

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF Office Workers

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 an intern providing general office support to the firm in tax years 2016 and 2017, for which he received Form 1099-MISC. The worker was a university student with a major in finance; he saw the job posting and applied because it looked interesting and was hired. He did not receive school credit. He vaguely recalls the contract and the non-compete. His hours were minimal based around his school schedule although he did work up to 40 hours. The firm's business is described as an economic development consulting and real estate agency.

The firm's response was signed by the CEO. The firm's business is an economic development consulting firm. The worker provided services doing online research for contact information, market research, and writing blog posts.

The firm provided a copy of the Independent Contractor Agreement and non-compete clause; essentially, the worker was to provide office support services for a period of 60 days for 15 hours per week at a rate of \$XX/hour. The worker's duties were outlined as: assist with preparation of reports, data gathering, research, writing reports, Google Earth analysis, errands and deliveries, and phone calls.

The worker stated that his training and instructions consisted of 'learning the ropes' from the firm's employees, who also gave him his job assignments. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered primarily on the firm's premises during business hours. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that the worker was not given formal training, but, instructions on the tasks to be completed. His job assignments were conveyed via email or voice communication. The individual giving the worker the assignment would provide recommendations as to the methods to complete the task. The worker had the contact information of the full-time employees should he encounter any problems. There were no formal reports required from the worker; he was to inform the full-time staff as to status of tasks. The firm provided copies of the invoices that reflected the worker's days and hour of work and the tasks he was working on. The worker stated the firm provided him with the template of this 'timecard'. The services were rendered at the firm's business location. The firm responded the worker was not required to perform the services personally; he could hire and pay for any additional helpers or substitutes and the firm's approval was not required.

The firm and worker were in agreement that the firm provided office space, desk, office supplies; and, the worker furnished his laptop. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was at risk for a financial loss in this work relationship for loss or damage to equipment or engaging/paying for someone's help; the worker disagreed, stating he was not at risk for a financial loss or in a position to hire anyone based on his hourly wage. The firm responded that both parties agreed to the level of payment for services provided; the worker disagreed indicating the firm established the level of payment.

There were no benefits extended to the worker. 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. He stated he was represented as an intern and he reported to a senior associate or another employee.

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.

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.

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.