

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 her work status as a leasing consultant in tax year 2018, for which she received Form 1099-MISC. In this capacity she conducted apartment tours for prospective tenants, contacted current tenants about delinquent rent, answered company phones and emails, and created content for posting to company's social media. The firm's business is described as leasing and managing apartment rentals in a particular area.

The firm's response was signed by the firm's principal/member. The firm's business is a boutique real estate firm focusing on the development, management, and brokerage of student housing. The worker provided services on a part-time basis to assist the firm's management team with a variety of supplemental efforts, primarily clerical/administrative type work.

The worker was responsible for calling and sending emails to leads obtained via online rental listings provided by the firm. The worker stated she provided daily 'traffic reports' via email to report the number of leads obtained each day. The firm determined the non-negotiable rental rates; all orders were subject to the firm's approval.

The worker indicated she received training and instructions on how to use the software, the processes to follow when contacting current tenants about delinquent rent, and what information to collect as part of a 'new' tenant's lease file. Job assignments were disseminated by the managers via phone calls and emails. 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 9 am to 5 pm Monday through Friday. Any additional personnel were hired and paid by the firm.

According to the firm, the worker set her own initiatives as to how to best perform the work and was very proficient in her productivity performing those tasks. The job tasks were determined by the worker and it was the worker who determined the methods by which she performed her services. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered according to worker's schedule at the firm's location, which is now closed. There was no requirement of the worker to attend meetings. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

Both parties acknowledge the firm provided desk space in the leasing office where the work was performed and included a computer, software, and phone. The worker furnished nothing other than her vehicle; she did not lease equipment, space, or a facility. The worker indicated she was reimbursed for gas. The customers paid the firm; the firm paid the worker an hourly wage. The worker was 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 established the level of payment for services provided or products sold.

The firm and worker 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 work relationship ceased when the firm closed their office in that geographical area.

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.

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.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

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.

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.