

SS-8 Determination—Determination for Public Inspection

Occupation

02ABT Accountants/Bookkeepers/Tax Preparers

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 as a secretary/assistant with leasing/payroll/office management duties in tax years 2008 through 2017. Through the years she was referred to as an assistant, secretary, or office manager. The firm's business is described as construction and general contracting, rentals, real estate flipping, and property management.

The firm's response was signed by the owner. The firm's business is described as general contracting. The worker performed services of bookkeeping (accounts payable) and payroll; she was a bookkeeper. The worker was paid under the owner's SSN as well as the EINs of related businesses. The owner confirmed he is the sole owner of all the businesses that issued Form 1099-MISC to the worker, except for one, which is designated as a partnership. The owner stated he operated the businesses separately; but, the work she performed for each was the same/similar. The firm handled the accounts receivables.

The worker responded that she was given specific training and instructions via phone, text, or in person and that all job assignments came from the firms' owner. The firm determined 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. She was asked to prepare spreadsheets on occasion for bank loans, PFS, property acquisitions and sales. She generally rendered her services from 9 am to 4 pm, five days a week at one of the firms' locations. She stated that her hours were flexible and that on occasion would take work home, such as collating mileage/gas receipts or totaling hours for payroll. The worker stated she was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm indicated no specific training and instructions were provided to the worker and that the worker determined the methods by which the worker's services were performed. The worker notified the firm of problems or complaints which were handled by the firm. The worker worked from the firm's office or from her home; but, the amount of time spent at each was not known to the firm. The firm responded the worker was not required to perform the services personally; and, any additional helpers were hired and paid by the worker.

The worker stated the firm provided office space, desktop computers, office equipment, phone/internet/Wi-Fi, office materials, and gas if she was running errands. The worker furnished her personal vehicle for running errands; she indicated she did not use a personal laptop to conduct the firm's business. The worker did not lease equipment, space, or a facility and did not incur expenses in the performance of the job. The worker was paid an hourly wage and an occasional advance/loan was repaid via a deduction from her check as agreed and on occasion a deduction for rent of her personal living space. The customers paid the firm. She was not covered under the firm's workers' compensation insurance policy. The worker indicated she was not at risk for a financial loss in this work relationship unless she sustained an injury on the job. The firm established level of payment for services provided.

The firm responded that she was provided with pens, paper, staples and tape; the worker furnished her laptop. The worker did not lease equipment, space or a facility; however, she did incur expenses in the performance of the job for a vehicle, gas, and office supplies. The firm stated the worker determined her compensation; and, that the customers 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 due to loss of electronics and that the worker established level of payment for services provided.

There were no benefits extended to the worker other than paid vacations and Christmas bonuses until 2014-2015; she stated there are no records just memos on checks. Either party could terminate the work relationship without incurring a liability or penalty. The worker responded she was not performing same or similar services for others during the same time frame; just the firm owner under his various businesses. Any work done at home for the firm was returned to the firm.

According to the firm, the worker was not entitled to benefits. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was performing same or similar services for others during the same time frame and confirmed the worker returned finished work to the firm. The firm stated he did not care where the work was performed.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

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.

We have considered the information provided by both parties to this work relationship. In this case, the owner of the firm and its related businesses 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.