

SS-8 Determination—Determination for Public Inspection

| | |
|---------------------------------|---|
| Occupation 02REC.5 Recruiter | 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 performing in-house recruiting for sales and creative positions in tax year 2013. The firm's business is described as the middleman between clients and realtors.

The firm's response was signed by the [REDACTED]. The firm's business is described as real estate referral and website. The worker performed services as the recruitment of customer service representatives. The firm acknowledged that there was a 100%-owned related company and that the two businesses split the expense. Research indicated that both entities issued Form 1099-MISC in the same amount for tax year 2013.

According to the firm, there was no specific training or instructions given. The worker was asked to pre-screen/source candidates for an internal review. The firm responded that the worker determined the methods to be used to perform the job. It was unknown to the firm as to the worker's daily routine. There were no reports required until the firm became concerned about the worker's output and the firm requested documentation. The firm indicated the worker worked from his home 75% of the time and the office 20% of the time. The worker was not required to perform the services personally; the worker could hire and pay substitutes.

The worker indicated that he was given specific training and instructions regarding who to report to, job descriptions, roles, attributes, how data should be reported, and the interviews scheduled and when. The job assignments came from the CEO and his second in command. The firm determined the methods by which the worker's services were performed. He stated that any problems or complaints encountered by the worker were directed to the firm for resolution. The services were rendered at the firm's location. He responded that he was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm acknowledged providing access to phone and PC if the worker was in the office as a convenience, and an email address. The worker furnished a PC and software, home office, and a phone. The worker did not lease equipment, space, or a facility. The firm responded that the worker was paid hourly as per invoice.

The worker indicated the firm provided desk, computer, office, phone, and stationary supplies and [REDACTED] and [REDACTED] ads were paid for with the company credit card. The worker stated he furnished nothing and he did not lease equipment and did not incur expenses in the performance of the job. The firm paid the worker an hourly wage. The worker indicated he was not at risk for a financial loss in this work relationship and that the firm established the level of payment for services provided or products sold.

Both parties concurred that there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker responded he was not performing same or similar services for others during the same time frame.

The firm provided a copy of the agreement May 15, 2013: worker was to provide recruiting and other human resources-related services; worker to deliver services at an agreed upon deadline; either party could provide the location; compensation at \$XX/hour and worker to provide an invoice that detailed the project worked on; non-solicitation clause for a period of 24 months.

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.

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.

The firm's 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. 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.