

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.154 AdministrativeAssist	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 her work status as an administrative assistant in tax years 2014 and 2015. The firm's business is described as an international affairs consultant.

The firm's response was signed by [REDACTED]. The firm is an individual that serves on various advisory boards, giving speeches, and as an investor in an equity fund. The worker performed services as supporting administrative services remotely. Her role was to primarily provide scheduling services and occasionally make travel arrangements. There was no written agreement between the parties.

The firm responded that the worker was not given specific training or instructions. The firm and worker used email, texts, and occasional phone calls used to communicate about the firm's schedule and his messages. The firm indicated there were no specific assignments, although the worker determined the methods. The worker's daily routine was established by worker, with services were rendered from the worker's home. The firm responded that the worker was not required to perform the services personally – she could outsource, if necessary.

The worker indicated she was given two weeks of training by the prior assistant as to current operations, document locations, addresses, clients, and calendars. She stated job assignments came via text, email, phone, or in person; and it was the firm or his wife 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 stated the services were rendered 24/7 including weekends and holidays at her home, HQ, office, and at the firm's law office with her routine consisting of answering email, phone, and text messages, organizing travel, editing and transcribing documents for publication, researching companies, and organizing meetings. The worker responded that she was required to perform the services personally.

Both parties acknowledged that the firm provided computer and printer provided by firm; the worker provided all other equipment and supplies including a phone. The firm responded that the initial agreement was for 90 days with a possible extension. They firm and worker concurred that the firm paid the worker biweekly based on annual compensation. The worker not at risk for a financial loss.

There was a verbal agreement of worker to be paid biweekly; the worker planned her vacations and took time off for illness with no change to her compensation. 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.

Both parties provided copies of emails to support the work relationship. Communications covered the topics of: health insurance; withholding and payroll; paid holidays and vacation; purchase of equipment using a credit card provided by firm; the firm needed to secure the services of someone who could manage his calendar and travel and to check his emails for important notices or events and the worker was retained to provide administrative services as an IC and to be paid from his personal account; and, the return of the purchased equipment upon worker's resignation.

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.

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.

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. 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 his financial investment and business reputation and to ensure his customers' satisfaction. The worker was not operating a separate and distinct business; she 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 a 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 as an advisor and consultant.

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.