

## SS-8 Determination—Determination for Public Inspection

Occupation

02PDP.13 PublishEditProducing

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The firm is a real-time marketing company in the business of offering a suite of creative services from [REDACTED] to [REDACTED]. The worker provided her services to the firm as a producer and makeup/hair artist with services including casting, field, producing, makeup and hair in 2012 through 2014 and received the Forms 1099-MISC for these services.

The worker received her assignments from the firm via e-mails and phone calls and the firms' clients determined the methods by which the assignments were performed. If problems or complaints arose the worker was required to contact the firm and the firm was responsible for problem resolution. The firm required the worker to submit budget, invoice, and expense reports, shooting schedules, talent releases, and W-9's. The worker's schedule varied depending upon which job function she was performing. She provided her services personally on the firms' premises and the firms' customers locations. The worker was required to attend meetings held by the firm which included staff, producer, production, week of, and monthly meetings. If additional help was required, the firm hired and compensated the helpers.

The firm provided some pre written letters for use in media marketing, which the worker needed to provide her services. The worker provided supplies and equipment as well; some of which included the printer, paper, fax, postage, food, laptop and hard drive. The firms' customers provided the new camera or sound. The worker did lease equipment and was reimbursed by the firm for the facility, location fees, mileage, food, printer, and miscellaneous office supplies which were incurred in the performance of her services. The worker was paid a flat rate per day for her services. The firms' customers paid the firm for the services the worker provided. The firm established the level of payment for the services the worker provided.

The worker did not provide similar services to others during the same time period. The worker reported that any work was sent over night, express mail to the firm. She provided her services under the firm's business name. Both parties retained the right to terminate the relationship without incurring liability. In fact, the relationship ended because the contract was breached by the firm's client.

---

## Analysis

---

The application of the three categories of common law evidence to the available facts of the relationship indicates that the firm retained the right to direct and control the worker in the performance of her services. Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.

Worker status is not something to be selected by either the firm or the worker. Worker status is determined by the examination of the actual working relationship as applied to Internal Revenue Service code.

There was a written contract describing the terms and conditions of the relationship. However, for Federal tax purposes it is the actual working relationship that is controlling and not the terms and conditions of a contract be it written or verbal between the parties. See also Section 31.3121(d)-1(a)(3) of the Employment Tax Regulation.

Hence, to clarify the Federal Government's position on worker status, we will be determining this case based on their common law practices in which the actual relationship between the parties is the controlling factor.

The firm retained the right, if necessary to protect their business interest, to determine or change the methods used by the worker to perform her assignments. 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. The facts show that the worker was subject to certain restraints and conditions that were indicative of the firm's control over the worker. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The worker had a continuous relationship with the firm as opposed to a single transaction. 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. The worker rendered her services personally. 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. 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. 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. The worker's services were under the firm's supervision.

The firm provided the worker with the necessary equipment and materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. The fact that the worker had an investment in many of the supplies and equipment is not uncommon in this type of occupation and is not sufficient to show an independent contractor relationship. The worker was paid a flat rate per day for her services. The worker could not have incurred a loss in the performance of her services for the firm, and did not have any financial investment in a business related to the services performed.

The worker worked under the firm's name, and her work was integral to the firm's business operation. The above facts do not reflect a business presence for the worker, but rather, strongly reflect the firm's business. The fact that the worker was not closely monitored would not carry sufficient weight to reflect a business presence for the worker. In fact, many individuals are hired due to their expertise or conscientious work habits and close supervision is often not necessary. 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. Either the firm or the worker could terminate the agreement.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.