

SS-8 Determination—Determination for Public Inspection**Occupation**

02CSP Computer Services Personnel

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 his work status as a UI developer – architected user interface for [REDACTED] software product in tax years 2016 and 2017 for which he received Form 1099-MISC. In this position he worked on location 40 hours per week at the direction of the manager. He attended daily meetings, weekly catered-team lunch, and managed a junior developer. The firm's business is described as converting source code into data.

The firm's response was signed by the COO. The firm's business is described as owning software that its subsidiary develops. The software includes software development tools that employ artificial intelligence. The worker, as an IC performed software development and various projects working sporadic hours, often from home. As an employee he was the senior software engineer with an emphasis on User Interface working full-time usually on site and more specifically supervised and was required to learn the company's methods and had benefits. In 2017, the worker was issued Form W-2 by the firm's subsidiary.

The worker was contacted since no reference was made to the W-2 from the subsidiary. He stated he was not aware of the exact relationship between the firm and its subsidiary. He was hired (no formal interview process) because the firm needed people and he knew people that worked for the firm that recommended him. When he was converted to 'employee' status, he stated nothing changed; he continued working at the same location, under the same supervisor, and on the same project. His job did not change and he did not take on additional duties. He never worked from home as an independent contractor or as an employee; he always worked at the office, submitted his hours to his supervisor via email every pay period, and generally worked 40-hours a week.

The worker indicated he was given specific training on the product and how it worked, an uncommon product that required a specific understanding of its operation. The job assignments were determined during daily meetings, working with other employees, and under a supervisor to determine the best plan and implementation. He stated that as lead developer he had leeway to make certain decisions. Any problems or complaints encountered by the worker were directed to the firm's director of engineering for resolution. The worker performed his services daily from 8am to 4:30/5:00pm at the firm's location. He added that the firm had a 'no-working-from-home' policy. He was not required to perform the services personally.

The firm responded that there was no training and instructions given for the IC position; but, as an employee he was given specific training by the firm on the firm's software structure and function. The jobs were dispersed via email, conversations, and using a project management system called [REDACTED]. As an employee, the firm determined the methods by which the worker's services were performed, as an IC the worker did. Any problems or complaints encountered by the worker were directed to the firm's director of engineering for resolution. The worker's services were rendered at his home and the firm's location and varied from 1 hour per day to 10 hours per day as an IC, and as an employee he worked at the firm's premises 40 hours per week. The worker was required to perform the services personally; any additional personnel could be hired and paid by the worker with the firm's approval.

The worker stated the firm provided everything such as a computer, desk, monitor, software, office supplies, and food. The worker furnished nothing, he did not incur expenses, and he did not lease equipment, space, or a facility. The firm paid the worker an hourly wage. The customers paid the firm. The worker replied he was not at risk for a financial loss in this work relationship and that he did not establish the level of payment for services provided or products sold.

The firm acknowledged that it provided all necessary equipment and supplies to the worker as an IC and employee; and the worker furnished nothing. The worker did not lease equipment, space, or a facility. As an employee the firm paid all the worker's expenses; but as an IC the worker was responsible for all expenses. The firm stated that as an IC the worker was paid an hourly wage and a salary as an employee, with the customers paying the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm indicated the worker established the level of payment for services provided as an IC and as an employee they negotiated the salary.

Both parties acknowledge there were no benefits extended to the worker, that either party could terminate the work relationship without incurring a liability or penalty, and the worker was not performing same or similar services for others during the same time frame. Both provided a copy of the IC agreement dated December 13, 2016 between firm and/or its subsidiary: the worker was to provide software development- assignments primarily f

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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.

The 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 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.