

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.49 OfficeWorker	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker initiated the request for a determination of his work status as a resume writer in tax years 2009 through 2014. He interviewed company clients and wrote the resumes. The firm's business is described as resume writing. The worker provided copies of the 2009 through 2013 Forms 1099-MISC issued to him by the firm.

The firm's response was signed by the owner. The firm's business is described as preparing resumes, cover letters, and a typing service. The worker performed services preparing resumes and cover letters.

According to the firm, the firm provided instructions as to formatting resumes. The worker's job assignments came from previous clients, client referrals, and phone calls. The firm indicated the worker determined the methods by which the services were performed. If the worker encountered any problems or complaints, the worker tried resolve the issue; but, if not the firm was notified. The worker provides copies of the pay sheets which listed the client name, start date, completion date, the sale, and amount owed to the worker. The worker made his own schedule; and performed the services at his home and the office. The firm indicated the worker was to perform the services personally.

The worker responded that he was given specific training and instructions as to the format and content as directed by the firm's owner. He stated that the work must meet company guidelines and not client guidelines before commissions were paid. The job assignments were received during office hours or assigned by the firm from internet or phone referrals. He indicated the firm determined the methods by which the worker's services were performed. The services were rendered only in the firm's business location or via a firm office phone. The worker was required to perform the services personally.

The firm provided a computer, printer, internet access, paper, and folders; the worker provided a computer, printer, internet access. The firm responded that the worker did not lease equipment, space, or a facility and he did not incur expenses in the performance of services for the firm. The worker received a commission; the customer paid the firm. The firm indicated the worker was not at risk for a financial loss in this work arrangement. The firm did respond that the worker established the level of payment for services rendered or products sold.

According to the worker, the firm provided office location, desk, chair, desktop computer, printer, monitor, internet access, and a credit card machine. He indicated he furnished nothing and did not lease equipment, space, or a facility nor did he incur expenses in the performance of the job. He acknowledged the firm paid him a commission, with the customer paying the firm. The worker indicated he was not at risk for a financial loss in this work relationship and that the firm established the level of payment for services provided or products sold.

Both parties concur that no benefits were extended to the worker; however, the worker indicated he was entitled to bonuses. 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 worker stated that upon client approval of the finished product, the resumes had to be saved to the firm's database and deleted from the worker's computer.

The firm provided a copy of a 'Writer's Contract': the worker was to produce documents for the firm's clients; documents become the property of the firm; the writer's commission is 40% of all completed work for weekly sales that total up to \$XX and a 50% commission for sales \$YY to \$ZZ with a bonus for higher weekly sales; and a non-compete statement referencing a time period of 5 years.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 70-630, 1970-2 C.B. 229.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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.

Your 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 and have applied the above law 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.