field auditor Lisa Gaeta appeared and testified for IWD. Dirks appeared along with his representative, John Lappe.

IWD submitted its 32-page Appendix, which includes the decision letter, the appeal letter, IWD's synopsis, and other evidence. The appellant also submitted exhibits, which were admitted without objection.

ISSUE

Whether IWD properly determined that an employer-employee relationship existed between Dirks Construction, Ivan Potts, and all other workers performing services for Dirks Construction.

FINDINGS OF FACT

Brian Dirks operates a business called Dirks Construction, LLC. Dirks Construction primarily provides roofing and siding services.

Gaeta was auditing another business when she found tax forms—1099s—related to Dirks Construction. She looked up Dirks Construction to see if it was registered with IWD for unemployment tax purposes. Dirks had an incomplete registration. She looked up Dirks Construction to see if it was registered with the Secretary of State. It was. It also had a contractor's registration with the State of Iowa. (Gaeta testimony).

Employers need to begin registering with IWD for unemployment tax purposes to obtain a contractor's registration with the state. Employers only need to finish registering with IWD, however, if the business has employees. Dirks Construction's incomplete registration, therefore, suggested to Gaeta that Dirks believed Dirks Construction had no employees. (Gaeta testimony; App. p. 20).

Gaeta began an audit of Dirks Construction for the years of 2017 and 2018. Gaeta sent Dirks a pre-audit questionnaire, which was not returned. During her audit, she reviewed four workers: Ivan Potts, Elijah Pavin, James Tilley, and Jared Lathery. None of the four were registered with the Secretary of State. None had a contractor's registration. None were registered with IWD for unemployment tax purposes. Gaeta could not find, for any of the four, evidence of advertising on Google or social media. The workers did not have business insurance or workers' compensation insurance. Gaeta found Dirks could fire the workers without incurring liability and the workers could end the relationship without incurring liability. (Gaeta testimony).

All four workers provided roofing and siding services. The workers did not have financial investments in the business. The workers could not realize a profit or loss from Dirks Construction. The workers did not have contracts with Dirks Construction. The workers did not submit written invoices to Dirks Construction. Gaeta found the workers were paid weekly. (Gaeta testimony).

The workers were paid by the square foot. The workers received 1099s from Dirks Construction. Gaeta found Tilley earned wages from two other employers in 2018. Gaeta found Potts earned wages from two other employers in 2014 and 2015. (Gaeta testimony; App. p. 21).

Gaeta concluded the four workers were employees of Dirks Construction. This conclusion resulted in an unemployment tax assessment against Dirks Construction of \$3,352 for 2017 and \$4,183.13 for 2018. Dirks filed a timely appeal. (Gaeta testimony; App. p. 10).

As part of his appeal, Dirks submitted evidence that Pavin and Potts held themselves out as owners of their own businesses. Pavin's contact information was displayed at Menards' Installer Center and "Elijah's Exterior Remodel" was listed as a "local business pro" available for hire. Potts has business cards listing "Potts Exterior Remodeling" as an independent business owned by Potts, and "Potts Exterior Remodeling" likewise has a display at Menards. (Unnumbered App. Ex.).

Dirks asserts the workers were paid by the job, not weekly. He asserts he forms verbal contracts with his workers for each job. He allows them one “draw” on a future paycheck per job. The workers provide their own tools for each job. (Dirks testimony).

CONCLUSIONS OF LAW

For purposes of unemployment compensation, the term “employer” is defined under Iowa law as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages for service in employment. Iowa Code § 96.19(16)(a). “Employment” is defined as service performed for wages or under any contract of hire, written or oral, express or implied. *Id.* § 96.19(18)(a). “The burden of proof shall rest with an employing unit . . . which considers itself not an employer subject to the Act, to establish that it is not an employer subject to the Act by presenting proper records, including a record of the identity of the employees, number of individuals employed during each week, and the particular days of each week on which services have been performed, and the amount of wages paid to each employee.” Iowa Admin. Code r. 871-23.55(2).

“In the unemployment compensation context, it is well settled that the right to control the manner and means of performance is the principal test in determining whether a worker is an employee or independent contractor.” *Gaffney v. Dep’t of Emp’t Servs.*, 540 N.W.2d 430, 434 (Iowa 1995). “An independent contractor represents the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.” *Meredith Publ’g Co. v. Iowa Emp’t Sec. Comm’n*, 6 N.W.2d 6, 10 (Iowa 1942).

The factors used to determine whether a worker is an employee or independent contractor are set forth in the Iowa Administrative Code. *See* Iowa Admin. Code r. 871-23.19. I will now discuss the factors set forth in the administrative rule.

23.19(1).

“The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and a place to work to the individual who performs the services. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business or profession, in which they offer services to the public, are independent contractors

and not employees. Professional employees who perform services for another individual or legal entity are covered employees.” Iowa Admin. Code r. 871-23.19(1).

In this case, there was little evidence about whether Dirks controlled the details and means by which the results were accomplished. It appears Dirks could terminate the workers without liability or penalty. This suggests an employer-employee relationship. It seems as though Dirks and the workers supplied materials, although the workers provided more of their materials. This is a mixed result, leaning toward a contractor-subcontractor relationship.

23.19(2).

“The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.” *Id.* r. 871-23.19(2).

The workers appear to be paid regularly and appear to perform work continuously for Dirks Construction. However, at least two of them sell their labor at Menards, for example. On the whole, this factor suggests Potts and Pavin, at least, were independent contractors.

23.19(3).

“Independent contractors can make a profit or loss. They are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed. Independent contractors often have significant investment in real or personal property that they use in performing services for someone else.” *Id.* r. 871-23.19(3).

There is no evidence the workers could make a profit or loss. This suggests they were employees.

23.19(4).

“Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments.” *Id.* r. 871-23.19(4).

Gaeta found the workers were paid weekly. Dirks disputes that. Neither side offers more than a conclusory statement by way of evidence. This factor is a wash.

23.19(5).

“The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.” *Id.* r. 871-23.19(5).

Nothing in the record suggests a conclusion one way or another on this factor.

Discussion.

A presumption exists in favor of a finding of employment. *Id.* r. 871-23.19(6). As the Supreme Court of Kansas has persuasively put it, “the goal is not to simply compare the number of factors favoring one result against the number of factors favoring the other result. To the contrary, we are tasked with viewing the factors as a whole.” *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 80 (Kan. 2014).

It is Dirks’ burden of proof here. Iowa Admin. Code r. 871-23.55(2). In a close case, I conclude he has not met his burden. The workers were an integral part of his business, they did not have a financial investment in the business, both sides could end the relationship without incurring liability, the workers had a continuing relationship with Dirks, the workers were not registered as contractors, the workers could not provide proof of current business or workers’ compensation insurance, and there is at least some evidence the workers were paid regularly. Those facts all suggest an employer-employee relationship. On the other hand, the workers provided some of their equipment and had some flexibility in their schedules, and at least two of them advertised their businesses on the side. Those facts suggest the workers are independent contractors, but they do not overcome the weight of the evidence. IWD’s decision is affirmed.

DECISION

IWD’s decision is affirmed. IWD shall take any steps necessary to implement this decision.

Dated January 16, 2020.



Joseph Ferrentino
Administrative Law Judge

cc: Dirks Construction, LLC (by mail)
David Steen, Attorney for Respondent (by email)
Matthew Engelstad, IWD (by email)
Justin Knudson (by email)
Lisa Gaeta (by email)
John Lappe (by email)