

SS-8 Determination—Determination for Public Inspection

Occupation 02PDP.9 PublishEditProducing	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 content production specialist – he facilitated the creation of human resources videos. In this capacity he edited scripts, fixed animations, and spliced audio clips in tax year 2014.

The firm's response was signed by [REDACTED]. The firm's business is described as developing a software platform creating engagement communication and content for employees. The worker performed services as a content production specialist.

The firm responded that no formal training with respect to design/writing was given to the worker. The worker's tasks were assigned through project management. The worker determined the methods by which services were performed. The worker was required to contact project management office if he encountered any problems that required resolution. There were no reports required of the worker and meetings were optional; he was expected to meet project deadlines assigned. The worker was required to perform the services personally.

According to the worker, he was given training and instructions as to the 'ins and outs' of the company, how to do his job, and attended seminars on topics. The job assignments came from management via an online project management software. The firm determined the methods by which his services were performed. Any problems or complaints encountered by the worker were directed to the firm. The worker rendered his services personally at the firm's business location.

The firm provided desk, laptop, multiple screens. The worker furnished his services; he did not lease equipment and did not incur expenses in the performance of the job aside from commuting. The firm paid the worker an hourly wage; the customer paid the firm. The worker was covered under the firm's workers' compensation insurance policy, The worker was not at risk for a financial loss in this work relationship unless he damaged the firm's property/equipment. The firm indicated that the rates were negotiated; the worker indicated the firm established the level of payment for services provided or products sold.

Both parties agreed the firm did not offer benefits to the worker. 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 firm provided a copy of the unsigned Independent Contractor agreement with the worker: the services to include content production – related projects, assigned weekly or daily; expected that worker/consultant will work on-site 5 days per week for a regular 8 hour day; any hours in excess of the 8 must be approved in advance; worker to be provided necessary work space and equipment; firm will make requests through email, statement of work, or through an internal tracking system; all services will be provided within the deadlines identified; worker to be compensated at \$X/hour.

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.

The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56-694, 1956-2 C.B. 694.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

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.

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.