

SS-8 Determination—Determination for Public Inspection

Occupation 02LAW Business/Computer Services/Office/Sales	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 her work status as a litigation paralegal in tax year 2016. The firm's business is described as a law office handling personal injury, car accidents, slip 'n falls, and wrongful death. The worker indicated she had been treated as an employee in prior years when the firm had merged with other law practices and that there were no differences in the duties she performed.

The firm's response was signed by the CEO. The firm's business is described as a law office/legal services. The worker performed services of litigation and pre-litigation file handling, interaction with client, drafting correspondence, and gathering evidence.

According to the firm, the worker was not given specific training and instructions as worker had prior legal experience. The worker's job assignments would be provided by the firm every two weeks and were prioritized by the firm. The firm stated that the worker's work product was given to him for finalization and signatures. The court systems and attorneys determined the deadlines. Any problems or complaints encountered by the worker were directed to the firm for resolution. The firm operated from his home office and the worker's services were rendered at the worker's home. The firm indicated the worker was not required to perform the services personally; however, in a follow-up conversation the firm responded that the worker was not in a position to hand-off work to another paralegal.

The worker stated she was not given specific training and instructions were minimal. She received job assignments from the firm via phone, email, or going to his home to pick up work. She indicated that she and the firm 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 at her home office and she went to the attorney's home office 5-12 times per month. The worker responded that she was required to perform the services personally.

The firm acknowledged providing the case files to the worker and the worker provided a computer, cellphone, internet service, supplies, and a vehicle. Both parties concurred the worker was paid an hourly wage and the clients paid the firm. The firm responded the worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker established the level of payment for services provided; the worker disagreed, indicating the services were at a set hourly rate.

Both parties agreed that there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was performing same or similar services for others during the same time frame; the worker disagreed.

The firm acknowledged the prior association with the worker and that she was treated as an employee; but stated there was a verbal agreement that worker would work as an Independent Contractor on a month-to-month basis and would be paid hourly for actual hours worked, setting her own hours, stating that rarely did she work a traditional 8-5 schedule. The firm stated she was offered employment when he set up an office; however, she refused to work as an employee. The worker concurred; but, stated that the firm refused to offer her benefits and they parted by mutual agreement.

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.

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 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.