

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF.145 Administrative Assistant

Determination:

Employee

Contractor

UILC

Third Party Communication:

None

Yes

Facts of Case

The worker initiated the request for a determination of her work status as an administrative assistant in tax year 2014. In this capacity she watched over the guard shack, checked people on/off the site, attended meetings, kept minutes, managed emails, created presentations, scheduled travel details, drove quick response units to job site, cleaned office, cooked and cleaned living quarters while in travel status. The firm's business is described as providing safety training and medical care to oil rig workers.

The firm's response was signed by [REDACTED], owner. The firm's business is described as health, safety, and over-all wellness consulting. The worker performed services as a consultant. According to an attached letter, the worker was in charge of setting up the company books, overlooking contracts for the company, and ensuring that any assorted paper work that was needed for new consulting company was filed correctly.

The firm and worker provided a copy of a 'consulting agreement'; the worker is identified as having a background in human performance. In her capacity with firm she was to be a personal assistant to [REDACTED] with other duties to be determined. The manner in which the services are to be performed and the specific hours to be worked by the worker would be determined by [REDACTED]. Performance review after 90 days to determine continuation of contract, duties, and compensation. Compensation at a daily rate with per diem, fee for location assignments, and reimbursement of travel expenses.

According to the firm the training and/or instructions were given to the worker on site. The work assignments were conveyed in a direct conversation, email, and/or text. The firm responded that the worker determined the methods by which the services were performed. The worker set her own schedule and when she took lunch. The worker's services were rendered at the firm location, her home, or travel status.

The worker responded that she was given specific training and instructions along with rig workers on emergency response protocol and was trained to use [REDACTED] max equipment to calculate patient oxygen transfer capabilities. She stated that job assignments came through a work email address assigned to her. 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. Her services were rendered at the firm's premises or oil rigs. The worker indicated she was required to attend monthly staff meetings as well as meeting with the firm's clients at off-site. The worker responded that she was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided a computer; and responded that the worker furnished her services and needed supplies. The worker was not reimbursed for meals or office supplies. The firm acknowledged that the customer paid the firm and the worker invoiced the firm. The firm indicated that the worker established the level of payment for services rendered.

According to the worker, the firm provided laptop computer, office supplies, work space, work shirts, flame retardant pants, hard hat, and safety goggles; she furnished her steel-toed boots. The worker did not lease equipment and did not incur expenses in the performance of the job. She responded the firm paid her a salary; the customer paid the firm. The worker indicated she was not covered under the firm's workers' compensation insurance policy. She stated she was not at risk for a financial loss in this work relationship and that she did not establish the level of payment for services provided or products sold.

Both parties concur that no benefits were extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker responded that she was not performing same or similar services for others during the same time frame; but, if she did, the firm's approval would have been required.

Both parties provided a copy of the worker's recordation of time. The date, hours, rate/total, per diem and a brief description of her actions that day.

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.

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.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

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.