

SS-8 Determination—Determination for Public Inspection

Occupation 02AAD Architects, Artists, and Designers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

The worker initiated the request for a determination of her work status performing staging services and acting as an operations manager in tax year 2018, for which she received Form 1099-MISC. The worker stated she had a background in interior design; but ,was hired as a decorator/stager. The firm’s business is described as a staging company to aid in selling real estate. The worker noted there were 6+ other people performing same or similar services.

The firm’s response was signed by the owner. The firm’s business is staging and decorating homes that are on the market with real estate agents or working with the homeowners to speed up the sale or increase the market value. The worker provided services as a decorator. She would go in with the client to decorate the home; the worker made all the decisions for furniture and decorations. The firm stated the worker had relocated from the west coast and was in need of money and did not have a job.

The worker indicated she was given the property address and instructions on what was to be performed and the time frame. The firm made the decisions as to what painting or minor repairs needed to be done to the property, which furniture from the firm's inventory went to which property, and the methods by which the worker’s services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered at numerous homes throughout the city or meeting at the the firm owner's home. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, the worker was not given training and instructions; the worker was hired because she was an expert in her field. The firm would text the address of the job assignments to the worker if she felt it was a good fit for her expertise; and, if the worker was going to be gone or not interested she would let firm know. The worker determined the methods by which she performed her services. The firm indicated the worker was required to deal with the clients and any issues that may arise; but, may ask for the firm's opinion. The worker's services were rendered primarily at the client’s location and was based on the worker’s availability and client’s and the completion due date. The worker had to be on site for furniture or when other subcontractors were tat the location. The worker was not required to perform the services personally; she would use existing moving services or hire help, as needed. The firm indicated the worker would add the 'helper’s hours to her payroll and then she’d pay helper. The firm noted in a conversation that the 'contractors' tracked their own hours on the 'honor system' and the firm paid the agreed upon rate at the end of the week.

The firm and worker concur the firm provided furniture and decorations; and, the worker furnished her transportation and a bag of minor tools and supplies. Any supplies purchased by the worker for a property was reimbursed by the firm. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage. The clients paid the firm. The worker was not covered under the firm’s workers’ compensation insurance policy. The firm indicated the worker was at risk for a financial loss in this work relationship if she incurred damage to her transportation or a loss of tools; the worker responded she was not at risk for an economic loss in this work relationship. The firm owner set the pricing and negotiated with the clients.

Both parties agree there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm responded the worker was performing same or similar services for others during the same time frame; the worker disagreed, stating she did not have a business and was not providing services to anyone else. The firm indicated the worker was never willing to sign a non-compete agreement, although she was willing take on jobs as she was available. The worker stated a non-compete agreement was enclosed in her last pay check. The worker noted she left for a pre-arranged trip and a family medical appointment and upon return she was no longer employed. The firm indicated the job ended and that excessive labor and inventory costs prevented further help.

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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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.

We have considered the information provided by both parties 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.