

SS-8 Determination—Determination for Public Inspection

Occupation OFF02.247 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

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The worker initiated the request for a determination of her work status as an assistant to the firm's co-founders in tax years 2014 through 2016. In this capacity she monitored the email accounts, responded to customers and inquiries, processed orders, and performed bookkeeping and other tasks. The firm's business is described as a magazine that celebrates women in the food industry; it publishes twice a year, has a radio show, and hosts events.

The firm's response was signed by the owner. The firm's business is described as an independent magazine publisher. The worker performed services as a freelance assistant performing a variety of tasks including answering emails, booking travel, organizing schedules, organizing editorial lineups, mailing packages, and taking pictures for the magazine.

According to the firm and worker, the worker was given general instructions regarding the above-mentioned tasks. The work assignments were given verbally, over the phone, or via email, with the firm and worker determining the methods by which the services were performed. The worker would direct any problems to firm; however, either the worker or firm would resolve the matter. The parties acknowledged that the worker's services were rendered at the firm's office or remotely. The firm indicated that the worker was not required to perform services personally; and that the worker or firm hired helpers/substitutes, who were paid by firm. The worker stated she was required to provide the services personally.

Both parties responded that the firm provided the office, office supplies, desk, chair internet, computer, and printer. The worker furnished a laptop and her phone. The worker did not lease equipment, space, or facilities and she did not incur expenses in the performance of the job; if she did, the firm reimbursed her. The firm acknowledged that the worker was paid an hourly wage and the customers paid the firm. The worker was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided or products sold.

The firm responded that the worker was frequently paid for time she couldn't work when she was sick or needed time off. 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.

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.

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. 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.