

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Salespersons	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

The worker initiated the request for a determination of her work status as a personal assistant and merchandise analyst in tax years 2014 through 2018, for which she received Form 1099-MISC. In this capacity she cleaned, sorted, organized, photographed, listed merchandise on [REDACTED] packaged and shipped clothing items for sale on [REDACTED]. She also did paperwork, filing and other tasks requested by the firm. The firm's business is described as online clothing retail through [REDACTED].

The firm's response was signed by the owner. The firm's business is described as reverse logistics; the firm sells ladies clothing on [REDACTED]. Items are taken into inventory, inspected, photos taken, with a listing created by writing a description and inserting a photo of the item. The terms of employment were that the worker could work the hours she needed at an hourly rate until she could find steady employment in her chosen profession (musician). The worker was told that she needed to keep a certain number of items on online so the sales would cover her earnings.

The worker stated that she was given specific training and instructions on the [REDACTED] interface, how to clean and photograph the items, how to list the items, and how to package and ship the items sold. The firm determined her job assignments and 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 reported her hours daily to the firm. The worker's services were rendered at the firm's home office with a daily routine which consisted of loading accounts onto the computer, answering questions from customers, retrieving items to be shipped, packaging, weighing, and the printing of shipping labels purchased through the firm's account on the [REDACTED] platform. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that the worker was shown a few sample listings, shown how to check clothing for damage before listing, and how to print labels from [REDACTED], as well as how to navigate the programs used such as [REDACTED], photo editors, etc.. The job assignments per se were based on the firm's large inventory of clothing ready to be listed and maintained. The worker was given examples of the work; but, she developed her own methods to perform the services. Any problems or complaints encountered by the worker were handled by the worker; the firm was only involved if a refund was requested from an unsatisfied buyer. The services were rendered at the owner's premises. The worker was not required to perform the services personally.

The firm and worker acknowledged that the firm provided computers, mannequins, shipping supplies, inventory items, and digital cameras. The worker did not furnish any materials, equipment, or supplies nor did she lease equipment, space, or a facility. The firm paid the worker an hourly wage. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. Neither party acknowledged whether the worker was at risk for a financial loss in this work relationship. The firm indicated the worker established the level of payment for products sold. The worker indicated the firm set the basic range for the products to be sold; however, the worker researched and made a decision for the specific item, with the firm adjusting the prices, if needed.

There were no benefits extended to the worker; although the worker noted there were flexible hours and an occasional paid holiday. 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.

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.

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.

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.

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 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.