

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.138 Administrative Assistant	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 was issued Forms 1099-MISC in tax years 2012 through 2014. In 2012, the EIN was used to issue the pay document and in 2013 and 2014 the SSN of the firm's president was used. The two cases involve the same work relationship; therefore, the cases have been consolidated and Case [REDACTED] will address both payers.

The worker initiated the request for a determination of her work status as an administrator doing research and compiling data and administrative/office support doing day-to-day admin, correspondence, email, trainings, webinar development, workshops, etc. in tax years 2012 through 2015. The firm's business is described as educational, research, and training.

The firm's response was signed by the president. The firm's business is described as human development – K through 12 curriculum, college program, psychotherapy trainings, marriage workshops, etc. The worker performed services doing mass emails, marketing, and volunteer support. The firm stated the worker was initially engaged as a volunteer; after four months, a discussion took place as to nominal compensation.

According to the firm, there was no training or instructions given to the worker. The worker received her work assignments verbally and via email. The firm indicated the worker determined the methods by which the services were performed. She was required to contact the firm if she encountered any problems or complaints that required resolution. The firm stated the worker was required to provide a daily summary of her work, which she refused to do. The services were rendered 1-2 days per week; she worked from her home and the firm's office. The worker was to provide the services personally; there was no need for substitutes or helpers.

The worker's statements were similar, except that she responded that she was given training and instructions and that her hours were 10 a.m. to 3 p.m., Monday through Friday.

The firm response indicated that the firm provided printing of materials; the worker provided laptop. The worker did not lease equipment, space, or a facility - she worked from her home. There were no expenses directly incurred by the worker. The firm acknowledged the worker was paid an hourly wage as agreed upon. The worker not at risk for a financial loss in this work relationship.

The worker stated that the firm provided basement office space, computer, folding table and chairs, and an electric heater. She concurred that she furnished a laptop computer, she did not lease equipment/space/facilities, and she did not incur expenses in the performance of the job. She agreed that she was paid an hourly wage. She was not at risk for a financial loss in this work relationship. The worker responded that she did not establish the level of payment for services provided or products sold.

The firm and worker concurred that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The parties disagree as to whether the worker was performing same or similar services for others during the same time frame. The worker indicated that she was not advertising; however, she was doing marketing for the firm on volunteer.com and internships.com. The firm responded that the worker did research and helped develop a bullying curriculum centered around love and relationships; he stated the worker had her heart involved in his business. The firm responded that in late 2014/early 2015 he decided to hire an employee and had approached the worker with specific compensation, with the condition of regular hours, and work being performed at the firm's location. The work relationship ceased in March 2015.

A copy of the '[REDACTED]' dated August 14, 2012 was submitted for consideration. The agreement signed by both parties, identifies the worker as a consultant. The agreement addresses intellectual property rights, ownership of proprietary information, inventions, non-company commitments, etc.; the agreement does not identify the intent of the work arrangement between the parties.

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 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.

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 right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

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 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. 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.