

SS-8 Determination—Determination for Public Inspection

Occupation 02AAD.21 Designer/Artist	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 initiated the request for a determination of her work status as a design specialist; she assisted in editing customized videos, creating design assets and other design related projects in tax year 2014. The firm’s business is described as creating short and engaging videos that simplify complex and important HR topics.

The firm’s response was signed by ██████████. The firm develops software platform creating engaging communication and content for employees. The worker performed services as a design specialist.

According to the firm, there was no formal training with respect to design work she was contracted for. Tasks were assigned through the project management office. The worker determined the methods by which services were performed; however, if the worker encountered any problems she was to notify project management office. The worker had no set hours – she was expected to meet the project deadlines assigned. The services were rendered at the firm’s location. The worker was required to perform the services personally; the firm paid for other workers who completed tasks.

The worker responded that she was given specific training and instructions as to software and workflow related to the creating of the videos as well as Power Point, AtTask project management software, and the G2 software program. The job assignments came from the manager through AtTask. The stated the firm determined the methods by which the her services were performed. She was to direct any problems to the department head or a manager for resolution. She worked 5 days a week from 9 a.m. to 6 p.m. on the firm’s premises. The worker concurred that she was required to perform the services personally.

Both parties acknowledged that the firm provided desk, laptop computer, and related equipment as well as software and that the worker did not lease space, equipment, or facilities and she did not incur expenses in the performance of the job. The firm paid the worker an hourly wage; the customers paid the firm. The firm confirmed the worker was covered under the firm’s workers’ compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The parties did not agree as to which one established the level of payment for services provided or products sold.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. Completed tasks were submitted to the firm.

The firm and worker provided a copy of the contract: projects assigned daily or weekly by her contact person or department head; the worker expected to work-on site 5 days per week for a regular 8-hour day; the worker was provided the necessary workspace and equipment; the project requests will be via email, statement of work, or through firm's internal tracking system as determined by the firm; worker compensated at an hourly rate and must be pre-approved if in excess of 8 hours in a day.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 71-524, 1971-2 C.B. 346.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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.