

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 data science analyst in tax years 2018 to 2019, for which he received Form 1099-MISC. In this position he created data visualizations, did estimates for proposals, and analysis of energy bills to gauge energy bills attainable. The firm's business is described as providing energy savings to other businesses by way of automations and insight into operations and devices. The worker stated the first 90 days were an 'intern trial period' that stretched an additional month and a half due to lack of funds to hire him at that point.

The firm's response was signed by the CEO. The firm's business is described as internet development. The worker provided services as a data science analyst, analyzing data.

The worker indicated he was given training and instructions from other data scientists and developers. The detailed job assignments were via email, phone call, or in person. The firm's CEO or COO 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 stated he was required to report on dashboards created, reporting and analysis for management, query results from databases and etc. His services were rendered Monday through Friday from 9 am to 5pm except for occasional site visits. Missing a scheduled meeting could result in a reprimand. He was required to perform the services personally.

According to the firm, the worker was given instructions when the task was assigned; job assignments were sent electronically. The worker determined the methods by which performed the assigned tasks. Any problems or complaints encountered by the worker were directed to the firm's CEO or CTO for resolution. The firm indicated the worker's services were rendered on the firm's premises or off-site at the worker's home or elsewhere and noted there were no scheduled hours. The worker was required to perform the services personally.

The worker stated the firm provided an office, furniture, and installation materials. The worker furnished his laptop; but, stated others were given new ones. The worker did not lease equipment, space, or a facility. The worker stated he was paid a salary. The customers paid the firm. The worker was not at risk for a financial loss in this work relationship unless there were late payments or bounced checks. The firm established the level of payment for the services provided or products sold.

The firm responded that the worker was provided a work area if he came to the office and that the worker furnished his own computer. The worker was paid piecework. The customers paid 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 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 or products sold.

The firm and worker acknowledge there were no benefits extended to the worker; however, the worker indicated personal days were available to him. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker noted he was represented as an employee/a team member to clients. The worker terminated the work relationship.

Both parties provided a copy of the Firm Consulting Agreement signed June 1, 2018, in which the worker was to provide services as a data analyst for \$XXX per year. The 'Consultant will perform services for the Company on a project-by-project basis, and each project shall be mutually agreed upon between Consultant and the Company and attached to this Exhibit A successively numbered Schedule "A"s {e.g., Schedule A-1, Schedule A-2, etc.) (each a "Project"). Each Project shall contain at a minimum a detailed description of services to be performed and any deliverables to be provided, and together with this Agreement (but separate and apart from any other Project), shall collectively constitute the entire agreement for such project.' The scheduled projects were not submitted for review. Payment will be through cash or equivalent stock options depending on funding capability. Minimum payment will be 60% cash. On January 1, 2019 we will hold a review for Chief Data Scientist {CDS} position.

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.

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.

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 person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. However, it is also possible that the individual may be an employee acting in the capacity of a foreman for, or a representative of, the employer.

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.

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

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.