

SS-8 Determination—Determination for Public Inspection

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| Occupation 02CSP Senior PHP Developer | Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor |
| UILC | Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 senior PHP developer; he primarily developed websites, as well as covering the sales floor and repairing computers when needed in tax years 2014 to 2015, for which he received Form 1099-MISC. He completed an application for the position, noting there were 2-4 workers at a time performing same or similar services. The firm's business is described as a computer store and web development studio. He was required to be on site during business hours, was given a 1-hour lunch, was written up for being late repeatedly, used the firm's office equipment and software to perform tasks as assigned, and the assigned order of completion. The worker acknowledged a non Disclosure/Non Compete agreement of which he did not have a copy.

The firm's response consisted of a cover letter and a copy of the consulting agreement allegedly used by the firm and worker. Form SS-8 was not submitted. The agreement was not signed by the firm or worker and the name of the 'consultant' in the contract was blacked out. The firm's business is a full-service consulting firm in the business of providing professional general process and technology services for its clients. The worker had substantial skills and expertise specified in applicable Work Orders. The firm had the right to request for drug and alcohol screening as well as a background check and the right to terminate with or without cause upon written notice. The worker to be paid bi-weekly at \$X/hour for services rendered and for any pre-approved applicable expenses supported by receipts.

According to the worker, there was no training, but instructions were given as to when to work, what tasks to perform, and when to cover the sales floor or repair computers. The job assignments were given verbally or via email from the firm and it was the firm that 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. The worker's services were rendered starting at 9am, with a timed lunch hour, clocking in and out, 100% on the firm's premises; the worker serviced walk-in customers only. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided computers, software, office space, internet, and servers. The worker furnished nothing, did not lease equipment, space, or a facility, and did not incur expenses in the performance of his job duties. The worker was paid an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker stated he was not at risk for a financial loss in this work relationship other than loss of income. The worker did not establish level of payment for services provided or products sold.

The only benefit extended to the worker was paid holidays. 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 stated he worked under the firm's name and was introduced as an employee. The worker quit under threats of being fired.

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.

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.

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.

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 firm's 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.