

SS-8 Determination—Determination for Public Inspection

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

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Facts of Case

The worker initiated the request for a determination of her work status as a personal assistant, performing secretarial-type duties in tax year 2018, for which she received Form 1099-MISC. The firm's business is described as a property management business.

The firm's response was signed by the owner. The firm's business is real estate and the worker provided services as an assistant answering phones and managing social media activities. In a telephone conversation, the firm added that the worker took phone calls for the firm's other business, a carpet cleaning company. The worker was an assistant; but, was not licensed to show or sell real estate. The firm also stated the real estate broker was not involved in this work relationship and never paid the worker.

The worker indicated she was given training and instructions on daily duties based on the firm's preference. The job assignments were disseminated by the firm and it was the firm that 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 from 8 am to 2 pm, at the broker's office that the firm worked from. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that the worker did not require specific training and/or instructions; the worker jumped in and handled tasks since she had a knowledge and understanding of rentals. Any problems or complaints encountered by the worker were resolved by the worker. The worker's services were rendered based on her children's school schedule, at the firm's location and at the worker's residence. The worker was required to perform the services personally.

The worker stated the firm provided a computer, internet service, phone, and office supplies. The firm responded that the firm provided nothing; the office space, computer, and office supplies were made available by the broker. The firm and worker concur the worker furnished nothing, she did not lease equipment, space, or a facility, and she did not incur any expenses in the performance of her job. The worker tracked her hours and submitted them to the firm and was paid an hourly wage. The customers paid the firm. She 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; and, she did not establish level of payment for services provided or products sold.

Both parties acknowledge there were no benefits of health insurance, paid vacations or sick pay made available to the worker; however, the worker indicated personal days were extended to her. 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.

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.

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

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.