

SS-8 Determination—Determination for Public Inspection

Occupation

02DBT Director of Operations

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 director of operations in tax year 2018, having submitted an application, and for which she received Form 1099-MISC. She was initially hired to oversee daily operations and prepare strategic plan. The worker stated she was offered the four-month contract for specific work, after which it would be determined if she would stay on. The firm's business is described as an interior design/build company. At the end of the agreement she was asked to stay on; but, was not offered the W-2, even though she requested it.

The firm's response was signed by the president. The firm's business is a kitchen and bath design company and product showroom. The worker provided services as an operations consultant to develop mission statements, a one-year strategic plan, process mapping, implementation of collaboration tools, etc.

Both parties provided a copy of the General Service Agreement dated February 13, 2018 through May 18, 2018; the work relationship ended November 21, 2018. In part, the agreement covers the following services that the worker was to perform: oversee deliverables; oversee and manage day-to-day operations of the company; develop mission and vision statements for the company; have 100% of the staff trained on a functional operations manual & new management technologies; develop a functional operations manual and implement (or increase) the use of remote collaboration tools to connect and engage with remote staff. In addition, it covered the milestones set for each of the four months. The agreement could be extended with the written consent of the parties. Compensation of \$XXX/month; and, reimbursement of expenses for reasonable and necessary expenses incurred in connection with providing the services. The worker was responsible for hiring, terminating, and training employees as necessary. The agreement also addressed confidentiality, disclosure, and ownership of intellectual property.

The worker indicated she was given general training and instructions by the CEO of the firm. The job assignments and responsibilities were assigned by the CEO/firm. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were handled by the worker unless the issue needed to be directed to the firm for resolution. The worker provided a report at the end of four months, although the CEO would request occasional updates on projects/tasks/duties. The worker's services were rendered Monday to Friday between 9am to 4pm until June 2018 at which point they became 9am to 5pm, and she generally worked 50-55 hours per week; 80% of the time was at the firm's premises. With the firm's permission she worked from home on sick/snow days or school vacations. The worker was required to perform the services personally. Any additional personnel were hired by the worker with the firm's approval and paid by the firm.

According to the firm, the worker was not given specific training and instructions. The job assignments were based on the agreement. The worker determined the methods by which her services were performed; and it was the worker that handled any problems or complaints. The firm indicated the services were rendered at her home, the showroom, and local cafes; the work was not based on hours but on performance. The worker was not required to perform the services personally; any additional personnel were hired and paid by the worker.

The worker stated the firm provided office space/desk, software programs, email address and hosting, internet, printer, fax, VOIP phone line, and office supplies. The worker furnished a computer, cell phone, and gas for client travel. The worker was reimbursed for anything purchased for a client or the firm's office. The worker did not lease equipment, space, or a facility. The worker was paid a salary. The customers paid the firm. The worker responded that the risk for a financial loss in this work relationship was only if there was loss or damage to her personal cellphone and laptop. The worker did not establish the level of payment for services provided or the products sold - the CEO did.

The firm indicated nothing was provided to the worker; but, that she furnished a laptop, home office, and vehicle. The worker did not lease equipment, space, or a facility. The worker was paid piecework. The worker incurred expenses for travel, internet, and computer software. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm was not sure if the worker was at risk for a financial loss in this work relationship. The firm did not respond as to which party established the level of payment for services provided or the products sold.

The worker indicated benefits available to her were paid vacations, sick pay, paid holidays, and personal days; the firm did not agree. Both concurred that either party could terminate the work relationship without incurring a liability or penalty. The firm responded the worker was performing same or similar services for others during the same time frame; the worker disagreed. They do agree that the worker provided notice to e

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.

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.

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.