

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 her work status as a digital marketing assistant in tax years 2017 and 2018, for which she received Form 1099-MISC. She applied and interviewed for a full-time position; however, she was notified the position was canceled. She was asked to assist on a part-time basis while an employee was on vacation. The firm continued to request her services and extend the arrangement every two to three months. Her services included writing and editing content, creating and editing graphics and video, fixing technical problems on client's website, with regular reporting on project, attending and contributing to staff meetings, and other assigned tasks. The firm's business is described as a digital marketing agency providing website development, graphic design, social media content, and other advertising and marketing services.

The firm response was signed by the President/CEO. The firm's business is described as providing advertising and marketing services mainly within higher education. The worker was a digital marketing assistant. The worker completed an application for the position and was engaged to fill a need. She did not bid the jobs. The worker was hired at an hourly rate for a specific project for a specific client; she also assisted with other projects, collaborating with the firm's staff.

The worker stated she was given training and instructions as to the job duties, using equipment provided by the firm, with the job assignments disseminated by supervisors. The firm determined the methods by which the worker's services were performed as a means of meeting the firm's clients' needs. Any problems or complaints encountered by the worker were directed to the firm for resolution. She was required to provide bi-weekly reports of the work she performed for the specific clients. The worker stated she was expected to perform the work on a daily basis during the regular office hours of from 9am to 5pm, Monday through Friday, with occasional evening and weekend hours required, on the firm's premises. She stated she was required to attend weekly staff meetings as well as trainings and occasional meetings with clients. The worker was required to perform the services personally.

According to the firm, the worker was given insight on client-specific guidelines, and other skills she learned along the way. The job assignments were obtained through the firm's project management system. The firm responded that the specifics of the client projects determined which contractors/workers were needed. The worker was required to contact and report to "A", inside the firm, who was managing the project, and it was "A" that reviewed her work before it went to the client, because it was "A" that interfaced with the client; the worker was guided as to the deliverable to the client. The firm stated in a follow-up conversation that the worker did not contact clients directly. The firm replied no reports were required from the worker. The firm indicated the worker's daily routine was based on contract obligations with the client and that it was the worker's choice to work remotely or at the office. The firm stated that meetings were based on client-specific projects or changes that impacted the deliverable/project. The worker was required to perform the services personally.

The firm and worker concur the firm provided the worker with a laptop installed with necessary software; the worker added that she was provided with an additional monitor and a work station. The worker furnished nothing, did not incur expenses, and she did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; she filled out a time sheet, submitted it to "A" who signed it and forwarded to the firm's President/CEO, who issued the check. The clients contracted with and paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker indicated she was at risk for a financial loss in this work relationship due to tax implications and unpaid benefits of paid holidays, sick days, and personal days. Both parties agree the worker did not establish level of payment for services provided or products sold.

The firm and worker acknowledge there were no benefits made available to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker stated she was not performing same or similar services for others during the same time frame. completed project was returned to firm. The worker indicated she was represented as an employee; the firm disagreed, responding the worker never communicated with the client.

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.

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.

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.

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 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.