

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

For IRS Use Only:

Facts of Case

The worker initiated the request for a determination of her work status as an office assistant, dispatcher, and administrative assistant in tax years 2013 to 2018, for which she received Form 1099-MISC. In tax year 2019 she was issued Form W-2 and Form 1099MISC. The firm's business is described as AC, heating, and appliance installation.

The firm's response was signed by the office manager. The majority owner of the firm gave verbal permission to speak to the office manager to clarify the work arrangement. The firm's business is heating and air conditioning service, repair, and installation, appliance repair and installation, pool equipment repair and replacement. The worker occasionally cleaned the firm's house at two different locations, cleaned the office, house-sat, packed up and moved the firm's owners personal items from one place to another, babysat, took care of dogs, drove other workers and the firm's family members to and from various locations throughout the states of A and B, mediated for the firm's family's estate to collect items, picked up parts and supplies, answered phone calls, logged receipts, invoices, and appointments, located parts via the Internet, and anything else in order to earn at least a certain amount per week that she requested. She didn't have a work title but did claim many titles including owner, office manager, office assistant and dispatcher.

The worker stated she was given training and instructions on the computer system and on the day-to-day business operations. She was given job assignments verbally. The worker indicated she had to call prior customers to see if they needed services; the firm provided the leads and the worker had to document and schedule. 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 on the firm's premises from 8am to 5pm, answering calls, dispatching, data entry, research of parts, ordering parts, and filing. The worker attended mandatory meetings and was written up if she was late. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm indicated there wasn't any training given. If the worker couldn't figure it out what needed to be done, she'd ask. The firm would ask her if she was interested in doing various tasks; the worker would decide. The worker would have calls transferred to her personal phone some evenings and weekends or while the firm owners were out of town. She would use the firm's computer to create spreadsheets for various assignments. Any problems or complaints encountered by the worker were directed to the firm for resolution. The services were rendered approximately 60% at the office (for computer use), 15% firm's houses (computer use and cleaning), 10% in her personal vehicle (to drive other worker's, firms family, mediate for firm's family estate), and 15% at the worker's home (answering service). The worker was required to perform the services personally; there was there was no additional personnel hired.

The worker responded that the firm provided everything. The worker furnished nothing and she did not lease equipment, space, or a facility. The worker was paid an hourly wage. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. She indicated she was not at risk for a financial loss in this work relationship except for self employment taxes. The worker did not establish level of payment for services provided or products sold.

According to the firm, the firm provided all necessary office equipment and supplies. The worker furnished her vehicle and cellphone. The worker did not lease equipment, space, or a facility. There was a verbal agreement based on the worker needing to make \$XX per week, which was broken down hourly (for the firm's bookkeeping purposes), and was paid weekly and in lump sums. The firm stated the worker was paid for personal (domestic services of house cleaning, running errands, babysitting) in addition to work done for business and she was paid though the business or with cash. The 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 worker did establish level of payment for services provided or products sold.

The worker indicated she was entitled to benefits of paid holidays and paid vacations; the firm stated she was given bonuses. Either party could terminate the work relationship without incurring a liability or penalty. The firm's response was that the worker was performing same or similar services for others during the same time frame; the worker disagreed stating she was asked to sign a non-compete agreement. Both parties concur the worker terminated the work relationship.

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.

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.

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.

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, Publication 15 (Circular E) Employer's Tax Guide, and Publication 926, Household Employer's Tax Guide.