

## SS-8 Determination—Determination for Public Inspection

Occupation

02ABT.26 Accounting/TxPrepWkr

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The worker initiated the request for a determination of his work status as a fund accountant in tax years 2013 and 2014. In this capacity he calculated the net asset value of investment portfolios (i.e. hedge funds), with additional duties that included meetings with clients, training staff, etc. The firm's business is described as a fund administration service provider.

The firm's response was signed by the CFO. The firm's business is described as fund accounting and investor service support. The worker performed services as a fund accountant.

According to the firm, the worker traveled to headquarters for a training as well as via web-ex. The firm assigned the worker a set of client accounts to perform monthly services. If the worker encountered any problems he was to report to the head of operations in the \*\* office. The worker had flexible hours with a set of responsibilities to complete monthly accounting work for the firm's clients. The worker provided services from the firm's office and on occasion from his home. The worker was required to attend some meetings via conference call. The firm hires and pays substitutes or helpers, if needed.

The worker stated he received specific training and instructions from another employee and concurred that the job assignments came from the firm. The firm determined the methods by which the worker's services were performed. The worker agreed that any problems or complaints were directed to the firm for resolution and that his services were rendered at the firm's location from 9 am to 6 pm about 80% of the time and other times from his home. He indicated that he was required to attend some client meetings, interviews of potential hires, staff meetings, and monthly meetings. He was not required to perform the services personally.

Both parties acknowledged the firm provided a workstation, a computer and peripherals, software, office equipment, and office supplies. The worker furnished a computer; he did not lease equipment, space, or facilities and did not incur expenses in the performance of the job. The firm paid the worker an hourly wage; the clients paid the firm. The firm and worker agreed the firm established the level of payment for services provided or products sold. The worker stated he was not at risk for a financial loss in this work relationship.

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. The worker's services were rendered under the firm's name; the work was submitted for review and approval to the account manager or CEO, and once approved was sent to firm's client.

According to the engagement letter, the worker was required to work 20-25 hours per week for a weekly fee, with an opportunity to increase hours to a full time position. Upon commencement of the position there was 6-month probationary period, until a full time salaried position was warranted. A copy of the Employee Confidential Information Agreement was submitted.

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## Analysis

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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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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.

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 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.