

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 college student working an internship in tax year 2018, for which she received Form 1099-MISC. The firm's business is described as a marketing firm.

The firm's response was signed by the president. The firm's business is a digital marketing firm - social media and websites. The worker was a college student that was engaged as a summer intern/associate to learn and to do some event planning and marketing, coordinate social media posts and some writing.

The worker interviewed and was hired for an internship position. She was given training and instructions from the firm for certain tasks. The firm utilized a website where the job assignments were posted with the deadlines. 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 20-25 hours a week depending on the workload assigned by the firm. The services were rendered 20% of the time at co-working space and 80% at the worker's home. The worker attended meetings as required by the firm. The worker was not required to perform the services personally.

According to the firm, there was no specific training and/or instructions given; she was showed processes and given articles to read. Job assignments were disseminated via email. The worker 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 remotely and there was no requirement to attend meetings. The worker was not required to perform the services personally; any additional personnel were hired and paid by the worker.

The firm and worker acknowledge the firm provided the jobs and logins to web tools; and, the worker furnished her laptop and a phone. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage and 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 if she incurred loss or damage to her phone or computer; the worker disagreed. The firm responded that the worker established the level of payment for services provided; the worker disagreed, stating the firm determined the pricing.

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 firm replied the worker was performing same or similar services for others during the same time frame; the worker disagreed.

The firm provided a copy of the Internship Agreement with the worker identified as an intern. In this position the worker would perform services that consisted of content writing, proofreading, social media, event coordination, and support services as assigned by the firm. This was to be a hands-on experience. The worker would be paid \$X/hour on the first and 15th of the month and the worker was responsible for all taxes.

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.

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

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.