

SS-8 Determination—Determination for Public Inspection

Occupation 02ABT.15 Accounting/TxPrepWkr	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 tax preparer in tax year 2014; but acknowledges the 2015 work relationship and the related 'Employment Agreement'. The firm's business is described as tax preparation, payroll services, legal services, and customer services. The worker indicated she has an 'employee' contract but is paid in cash, with regular hours, and a set schedule. The worker provided a copy of the 2014 Form 1099-MISC.

The firm's response was signed by the owner. The firm's business is described as preparing taxes, payroll services, as well as legal services as a public notary, and other customer services. The worker performs services as a tax preparer and payroll services. In a telephone conversation with the firm, the firm acknowledged the work relationship from tax year 2013 to the present; there are no changes to the duties performed.

The firm and worker concurred in the responses to Form SS-8.

The worker is engaged under an employee-employer contract with regular hours and set duties. She is provided training and instructions and attends yearly seminars. The job assignments are as customers walk in to the firm's place of business. The firm determines the methods by which the worker's services are performed. Any problems or complaints encountered by the worker are directed to the firm for resolution. The services are rendered at the firm's business location during established hours. The worker is expected to attend a monthly meeting as a means for improvement. The worker is required to perform the services personally; any additional personnel is hired and paid by the firm.

The firm provides the equipment, software, supplies, and materials. The worker pays for seminars and half of the the online classes. Both parties acknowledge the worker is paid an hourly wage in cash. The customers pay the firm. The worker is not at risk for a financial loss in this work relationship unless she damages the computer. The firm establishes the level of payment for services provided or products sold.

There are no benefits extended to the worker other than personal days. Either party could terminate the work relationship without incurring a liability or penalty. The worker is/was not performing same or similar services for others during the same time frame. For a period of five years the worker cannot compete with the firm within a 10-mile radius. Both parties stated the worker is an employee and performs services under the firm's name.

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.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this case, the firm retains 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 are met. The worker is not operating a separate and distinct business; the worker does not assume business risks, and therefore, does 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business.

CONCLUSION

Based on the above analysis, we conclude and affirm that the firm has 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.