

SS-8 Determination—Determination for Public Inspection

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| Occupation 02OFF Office Workers | 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 customer care representative in tax year 2018, for which she received Form-1099MISC. The worker acknowledged she was unemployed when offered the job and that she did not have a background in the insurance industry. The firm's business is described as an insurance agency.

The worker provided a copy of the firm's Part-time New Hires job description given to her by the firm's owner, which addressed the following: 1099 for 90 days. evaluate performance after 90-day probationary period for employment opportunities; office hours of 9am to 2pm, no overtime unless approved by agent with one 15-minute break per day; payroll every other week with time cards submitted on Friday (worker confirmed she punched a time clock); office attire; office meetings; outside business and/or activities not related to the insurance company. The work description: under the immediate supervision of the agent, to do routine typing and office work of normal complexity in accordance with established standards and procedures; work is to be of standard quality and quantity. Duties included: answering telephone calls and taking messages; assist agent as needed; open and sort mail; type and proof read letters and forms; take payments and provide receipt to customer; and etc.

The firm's response was signed by the insurance agency owner. The worker was church-member and friend that had lost her job and was looking for temporary work. The worker provided data entry services. The firm indicated she was contracted to enter leads and update the agency's existing lead database. In addition, the worker offered to answer phones, take messages, and process payments if necessary, however, not required.

The worker indicated she was given limited formal training and some instructions on computer use, processing payments, and processing documentation. She stated the job assignments included opening the office, customer service, completing forms, and verbal instructions throughout the day. 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 on the firm's premises 9am to 2 pm Monday, Wednesday, and Friday. The worker was not required to perform the services personally.

The firm responded the worker was given access to the database in which she was able to learn through the tutorials, if and when needed. The job assignment consisted of the worker being given binders of leads to be entered into the database, a one-time process. The worker determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm's agency owner for resolution. The services were rendered at the firm's location during office working hours Monday through Friday. The worker was required to perform the services personally; the worker would be responsible for hiring and paying any helpers and substitutes and the firm's approval was not required.

The firm and worker concur the firm provided everything; database, leads, computer, and a comfortable work environment. The worker furnished nothing; she did not lease equipment, space, or a facility and did not incur expenses. The firm paid the worker an hourly wage; 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 stated the worker established the level of payment for services provided or products sold; the worker disagreed.

Both parties concur there were no benefits extended to the worker and that 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. The firm stated the worker was providing a specific service and the contract ended/project completed. The worker indicated she was laid off, having been told at the beginning of December that her position would not be available as of the end of the month; she was allowed to stay on staff until the end of the month.

The worker also provided copies of the part-time Customer Service Position paystub, identifying the payroll period, pay day, the number of hours worked at the hourly rate, and the total paid.

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.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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. 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.